ORIGINAL – FILED UNDER SEAL

STATE OF WISCONSIN
IN SUPREME COURT

Nos. 2013AP2504-2508-W

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,

Petitioners-Petitioners,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents-Respondents.

REVIEW OF AN ORDER OF THE COURT OF APPEALS, DISTRICT IV

Nos. 2014AP417-421-W

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents.

REVIEW OF AN ORDER OF JOHN DOE JUDGE GREGORY PETERSON

No. 2014AP296-OA

STATE OF WISCONSIN ex rel. TWO UNNAMED PETITIONERS,

Petitioners,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents.

ORIGINAL ACTION

BRIEF OF GREGORY PETERSON, JEFFREY KREMERS, JAMES DALEY, JAMES DUVALL, AND GREGORY POTTER IN APPEAL NOS. 2013AP2504-2508-W

BRAD D. SCHIMEL
Attorney General

DAVID C. RICE
Assistant Attorney General
State Bar #1014323

Attorneys for Gregory Peterson, Jeffrey Kremers, James Daley, James Duvall, and Gregory Potter

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823
(608) 267-8906 (Fax)
ricedc@doj.state.wi.us

TABLE OF CONTENTS

Cases

Page

Statutes

Supreme Court Rules

ORIGINAL – FILED UNDER SEAL

STATE OF WISCONSIN
IN SUPREME COURT

Nos. 2013AP2504-2508-W

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,

Petitioners-Petitioners,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents-Respondents.

REVIEW OF AN ORDER OF THE COURT OF APPEALS, DISTRICT IV

Nos. 2014AP417-421-W

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents.

REVIEW OF AN ORDER OF JOHN DOE JUDGE GREGORY PETERSON

No. 2014AP296-OA

STATE OF WISCONSIN ex rel. TWO UNNAMED PETITIONERS,

Petitioners,

v.

HONORABLE GREGORY A. PETERSON, et al.,

Respondents.

ORIGINAL ACTION

BRIEF OF GREGORY PETERSON, JEFFREY KREMERS, JAMES DALEY, JAMES DUVALL, AND GREGORY POTTER IN APPEAL NOS. 2013AP2504-2508-W

ISSUES PRESENTED[1]

(1) Did the Director of State Courts have lawful authority to appoint Reserve Judge

---

[1] Reserve Judge Gregory Peterson and Chief Judges Jeffrey Kremers, Kames Daley, James Duvall, and Gregory Potter will address only issues of John Doe procedure in this brief. The issues are the first five issues identified by the Supreme Court in its order dated December 16, 2014. Most of the issues were raised and decided by the court of appeals in Case Nos. 2504-2508-W, and now are before the Supreme Court on review. The judges will not address the remaining issues identified by the Supreme Court which relate to state election statutes and state and federal constitutional provisions.

Barbara Kluka as the John Doe judge to preside over a multi-county John Doe proceeding?

The court of appeals did not address the authority of the Director of State Courts. The court decided that there was no multi-county John Doe proceeding. Rather, the court determined, there were separate John Doe proceedings in five counties that were not consolidated. Moreover, the court concluded that the Chief Justice of the Wisconsin Supreme Court had lawful authority to appoint the same reserve judge to preside over the separate John Doe proceedings.

(2) Did the Chief Judge of the First Judicial District have lawful authority to appoint Reserve Judge Gregory Peterson as the John Doe judge to preside over a multi-county John Doe proceeding?

The court of appeals did not address the authority of the Chief Judge of the First Judicial District. The court decided that there was no multi-county John Doe proceeding. Rather, the court determined, there were separate John Doe proceedings in five counties that were not consolidated. The Chief Judge of the First Judicial District only assigned Reserve Judge Peterson to preside over a John Doe proceeding in Milwaukee County. The Chief Judges of the Fifth, Sixth, and Seventh Judicial Districts independently assigned Reserve Judge Peterson to preside over separate John Doe proceedings in Dane County, Columbia County, Dodge County, and Iowa County. Moreover, the Chief Justice of the Wisconsin Supreme Court made separate assignments of Reserve Judge Peterson to preside over the five John Doe proceedings.

(3) Does Wis. Stat. § 968.26 permit 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?

The court of appeals decided that there was no multi-county John Doe proceeding. Rather, the court determined, there were separate John Doe proceedings in five counties that were not consolidated. The court concluded that a John Doe judge is authorized to appoint a single district attorney or special prosecutor to conduct an investigation related to all five John Doe proceedings, especially where the same or integrally-related conduct is being investigated and where the same or substantially overlapping witnesses and documents are involved.

(4) Does Wisconsin law allow a John Doe judge to appoint a special prosecutor to perform the functions of a district attorney in multiple counties in a John Doe proceeding when (a) the district attorney in each county requests the appointment, (b) none of the nine grounds for appointing a special prosecutor under Wis. Stat. § 978.045(1r) apply, (c) no charges have been issued yet, (d) the district attorney in each county has not refused to continue the investigation or prosecution of any potential charge, and (e) no certification was made to the Department of Administration that no other prosecutorial unit was available to do the work for which the special prosecutor was sought?

The court of appeals decided that the John Doe judge (Reserve Judge Barbara Kluka) had authority to appoint the same special prosecutor to serve concurrently in each of the John Doe proceedings, where the judge issued a separate

appointment order in each of the five John Doe proceedings. The court concluded that Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor under *State v.* Cummings, 199 Wis. 2d 721, 735-736, 546 N.W.2d 406 (1966), and *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16-17, 531 N.W.2d 32 (1995), regardless whether the statutory criteria were met for appointment of the Special Prosecutor. Alternatively, the court determined the Special Prosecutor was lawfully appointed under Wis. Stat. § 978.045(1g) as that statutory subsection was interpreted and applied in *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451, and *State v. Bollig*, 222 Wis. 2d 558, 569-573, 587 N.W.2d 908 (Ct. App. 1998).

(5) If there was a defect in the appointment of the special prosecutor in the John Doe proceedings at issue in these cases, what effect, if any, would that defect have on the competency of the special prosecutor to conduct the investigation, or on the competency of the John Doe judge to conduct these proceedings? *See, e.g., State v. Bollig*, 222 Wis. 2d 558, 569-573, 587 N.W.2d 908 (Ct. App. 1998).

The court of appeals decided that if there was a defect in the appointment of the special prosecutor, it could be cured *nunc pro* tunc and it would at most affect the availability of state funds to compensate the special prosecutor. The court concluded that the defect would not deprive the John Doe judge of competency to conduct the John Doe proceeding, and it would not render the actions of the Special Prosecutor void *ab initio*, because the John Doe judge had inherent judicial authority independent of the statute to make

appointments necessary to effectuate the judge's mandate.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Supreme Court has scheduled oral argument on April 17 and 20, 2015. Publication is warranted because the court's opinion will clarify the law related to (1) the appointment of judges and special prosecutors in John Doe proceedings, and (2) state regulation of issue advocacy by an independent organization when the issue advocacy is coordinated with a candidate or a candidate's campaign committee. *See* Wis. Stat. § 809.23(1)(a)1. The court's opinion will decide a case of substantial and continuing public interest. *See* Wis. Stat. § 809.23(1)(a)5.

STATEMENT OF THE CASE

A. Nature of the cases.

The Supreme Court has consolidated three cases for purposes of briefing and oral argument. The first case involves a review of an opinion and order of the Court of Appeals, District 4, which was entered on January 30, 2014, and which denied supervisory writ petitions of Three Unnamed Petitioners to prohibit further John Doe proceedings on procedural grounds. The Supreme Court granted review on December 16, 2014.

The second case involves a supervisory writ petition by Special Prosecutor Francis Schmitz to review a decision of the John Doe judge quashing a subpoena and requiring the return of seized

property. The Supreme Court granted a petition to bypass the court of appeals on December 16, 2014.[2]

The third case involves an original action for declaratory relief regarding whether the state may regulate issue advocacy by an independent organization if the issue advocacy is coordinated with a candidate or a candidate's campaign committee. The Supreme Court granted leave to commence an original action on December 16, 2014.[3]

In its order, the Supreme Court identified 14 issues that it directed the parties to address. The first five issues are John Doe procedural issues, most of which were raised by the Three Unnamed Petitioners and were decided by the court of appeals in Case Nos. 2014AP2504-2508-W. The remaining nine issues generally are substantive issues related to state election statutes and federal and state constitutional provisions. The substantive questions were raised both in the Special Prosecutor's supervisory writ petition and in the petition for an original action. Reserve

---

[2] On March 12, 2014, the court of appeals granted Reserve Judge Gregory Peterson's request to be excused from participating as a respondent in the supervisory writ proceeding brought by the special prosecutor. *See* Court of Appeals Order dated March 12, 2014 (Judges App. 24-27). The court of appeals agreed with Judge Peterson that it would be inappropriate for him to align with either side because the John Doe proceeding might be permitted to continue (Judges App. 25).

[3] On February 14, 2014, Judge Peterson notified the Supreme Court that he would not respond to the petition for leave to commence an original action, unless ordered otherwise, in order to preserve his impartiality if the John Doe proceeding were permitted to continue. *See* Letter from AAG Rice to Clerk Fremgen dated February 12, 2014 (Judges App. 22-23).

Judge Peterson and the Chief Judges will address the John Doe procedural issues but not the substantive issues in this brief.

Unnamed Petitioner No. 7 in the three consolidated cases (one of the Unnamed Petitioners in Case Nos. 2014AP2504-2508-W) has addressed the five John Doe procedural issues in that unnamed petitioner's initial brief. The remaining unnamed petitioners have adopted the arguments of Unnamed Petitioner No. 7 regarding the five John Doe procedural issues in their initial briefs. Unnamed Petitioner No. 3 in the three consolidated cases, however, has argued another John Doe procedural issue not identified by the Supreme Court.

Reserve Judge Gregory Peterson and Chief Judges Jeffrey Kremers, James Daley, James Duvall, and Gregory Potter (the "Chief Judges") object to the Supreme Court's consideration of the additional John Doe procedural issue raised by Unnamed Petitioner No. 3. This is true for at least four reasons. First, the issue was not among the issues that the Supreme Court identified and directed the parties to address. Second, Unnamed Petitioner No. 3 was not a party to the supervisory writ proceeding in which the John Doe procedural issues were raised and decided by the court of appeals (Case Nos. 2014AP2504-2508-W). Third, Unnamed Petitioner No. 3 did not raise the issue in the John Doe proceeding that gave rise to the Special Prosecutor's supervisory writ petition. Fourth, resolution of the issue depends

in part on a determination of facts that are not developed in the appellate record.[4]

---

[4] Without waiving their objection, Reserve Judge Peterson and the Chief Judges offer a summary response. Unnamed Petitioner No. 3 asks the Supreme Court to overrule *State v. Cummings*, 199 Wis. 2d 721, 734-735, 546 N.W.2d 406 (1996), insofar as it holds that John Doe judges have authority to issue search warrants, and to require that search warrants in John Doe proceedings be issued by a neutral and detached magistrate other than the John Doe judge. Unnamed Petitioner No. 3 claims that John Doe judges are not sufficiently neutral and detached when deciding whether to issue search warrants because they serve as "chief investigators" in the John Doe proceeding. Unnamed Petitioner No. 3 also claims that Reserve Judge Kluka was not neutral and detached when she issued search warrants, solely because she subsequently disqualified herself due to an unspecified "conflict." The Supreme Court should reject these arguments.

A John Doe judge is not inevitably the "chief investigator" or "an arm or tool of the prosecutor's office." *See State v. Washington,* 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978). The John Doe judge is not to be viewed as "orchestrating the investigation." *See id.* Rather, the John Doe judge is a "judicial officer who serves an essentially judicial function" and who "must utilize his or her training in constitutional and criminal law . . . in determining the need to issue subpoenas [or issue search warrants] requested by the district attorney." *See id.* A John Doe judge is expected to "conduct himself [or herself] as a neutral and detached magistrate." Witnesses and persons accused can be protected by appellate review of John Doe proceedings. *See id*. at 828.

Two cases cited by Unnamed Petitioner No. 3, *Coolidge v. New Hampshire*, 403 U.S. 443, 450-453 (1971) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), are distinguishable. In *Coolidge*, the attorney general was the chief investigator in a murder investigation when he issued search warrants wearing his "justice of the peace" hat. In *Shadwick*, the town justice who issued a generalized search warrant became the "leader" of the "search party" that executed the search warrant. The remaining cases cited by Unnamed Petitioner No., 3 are simply inapposite.

B. Procedural history of Appeal Nos. 2013AP2504-2508-W and disposition in the court of appeals.

On November 14, 2013, three unnamed petitioners filed petitions for supervisory writs in the court of appeals. They claimed, *inter alia*, that Reserve Judge Barbara Kluka was unlawfully appointed or assigned to serve as a John Doe judge because there is no statutory authority to appoint or assign a *reserve* judge to preside over a John Doe proceeding. They also claimed that Reserve Judge Kluka was unlawfully assigned to preside over separate John Doe proceedings in five counties. Finally, they claimed that Reserve Judge Kluka violated a plain and positive duty by (1)

A John Doe proceeding is designed as an investigative tool that is used for "the discovery of crime." *See Cummings*, 199 Wis. 2d at 735. "Denying John Doe judges the ability to issue search warrants would seriously reduce the investigatory power of the John Doe proceeding." *See id.* The Supreme Court should not overrule *Cummings* and should not require search warrants in John Doe proceedings to be issued by a neutral and detached magistrate other than the John Doe judge.

Further, the mere fact that Reserve Judge Kluka disqualified herself (because of an unspecified "conflict") does not create any presumption or establish that she was not neutral and detached when she issued search warrants before the disqualification. Unnamed Petitioner No. 3 cites no authority for its contention that search warrants must be voided and seized items must be returned if a judge fails to prove that that she was neutral and detached when she issued the search warrants. Even if there were authority for the contention, factual issues would have to be determined that are not developed in the appellate record. On the present record, the Supreme Court could not permissibly conclude that Reserve Judge Kluka was not neutral and detached when she issued the search warrants.

consolidating the separate John Doe proceedings for purposes of investigation, (2) by appointing the same special prosecutor in each of the separate John Doe proceedings, and (3) by appointing a special prosecutor contrary to the requirements of Wis. Stat. § 978.045(1r).

On November 22, 2013, the Court of Appeals, District IV, entered an order. *See* Court of Appeals Order (Judges App. 1-12). Initially, the court pointed out that Wis. Stat. § 753.075 authorizes the Chief Justice of the Wisconsin Supreme Court to appoint reserve judges, and such reserve judges "shall perform the same duties as other judges" (Judges App. 6). *See* Wis. Stat. §§ 753.075(1)(a) and (2); *see also* Wis. Stat. § 751.03(1) ("the chief justice of the supreme court may designate and assign reserve judges under s. 753.075 to serve temporarily in . . . the circuit court for any county. While acting under a temporary assignment . . . [a] reserve . . . judge may exercise all of the authority of the court to which he or she is assigned"). The court noted the argument of the petitioners that John Doe judges ought to be accountable through elections, as a matter of public policy, but the court rejected the argument as a basis for issuing a supervisory writ and suggested that such an argument should be addressed to the legislature (Judges App. 6).

The court ordered the respondents, Reserve Judge Peterson (Reserve Judge Kluka's successor as the John Doe Judge), Chief Judges Kremers, Daley, Duvall and Potter, and Special Prosecutor Francis Schmitz, to respond to four issues identified by the court (Judges App. 10-11). On January 30, 2014, after submission of the responses and a reply by the petitioners, the court

issued an opinion and order denying the petitions (Judges App. 13-21).

The court rejected the argument of the petitioners that John Doe investigations initiated in multiple counties were unlawfully consolidated into a single proceeding (Judges App. 15-16). The court reasoned that the argument erroneously conflated the terms "investigation" and "proceeding" (Judges App. 15). The court noted that the end result of each of the John Doe proceedings would involve a separate determination by the John Doe Judge whether criminal charges were warranted against any individual or entity residing or headquartered in that particular county (Judges App. 16). The court summarized:

> [P]arallel John Doe proceedings focusing on various targets who may have interacted with other targets in different counties have not been "consolidated" merely because the same judge and same special prosecutor have been appointed to handle each of them or because the John Doe judge has issued joint orders or subpoenas rather than duplicative ones when the same information is being conveyed or sought in more than one of the proceedings."

(Judges App. 16).

The court next rejected the argument of the petitioners that Reserve Judge Kluka violated a plain legal duty by appointing the special prosecutor where none of the criteria for the appointment of a special prosecutor under Wis.

Stat. § 978.045(1r) were satisfied (Judges App. 16-19). The court decided that Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor under *State v.* Cummings, 199 Wis. 2d 721, 735-736, 546 N.W.2d 406 (1966), and *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16-17, 531 N.W.2d 32 (1995), regardless whether the statutory criteria were met for appointment of the Special Prosecutor (Judges App. 16-19). Alternatively, the court determined that the Special Prosecutor was lawfully appointed under Wis. Stat. § 978.045(1g) as that statutory subsection was interpreted and applied in *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451, and *State v. Bollig*, 222 Wis. 2d 558, 56-572, 587 N.W.2d 908 (Ct. App. 1998).

Finally, the court of appeals decided that if there was a defect in the appointment of the special prosecutor, it could be cured *nunc pro* tunc and it would at most affect the availability of state funds to compensate the special prosecutor (Judges App. 18-19). The court concluded that the defect would not deprive the John Doe judge of competency to conduct the John Doe proceeding, and it would not render the actions of the Special Prosecutor void *ab initio*, because the John Doe judge had inherent judicial authority independent of the statute to make appointments necessary to effectuate the judge's mandate (Judges App. 18-19).

C. Statement of facts.

Chapter 11 of the Wisconsin Statutes governs campaign financing. It makes certain conduct unlawful and provides both civil and criminal penalties. *See* Wis. Stat. §§ 11.60 and

11.61. All criminal prosecutions must be "conducted by the district attorney for the county where the defendant resides or, if the defendant is a nonresident, by the district attorney for the county where the violation is alleged to have occurred." *See* Wis. Stat. §§ 11.61(2) and 978.05(1). A person other than a natural person "resides within a county if the person's principal place of operation is located within that county." *See id*.

On August 10, 2012, the Milwaukee County District Attorney filed a petition in Milwaukee County Circuit Court to commence a John Doe proceeding regarding violations of Wis. Stat. ch. 11 committed in Milwaukee County (Affidavit of Special Prosecutor Schmitz dated December 19, 2013, Ex. 1.2; Judges App. 28-30).[5] On September 5, 2012, Wisconsin Supreme Court Chief Justice Abrahamson, by Director of State Courts A. John Voelker, assigned Reserve Judge Kluka to preside over the John Doe proceeding in Milwaukee County (Affidavit of Schmitz, Ex. 15; Judges App. 42). On September 5, 2012, Judge Kluka entered an order authorizing the commencement of a John Doe proceeding in Milwaukee County (Affidavit of Schmitz, Ex. 32; Judges App. 47).

On September 5, 2012, Judge Kluka issued a secrecy order (Affidavit of Todd P. Graves dated November 12, 2013, Ex. 2; Judges App. 70-71).[6] The secrecy order provided in part that all

---

[5] The affidavit of Special Prosecutor Schmitz was submitted in opposition to the petitions for supervisory writs filed by the Three Unnamed Petitioners in No. 2013AP2504-2508-W.

[6] The affidavit of Todd Graves was submitted in support of the petitions for supervisory writs filed by the Three Unnamed Petitioners in No. 2013AP2504-2508-W.

Assistant District Attorneys, support staff, and investigative staff of the Milwaukee County District Attorney's Office could have access to and use information gathered in the John Doe investigation for appropriate law enforcement purposes (Affidavit of Graves, Ex. 2; Judges App. 70-71).

On July 22, 2013, the Columbia County District Attorney filed a petition in Columbia County Circuit Court to commence a John Doe proceeding regarding violations of Wis. Stat. ch. 11 committed in Columbia County (Affidavit of Schmitz, Ex. 2; Judges App. 31-33). On August 14, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Kluka to preside over the John Doe proceeding in Columbia County (Affidavit of Schmitz, Ex. 11; Judges App. 43). On August 21, 2013, Judge Kluka entered an order authorizing the commencement of a John Doe proceeding in Columbia County (Affidavit of Schmitz, Ex. 28; Judges App. 48). On August 21, 2013, Judge Kluka entered a secrecy order that was substantially similar to the secrecy order entered in the Milwaukee County John Doe proceeding, but that allowed the Columbia County District Attorney and her legal secretary to have access to the record of proceedings to the extent necessary for the performance of their duties (Affidavit of Graves, Ex. 3; Judges App. 72-73).

On July 25, 2013, the Iowa County District Attorney filed a petition in Iowa County Circuit Court to commence a John Doe proceeding regarding violations of Wis. Stat. ch. 11 committed in Iowa County (Affidavit of Schmitz, Ex. 5; Judges App. 39-41). On August 7, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Kluka to preside over the

John Doe proceeding in Iowa County (Affidavit of Schmitz, Ex. 14; Judges App. 46). On August 21, 2013, Judge Kluka entered an order authorizing the commencement of a John Doe proceeding in Iowa County (Affidavit of Schmitz, Ex. 31; Judges App. 51). On August 21, 2013, Judge Kluka entered a secrecy order that was substantially similar to the secrecy order entered in the Milwaukee County John Doe proceeding, but that allowed the Iowa County District Attorney and his legal secretary to have access to the record of proceedings to the extent necessary for the performance of their duties (Affidavit of Graves, Ex. 6; Judges App. 78-79).

On July 28, 2013, the Dodge County District Attorney filed a petition in Dodge County Circuit Court, to commence a John Doe proceeding regarding violations of Wis. Stat. ch. 11 committed in Dodge County (Affidavit of Schmitz, Ex. 4; Judges App. 36-38). On August 7, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Kluka to preside over the John Doe proceeding in Dodge County (Affidavit of Schmitz, Ex. 13; Judges App. 45). On August 21, 2013, Judge Kluka entered an order authorizing the commencement of a John Doe proceeding in Dodge County (Affidavit of Schmitz, Ex. 30; Judges App. 50). On August 21, 2013, Judge Kluka entered a secrecy order substantially similar to the secrecy order entered in the Milwaukee County John Doe proceeding, but that allowed the Dodge County District Attorney and a special prosecutor to have access to the record of proceedings to the extent necessary for the performance of their duties (Affidavit of Graves, Ex. 5; Judges App. 76-77).

On August 21, 2013, the Dane County District Attorney filed a petition in Dane County Circuit Court, to commence a John Doe proceeding regarding violations of Wis. Stat. ch. 11 committed in Dane County (Affidavit of Schmitz, Ex. 3; Judges App. 34-35). On August 21, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Kluka to preside over the John Doe proceeding in Dane County (Affidavit of Schmitz, Ex. 12; Judges App. 44). On August 21, 2013, Judge Kluka entered an order authorizing the commencement of a John Doe in Dane County (Affidavit of Schmitz, Ex. 29; Judges App. 49). On August 21, 2013, Judge Kluka entered a secrecy order substantially similar to the secrecy order entered in the Milwaukee County John Doe proceeding, but that allowed the Dane County District Attorney, three deputy district attorneys, one assistant district attorney, and three investigators to have access to the record of proceedings to the extent necessary for the performance of their duties (Affidavit of Graves, Ex. 4; Judges App. 74-75).

On August 21, 2013, the five district attorneys wrote a letter to Judge Kluka suggesting that she appoint a special prosecutor for all five John Doe proceedings, on her own motion and in the exercise of her inherent judicial authority. (Affidavit of Schmitz, Ex. 16; Judges App. 52-55). In the letter, the district attorneys stated in pertinent part:

> By operation of § 978.05(1), the responsibility for the prosecution of the crimes alleged in the John Doe Petition is fractionated across the offices of five different Wisconsin prosecutors. In reality, however, the

investigation is one overall undertaking and should be managed by one prosecutor with general authority in all five counties. To proceed otherwise would unduly complicate, if not cripple, the investigation.

With this letter, we seek to apprise you of the legal and factual circumstances that make it appropriate to appoint a Special Prosecutor to handle the overall investigation. A special prosecutor is needed to review the allegations and, if charge(s) are well founded, then the Special Prosecutor should be authorized to proceed with said charge(s) through to disposition. We submit you have the authority to make this appointment on your own motion and as part of your authority to efficiently administer an effective John Doe investigative proceeding.

. . . [I]n January of 2013, the Attorney General of the State of Wisconsin was requested to undertake the investigation and the potential prosecution of these campaign finance crimes. In a letter dated May 31, 2013, the Attorney General declined to assume responsibility for the investigation . . . .

. . .

John Doe investigations were never intended to be run by a committee of

prosecutors. The inefficiency of a five-county investigation is well illustrated by the amount of time it has taken . . . to advance these five John Doe investigations to a point where . . . the appointment of a centralized independent Special Prosecutor, can be addressed. This investigation cannot efficiently and effectively continue in this fashion.

Moreover . . . the partisan political affiliations of the undersigned District Attorneys will lead to public allegations of impropriety. . . . An independent Special Prosecutor having no partisan affiliation addresses the legitimate concerns about the appearance of impropriety.

For all of these reasons, the John Doe Judge should entertain, on its own motion and in the exercise of its inherent authority, the appointment of an attorney to serve in the role of prosecutor who has authority across all counties involved. . . .

. . . .

We additionally submit that a John Doe judge has the inherent, if not express, authority to appoint a Special Prosecutor here. Considerations of investigative efficiency and economy require the attorney to serve in the role [of Special Prosecutor]. Such an appointment allows for the orderly

> progression of the overall John Doe investigation and is justified for that reason. *See State v. Cummings*, 199 Wis. 2d 721, 735, 546 N.W.2d 406, 411 (1996).

(Footnotes omitted)(Affidavit of Schmitz, Ex. 16; Judges App. 52-54).

On August 23, 2013, Judge Kluka entered identical but separate orders in all five John Doe proceedings, appointing a single Special Prosecutor. (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69). The appointment orders stated in pertinent part:

> 1. In January 2013, the Wisconsin Attorney General was requested to proceed with the investigation and prosecution of the criminal law violations as alleged in the Petitions and Affidavits filed in the above-referenced John Doe proceedings.
>
> 2. In a letter dated May 31, 2013, the Attorney General declined to assume responsibility for this investigation . . . .
>
> 3. A Special Prosecutor with jurisdiction across the severally affected counties is required for the efficient and effective conduct of the investigation, including any charging decisions that need to be made. Likewise, if charges are filed, a single prosecutor with jurisdiction across the severally affected counties is required

for the efficient prosecution of such charges.

4. The . . . District Attorneys for the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee all note that their individual status as partisan elected prosecutors gives rise to the potential for the appearance of impropriety. I find that a Special Prosecutor will eliminate any appearance of impropriety.

5. For these reasons, Attorney Francis D. Schmitz is appointed Special Prosecutor for the State of Wisconsin. He is authorized to investigate the matters more fully described in John Doe papers previously filed in the above-referenced proceedings. Attorney Schmitz is further authorized to determine if criminal charges are appropriate, and if he so determines, he is authorized to issue charges and proceed through to disposition with any such charges.

6. I make this appointment in light of the facts and circumstances set forth in the August 21, 2013 letter submitted by the District Attorneys for the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee. I make this appointment under my authority as expressed in *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 563. I find that a John Doe run by five different local prosecutors,

> each with the partial responsibility for what is and should be one overall investigation and prosecution, is markedly inefficient and ineffective. Consequently, I also make this appointment as part of my inherent authority under *State v. Cummings*, 199 Wis. 2d 721, 735, 546 N.W.2d 406, 411 (1996).

(Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69). Each of the appointment orders contained a directive that a copy of the appointment order be sent to the Wisconsin Department of Administration (DOA) (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69).

On October 27, 2013, Reserve Judge Kluka disqualified herself in the Milwaukee County John Doe proceeding, citing a "conflict" as the reason for her disqualification (Affidavit of Schmitz, Ex. 22; Judges App. 80). On October 30, 2013, Reserve Judge Kluka disqualified herself in the other four John Doe proceedings, citing a "conflict" as the reason for her disqualification (Dane County Record 97-1; Order of Supreme Court dated February 25, 2015, granting motion to supplement the record; Judges App. 82-84)

On October 29, 2013, Chief Judge Kremers of the First Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceeding in Milwaukee County (Affidavit of Schmitz, Ex. 22; Judges App. 80). On November 1, 2013, Chief Judge Potter of the Sixth Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceedings in Columbia County and Dodge County (Order of Supreme Court dated February 25, 2015, granting

motion to supplement the record; Judges App. 82-83). On November 1, 2013, Chief Judge Duvall of the Seventh Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceeding in Iowa County (Order of Supreme Court dated February 25, 2015, granting motion to supplement the record; Judges App. 84). On November 4, 2013, Chief Judge Daley of the Fifth Judicial District assigned Reserve John Peterson to preside over the John Doe proceeding in Dane County (Dane County Record 97-1; Judges App. 81).

On November 4, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Peterson to preside over the John Doe proceeding in Milwaukee County (Affidavit of Schmitz, Ex. 27; Judges App. 89). On November 14, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Peterson to preside over the John Doe proceedings in Columbia County and Dodge County (Affidavit of Schmitz, Exs. 23, 25; Judges App. 85, 87). On November 11, 2013, Chief Justice Abrahamson, by Director Voelker, assigned Reserve Judge Peterson to preside over the John Doe proceedings in Iowa County and Dane County (Affidavit of Schmitz, Exs. 24, 26; Judges App. 86, 88).

STATUTES INVOLVED

Wis. Stats. § 11.61(2) provides:

> Except as otherwise provided . . . all prosecutions under this section shall be conducted by the district attorney for the county where the defendant resides or, if the defendant

is a nonresident, by the district attorney for the county where the violation is alleged to have occurred. For purposes of this subsection, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

Wis. Stat. § 751.03(1) provides in part:

> . . . The chief justice of the supreme court may designate and assign reserve judges under s. 753.075 to serve temporarily . . . in the circuit court for any county. While acting under temporary assignment . . . [a] reserve justice or judge may exercise all of the authority of the court to which he or she is assigned.

Wis. Stat. 753.075(1) and (2) provide:

> (1) DEFINITIONS. In this section:
>
> (a) "Permanent reserve judge" means a judge appointed by the chief justice to serve an assignment for a period of 6 months. Permanent reserve judges shall perform the same duties as other judges and may be reappointed for subsequent periods.
>
> (b) "Temporary reserve judge" means a judge appointed by the chief justice to serve such specified duties on a day-to-day basis as the chief justice may direct.

(2) ELIGIBILITY. The chief justice of the supreme court may appoint any of the following as a reserve judge:

(a) Any person who has served a total of 6 or more years as a supreme court justice, a court of appeals judge, or a circuit judge.

(b) Any person who was eligible to serve as a reserve judge before May 1, 1992.

Wis. Stat. § 968.26 provides in part:

(1) If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene a proceeding described under sub. (3) and shall subpoena and examine any witnesses the district attorney identifies.

. . .

(3) The extent to which the judge may proceed in an examination under sub. (1) . . . is within the judge's discretion. The examination may be adjourned and may be secret. . . . [I]f the proceeding is secret, the 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. . . .

Wisconsin Stat. § 978.045 provides in part:

> (1g) A court on its own motion may appoint a special prosecutor under sub. (1r) or a district attorney may request a court to appoint a special prosecutor under that subsection. Before a court appoints a special prosecutor on its own motion or at the request of a district attorney for an appointment that exceeds 6 hours per case, the court or district attorney shall request assistance from a district attorney, deputy district attorney or assistant district attorney from other prosecutorial units or an assistant attorney general. A district attorney requesting the appointment of a special prosecutor, or a court if the court is appointing a special prosecutor on its own motion, shall notify the department of administration . . . of the district attorney's or the court's inability to obtain assistance from another prosecutorial unit or from an assistant attorney general.
>
> (1r) Any judge of a court of record, by an order entered in the record stating the cause for it, may appoint an attorney as a special prosecutor to perform . . . the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of the district attorney to

assist the district attorney in . . . John Doe proceedings under s. 968.26 . . . . The judge may appoint an attorney as a special prosecutor if any of the following conditions exists:

. . . .

(h) The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

(2)(a) The court shall fix the amount of compensation for any attorney appointed as a special prosecutor . . . .

(b) The department of administration shall pay the compensation ordered by the court . . . .

. . .

(3)(a) If an attorney is available and willing to serve as a special prosecutor without state compensation, the district attorney may appoint the attorney as a public service special prosecutor to serve at the pleasure of the district attorney. The public service special prosecutor may perform the duties and has the powers of the district attorney while acting under such appointment . . . . A full-time public service special prosecutor may not engage in a private practice of law while serving

under this paragraph. A part-time public service special prosecutor may engage in a private practice of law while serving under this paragraph.

Wisconsin Stat. § 978.05(1) and (3) provide:

> DUTIES OF DISTRICT ATTORNEY. The district attorney shall:
>
> (1) CRIMINAL ACTIONS. . . . [P]rosecute 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 . . . and from violations of other laws arising from or in relation to . . . any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12 . . . that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in his or her prosecutorial unit. . . . For purposes of this subsection, a person other than a natural person is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.
>
> . . . .
>
> (3) JOHN DOE PROCEEDINGS. Participate in

investigatory proceedings under s. 968.26.

SUPREME COURT RULES INVOLVED

SCR 70.01(1) provides:

> The director of state courts shall be the chief nonjudicial officer of the court system in the state. The director shall be hired and serve at the pleasure of the supreme court, under the direction of the chief justice. The director shall have the authority and responsibility for the overall management of the unified judicial system.

SCR 70.10 provides:

> The director of state courts shall have the responsibility and authority regarding the assignment of reserve judges . . . at the circuit court level where necessary to the ordered and timely disposition of the business of the court.

SCR 70.19 provides in part:

> (1) The chief judge is the administrative chief of the judicial administrative district. The chief judge is responsible for the administration of judicial business in circuit courts within the district . . . . The general responsibility of the chief judge is to supervise and direct the

> administration of the district, including the judicial business of elected, appointed and assigned circuit judges.
>
> . . .
>
> (3) In the exercise of his or her general responsibility, the chief judge has the following duties:
>
> (a) Assignment of judges within each judicial administrative district. . . .

ARGUMENT

I. A SUPERVISORY WRIT WILL NOT ISSUE UNLESS THE JOHN DOE JUDGE CLEARLY VIOLATED A PLAIN DUTY.

The court of appeals and the Supreme Court may exercise supervisory jurisdiction over the actions of a judge presiding over a John Doe proceeding. *See In Matter of John Doe Proceeding*, 2003 WI 30, ¶ 48, 260 Wis. 2d 653, 682-683, 660 N.W.2d 260. A supervisory writ is a blending of the writ of mandamus and prohibition. *See State ex rel. Kenneth S. v. Circuit Court for Dane Cnty.*, 2008 WI App 120, ¶ 8, 313 Wis. 2d 508, 512, 756 N.W.2d 573; *Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). It is considered to be an extraordinary and drastic remedy that will be issued only upon some grievous exigency. *See id*. A supervisory writ will not issue unless (1) an appeal is an utterly inadequate remedy; (2) the duty of the circuit court is *plain*, (3) the circuit court's refusal to act within the line of such duty or its

intent to act in violation of such duty is *clear*, (4) the results of the circuit court's action must not only be prejudicial but must involve extraordinary hardship, and (5) the request for relief must have been made promptly and speedily. *See id*.

II. THE CHIEF JUSTICE OF THE SUPREME COURT HAD LAWFUL AUTHORITY TO APPOINT THE SAME RESERVE JUDGE TO PRESIDE OVER SEPARATE JOHN DOE PROCEEDINGS IN FIVE COUNTIES.

The first John Doe procedural issue identified by the Supreme Court is whether the Director of State Courts had lawful authority to appoint Reserve Judge Kluka as the John Doe judge to preside over a multi-county John Doe proceeding. The issue assumes that the Director of State Courts assigned Reserve Judge Kluka and that the appointment was to preside over a multi-county John Doe proceeding. These two assumptions are contradicted by the record.

Chief Justice Abrahamson, not the Director, appointed and assigned Reserve Judge Kluka to serve as the John Doe judge. (Affidavit of Schmitz, Exs. 11-15; Judges App. 42-46). Reserve Judge Kluka was not assigned to preside over a multi-county John Doe proceeding; rather, Chief Justice Abrahamson made five separate assignments, one for each of the five counties in which a petition for a John Doe proceeding had been filed (Affidavit of Schmitz, Exs. 11-15; Judges App. 42-46). Chief Justice Abrahamson plainly had authority to make such assignments under Wis. Stat. §§ 751.03(1) and 753.075(2).

Even if the Director had made the five assignments of Reserve Judge Kluka to preside over the five separate John Doe proceedings, the Director arguably had authority to make such assignments under SCR 70.10. That rule grants the Director "the responsibility and authority regarding the assignment of reserve judges . . . at the circuit court level where necessary to the ordered and timely disposition of the business of the court." Since it was the Chief Justice rather than the Director who made the five assignments, however, the Supreme Court need not determine whether SCR 70.10 would have authorized the Director to make those assignments.

III. THE CHIEF JUSTICE OF THE SUPREME COURT HAD LAWFUL AUTHORITY TO APPOINT RESERVE JUDGE GREGORY PETERSON AS THE JOHN DOE JUDGE TO PRESIDE OVER SEPARATE JOHN DOE PROCEEDINGS IN FIVE COUNTIES.

The second John Doe procedural issue identified by the Supreme Court is whether Chief Judge Kremers of the First Judicial District had lawful authority to appoint Reserve Judge Peterson as the John Doe judge to preside over a multi-county John Doe proceeding. The issue assumes that the Chief Judge Kremers assigned Reserve Judge Peterson to preside over a multi-county John Doe proceeding. This assumption is contradicted by the record.

Chief Judge Kremers only assigned Reserve Judge Peterson to preside over the John Doe

proceeding in Milwaukee County. (Affidavit of Schmitz, Ex. 22, Judges App. 80). Chief Judge Daley of the Fifth Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceeding in Dane County. (Dane County Record 97-1; Judges App. 81). Chief Judge Potter of the Sixth Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceedings in Columbia County and Dodge County. (Order of Supreme Court dated February 25, 2015, granting motion to supplement the record; Judges App. 82-83). Chief Judge Duvall of the Seventh Judicial District assigned Reserve Judge Peterson to preside over the John Doe proceeding in Iowa County. (Order of Supreme Court dated February 25, 2015, granting motion to supplement the record; Judges App. 84).

SCR 70.19(3)(a), which authorizes a chief judge to assign judges within that chief judge's judicial district, arguably authorized the Chief Judges to assign Reserve Judge Peterson to preside over the John Doe proceedings in their judicial districts. The Supreme Court need not determine, however, whether SCR 70.19(3)(a) would have authorized the Chief Judges to make those assignments, because Chief Justice Abrahamson, by the Director, made separate assignments of Reserve Judge Peterson to serve as the John Doe judge in each of the five counties (Affidavit of Schmitz, Ex. 23-27; Judges App. 85-89). The Chief Justice had authority to make such assignments under Wis. Stat. §§ 751.03(1) and 753.075(2).

IV. WIS. STAT. § 968.26 PERMITS A JOHN DOE JUDGE, APPOINTED TO PRESIDE OVER SEPARATE JOHN DOE PROCEEDINGS IN FIVE COUNTIES, TO APPOINT THE SAME SPECIAL PROSECUTOR IN ALL FIVE COUNTIES, AND TO AUTHORIZE THE SPECIAL PROSECUTOR TO CONDUCT A COORDINATED INVESTIGATION.

The third John Doe procedural issue identified by the Supreme Court is whether Wis. Stat. § 968.26 permits a John Doe judge to convene a John Doe proceeding over multiple counties, which then is coordinated by the district attorney of one of those counties. The issue assumes that Reserve Judge Kluka convened a single John Doe proceeding over multiple counties. This assumption is contradicted by the record. Reserve Judge Kluka entered five separate orders, one in each county, commencing a separate John Doe proceeding in each county (Affidavit of Schmitz, Exs. 28-32; Judges App. 47-51).

It is true that Reserve Judge Kluka entered separate but identical orders in all five John Doe proceedings, appointing the same Special Prosecutor and charging him with conducting an efficient and effective investigation across the five counties. (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69). As the court of appeals noted in its opinion dated January 30, 2014, however, there is a distinction between an "investigation" and a "proceeding." (Judges App. 15). Although a John Doe judge may conduct a John Doe "proceeding" (a John Doe hearing) only to determine whether a

crime has been committed in a particular county, 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. This is especially true where the same or integrally-related conduct is being investigated and where the same or substantially overlapping witnesses and documents are involved (Judges App. 15). The issuance of joint orders, subpoenas, or search warrants, rather than duplicative ones, where the same information is being conveyed or sought in more than one of the John Doe proceedings, results in a more efficient and effective investigation. (Judges App. 15).

The authorization of such an investigation by a single district attorney or special prosecutor is consistent with the broad discretion granted to a John Doe judge to determine the nature and extent of the John Doe proceedings. *See In Matter of John Doe Proceeding*, 2003 WI 30, ¶ 52, 260 Wis. 2d 653, 684, 660 N.W.2d 260. A John Doe possesses "all powers necessary for the John Doe judge to 'carry out his or her responsibilities with respect to the proper conduct of John Doe proceedings.'" *See State ex rel. Individual Subpoenaed v. Davis*, 2005 WI 70, ¶ 26, 281 Wis. 2d at 431, 697 N.W.2d 803. "The latitude afforded the John Doe judge under the statute is designed to ensure that the proceeding is conducted in an orderly and expeditious manner." *See State v. Washington*, 83 Wis. 2d 808, 824, 266 N.W.2d 597 (1978). Consequently, where John Doe proceedings are pending in multiple counties before the same John Doe judge, permitting a single district attorney or special prosecutor to conduct a coordinated investigation is within the John Doe

judge's broad discretion to determine the nature and extent of John Doe proceedings, and does not clearly violate any plain and positive duty of the John Doe judge.

V. WISCONSIN LAW ALLOWS A JOHN DOE JUDGE TO APPOINT A SPECIAL PROSECUTOR TO PERFORM THE FUNCTIONS OF A DISTRICT ATTORNEY IN SEPARATE JOHN DOE PROCEEDINGS IN FIVE COUNTIES WHEN (A) THE DISTRICT ATTORNEY IN EACH COUNTY REQUESTS THE APPOINTMENT, (B) NONE OF THE NINE GROUNDS FOR APPOINTING A SPECIAL PROSECUTOR UNDER WIS. STAT. § 978.045(1r) APPLY, (C) NO CHARGES HAVE BEEN ISSUED YET, (D) THE DISTRICT ATTORNEY IN EACH COUNTY HAS NOT REFUSED TO CONTINUE THE INVESTIGATION OR PROSECUTION OF ANY POTENTIAL CHARGE, AND (E) NO CERTIFICATION WAS MADE TO THE DEPARTMENT OF ADMINISTRATION THAT NO OTHER PROSECUTORIAL UNIT WAS AVAILABLE TO DO THE WORK FOR WHICH THE SPECIAL PROSECUTOR WAS SOUGHT.

A. Whether Wisconsin law allowed Reserve Judge Kluka to appoint the Special Prosecutor depends upon Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor and, if not, whether the appointment was lawful under Wis. Stat. § 978.045(1g) or (1r).

The fourth John Doe procedural issue identified by the Supreme Court is whether Wisconsin law allows a John Doe judge to appoint a special prosecutor to perform the functions of a district attorney in a multi-county John Doe proceeding where (a) the district attorney in each county requests the appointment, (b) none of the nine grounds for appointing a special prosecutor under Wis. Stat. § 978.045(1r) apply, (c) no charges have been issued yet, (d) the district attorney in each county has not refused to continue the investigation or prosecution of any potential charge, and (e) no certification was made to the Wisconsin Department of Administration (DOA) that no other prosecutorial unit was available to do the work for which the special prosecutor was appointed. The issue assumes that the Special Prosecutor was appointed in a multi-county John Doe proceeding. This assumption is contradicted by the record. The Special Prosecutor was appointed by five separate orders to serve as the special prosecutor in separate John Doe proceedings in five counties (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69).[7]

[7] No statutory provision prohibits the appointment of the same special prosecutor in separate John Doe proceedings.

In determining whether Wisconsin law allowed Reserve Judge Kluka to appoint the Special Prosecutor in each of the five John Doe proceedings, the critical issues are whether Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor and, if not, whether the appointment was lawful under Wis. Stat. § 978.045(1g) or (1r). These issues are discussed below. First, however, regarding the other sub-issues identified by the Supreme Court, the district attorneys in each of the five counties requested the appointment of a special prosecutor (Affidavit of Schmitz, Ex. 16; Judges App. 52-55). Accordingly, insofar as a district attorney's request might be a precondition for appointment of a special prosecutor under Wis. Stat. § 978.045(1g) or Wis. Stat. § 978.045(1r), that precondition was satisfied in the five John Doe proceedings.[8]

No criminal charges have been issued yet as a result of the five John Doe proceedings. That fact alone, however, does not affect the appointment of the Special Prosecutor. Wis. Stat. § 978.045(1g) and (1r) both authorize the appointment of a special prosecutor to perform the duties of a

---

Nor is there any statutory prohibition against having that special prosecutor coordinate and perform investigative functions for the separate John Doe proceedings.

[8] The district attorneys could have appointed a "public service" special prosecutor themselves under Wis. Stat. § 978.045(3)(a), rather than requesting an appointment under Wis. Stat. § 978.045(1g) or (1r), but a "public service" special prosecutor must be willing to serve without state compensation and is subject to restrictions on private practice. The appellate record does not establish that any such public service special prosecutor appointment was made in any of the five John Doe proceedings.

district attorney, and the duties of a district attorney include participation in John Doe proceedings, *see* Wis. Stat. § 978.05(3). Since one of the purposes of a John Doe proceeding is to determine whether a crime has been committed and, if so, by whom, *see State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2n 605, 621, 571 N.W.2d 385 (1997), it is unremarkable that the commencement of a John Doe proceeding, and the appointment of a special prosecutor to perform the duties of a district attorney in the John Doe proceeding, precede the issuance of criminal charges.

Whether the district attorneys in the five counties either refused to continue the John Doe proceedings, or refused to prosecute any potential criminal charges arising out of the John Doe proceedings, is not established by the appellate record. What is established is that the five district attorneys requested that the John Doe judge appoint a special prosecutor in each of the five John Doe proceedings (Affidavit of Schmitz, Ex. 16; Judges App. 52-55). Such requests satisfy the requirement of a request for appointment of a special prosecutor by a district attorney under both Wis. Stat. § 978.045(1g) and (1r). A refusal to proceed with the John Doe proceeding is not required. *Cf.* Wis. Stat. § 968.02(3) ("[i]f a district attorney refuses to issue a complaint, a circuit court judge may permit the filing of a complaint if the judge finds that there is probable cause to believe that the person to be charged has committed an offense).

It is true that the orders appointing the Special Prosecutor in the five John Doe proceedings authorized him not only to investigate the matters described in the John Doe petitions,

but also to issue criminal charges and to prosecute the criminal charges (Affidavit of Schmitz, Exs, 17-21; Judges App. 60-69). At this juncture no criminal charges have been filed. Consequently, it is premature to determine whether the special prosecutor appointment by the John Doe judge would continue and bind the court hearing possible future criminal charges, or whether that court could make a new special prosecutor appointment. In any event, the central issue identified by the Supreme Court is whether Wisconsin law permitted Reserve Judge Kluka to appoint the Special Prosecutor to perform the duties of the district attorneys in the five John Doe proceedings.

B. Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor.

In the five separate orders appointing the Special Prosecutor, Reserve Judge Kluka did not cite any statute as the basis of her authority to make the appointment. Rather, she claimed that she that she had inherent authority to make the appointment (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69).

"A John Doe judge's authority stems both from the statutes and from powers inherent to a judge," the judge's powers "are not . . . limited to those enumerated in Wis. Stat. § 968.26," and the judge's inherent powers "include those necessary to fulfill the jurisdictional mandate." *See State ex rel. Individual Subpoenaed v. Davis*, 2005 WI 70, ¶¶ 23, 26, 281 Wis. 2d 432, 443, 697 N.W.2d 803. For example, a John Doe judge has inherent judicial authority to seal a search warrant despite

a lack of statutory authority. *See State v. Cummings*, 199 Wis. 2d 721, 735-736, 546 N.W.2d 406 (1996).

A judge has inherent judicial power to appoint a special prosecutor to accomplish constitutionally or legislatively mandated functions. *See State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 17, 531 N.W.2d 32 (1995). A judge has inherent authority to appoint a special prosecutor even where the enumerated statutory conditions for appointment are not satisfied. *See State v. Lloyd*, 104 Wis. 2d 49, 56, 310 N.W.2d 617 (Ct. App. 1981) (the statute authorizing appointment of a special prosecutor "is not the exclusive means by which a court can appoint a special prosecutor"). Consequently, in this case, Wis. Stat. §§ 978.045(1g) and (1r) were not the exclusive means for appointment of the Special Prosecutor. Reserve Judge Kluka had inherent authority to appoint the Special Prosecutor. Her appointment of the Special Prosecutor did not clearly violate any plain and positive duty.

C. Wis. Stat. § 978.045)(1g) authorized the appointment of the Special Prosecutor.[9]

Wis. Stat. § 978.045(1g) authorizes a "court" to appoint a special prosecutor either on its own

[9] If the Supreme Court agrees that Reserve Judge Kluka had inherent judicial authority to appoint the Special Prosecutor, the court need not address nor decide whether she also had statutory authority under Wis. Stat. § 978.045(1g) or (1r). Since the Court could disagree, however, this brief also will address the statutory authority for appointment of the Special Prosecutor.

motion or at the request of a district attorney.[10] The subjection imposes two preconditions before the court may appoint a special prosecutor. First, either the court or the district attorney must "request assistance from a district attorney or assistant district attorney from other prosecutorial units *or* an assistant attorney general." *See* Wis. Stat. § 978.045(1g) (italics added). Second, the court or the district attorney also must notify the Wisconsin Department of Administration (DOA) of the inability of the court or the district attorney to obtain assistance from another prosecutorial unit or from an assistant attorney general. *See id*.

In this case, the five district attorneys requested that the John Doe judge appoint a special prosecutor on her own motion and in the exercise of her inherent authority (Affidavit of Schmitz, Ex. 16; Judges App. 52-55). Although the five district attorneys did not request the assistance of a district attorney or an assistant district attorney in other prosecutorial units, they did request the assistance of the an assistant attorney general (Affidavit of Schmitz, Ex. 16; Judges App. 53). The Attorney General refused their request (Affidavit of Schmitz, Ex. 16; Judges App. 53).

The first precondition was satisfied in this case. The district attorneys requested the assistance of an assistant attorney general and the Attorney General denied the request.

---

[10] Wis. Stat. § 978.045(1g) refers to the authority of a "court" to appoint a special prosecutor. Although a John Doe "judge" may not be the equivalent of a "court" for all purposes, *see State v. Washington*, 83 Wis. 2d at 828, subsection 978.045(1g) authorizes special prosecutor appointments under subsection 978.045(1r), and the latter subsection expressly authorizes judges to appoint special prosecutors.

The second precondition for appointment of a special prosecutor under subsection 978.045(1g) is notification to DOA of the inability of the court or of the district attorney to obtain assistance from other prosecutorial units or from an assistant attorney general. In this case, the second precondition was met. The separate orders appointing the Special Prosecutor in the five John Doe proceedings recited that the Wisconsin Attorney General had been requested but had refused to assume responsibility for the John Doe investigation (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69). Each of the appointment orders also contained a directive that a copy of the appointment order be sent to DOA (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69).

In *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451, the defendant was convicted of operating a motor vehicle while under the influence of an intoxicant, based upon his improper refusal to submit to a chemical test. Although a district attorney normally would represent the State in a refusal hearing, the circuit court followed its customary practice of appointing the city attorney as a special prosecutor instead. The defendant challenged his conviction in part on the ground that Wis. Stat. § 978.045 did not permit the assignment of special prosecutors in civil cases.

The defendant relied on the language in Wis. Stat. § 978.045(1r) that a judge may appoint an attorney as a special prosecutor at the request of the district attorney to assist the district attorney "in the prosecution of persons charged with a crime, in grand jury or John Doe proceedings, or in investigations." The court of

appeals concluded that while that language might limit the types of cases in which a special prosecutor could be appointed at the request of a district attorney, Wis. Stat. § 978.045(1g) authorized a court to appoint a special prosecutor on its own motion independent of any request by the district attorney. *See Carlson*, 244 WI App 44 at ¶¶7-9.

In upholding the conviction, the court of appeals observed that the statute gives the circuit court almost "unfettered authority" to appoint a special prosecutor to perform the duties of the district attorney. *See id.* at ¶ 5. The court added that when a circuit court appoints a special prosecutor on its own motion under Wis. Stat. § 978.045, the only constraint is that the circuit court "must enter an order in the record stating the cause for the appointment." *See id.* at ¶ 9. Finally, the court made no mention of any request for assistance from another prosecutorial unit or an assistant attorney general, the denial of such a request, or any notification to DOA.

Reserve Judge Kluka's orders appointing the Special Prosecutor in the five John Doe proceedings satisfied the requirements of subsection 978.045(1g). Judge Kluka made the orders on her own motion, albeit at the suggestion of the district attorneys. The orders recited that the district attorneys had requested but were denied the assistance of an assistant attorney general. The orders also provided that DOA be notified of the orders, including the provision noting the inability of the district attorneys to obtain the assistance of an assistant attorney general. Finally, the orders identified the reasons for the appointment of the Special Prosecutor, *i.e.*, to permit an efficient and effective investigation,

and to eliminate any appearance of impropriety (Affidavit of Schmitz, Exs. 17-21; Judges App. 60-69).

D. Wis. Stat. § 978.045(1r) authorized the appointment of the Special Prosecutor.

The first sentence of Wis. Stat. § 978.045(1r) authorizes "[a]ny judge of a court of record, by an order entered in the record stating the cause for it, [to]appoint an attorney as a special prosecutor to perform . . . the duties of the district attorney." Under the statute, an attorney appointed as a special prosecutor has all the powers of a district attorney. The statute further provides that a judge may appoint an attorney, at the request of a district attorney, to assist the district attorney, *inter alia*, in John Doe proceedings under Wis. Stat. § 968.26. Finally, the statute provides that a judge may appoint an attorney as a special prosecutor if certain conditions exist, one of which is where the district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff. *See* Wis. Stat. § 978.045(1r)(h).

Viewed alone, the first sentence of Wis. Stat. § 978.045(1r) clearly provided authority for Reserve Judge Kluka to appoint the Special Prosecutor in the five John Doe proceedings. In *State v. Carlson*, the court read Wis. Stat. § 978.045(1g) and the first sentence of Wis. Stat. § 978.045(1r) as a broad authorization for a John Doe judge to appoint a special prosecutor to perform the duties of a district attorney. While the court of appeals focused on the language in subsection 978.045(1r) limiting the types of cases

in which special counsel may be appointed at the request of a district attorney, the court of appeals never suggested that the appointment of the city attorney on the circuit court's own motion was limited by any of the conditions listed in subsection 978.045(1r)(a)-(i). The circuit court's appointment of the city attorney as special counsel in *Carlson* would not appear to have satisfied any of the listed conditions.

In a footnote, however, the court of appeals in *Carlson* suggested that it need not reach the question whether the conditions listed in subsection 978.045(1r)(a)-(i) limit the appointment of a special prosecutor because those conditions only "relate back to the appointments made at the request of the district attorney," and do not apply to appointments made by a circuit court on its own motion. *See State v. Carlson*, 2002 WI App 44 at ¶ 8 n. 5. The footnote is curious for two reasons. First, on its face, subsection 978.045(1r) does not distinguish special prosecutor appointments made on the circuit court's own motion, and special prosecutor appointments made at the request of a district attorney, with respect to the applicability of the listed conditions. Second, the footnote seems to conflict with an earlier decision of the court of appeals. *See State v.* Bollig, 222 Wis. 2d 448, 587 N.W.2d 908 (Ct. App. 1998).

In *Bollig*, the court of appeals differentiated special prosecutor appointments made under subsection 978.045(1g) from those made under subsection 978.045(1r), regardless whether the appointments were made on the court's own motion or on motion of a district attorney. Under subsection 978.045(1g), for special prosecutor appointments exceeding six hours per case, the court or the district attorney must certify to [DOA]

that no other prosecutorial unit is able to perform the work. *See Bollig*, 222 Wis. 2d at 569.[11] Under subsection 978.045(1r), because the circuit court can make a special prosecutor appointment only for the reasons listed in the statute, notification of DOA is not required. *See id*. DOA pays the compensation set by the court for the special prosecutor both under subsection 978.045(1g) and under subsection 978.045(1r). *See id*. The central legislative purpose of limiting special prosecutor appointments under subsection 978.045(1r) is to assure that the State will not have to pay for special prosecutor services under circumstances not anticipated in the statute. *See id*. at 571.

Assuming that the broad authorization to appoint special prosecutors in the first sentence of Wis. Stat. § 978.045(1r) is limited by the conditions listed in subsection 978.045(1r)(a)-(i), the one condition that could apply in this case is where a district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney's staff. *See* Wis. Stat. § 978.045(1r)(h). In their letter to Reserve Judge Kluka dated August 21, 2013, in which they suggested the appointment of a special prosecutor in all five John Doe proceedings, the district attorneys stated that their partisan political affiliations would lead to public allegations of impropriety (Affidavit of Schmitz, Ex. 16; Judges App. 53). Every lawyer has a solemn ethical duty to strive to avoid not only professional impropriety but also the appearance of impropriety. *See State v. Braun*, 152 Wis. 2d 500, 503 n. 2, 449 N.W.2d

[11] The court also stated that DOA must give "prior approval" of the appointment, *see Bollig*, 222 Wis. 2d at 569, but Wis. Stat. § 978.045(1g) does not contain such a requirement.

581 (Ct. App. 1989). The determination of the district attorneys that they would have an appearance of impropriety (a conflict of interest) satisfies the condition specified in subsection 978.045(1r)(h), and provides statutory justification for Reserve Judge Kluka's appointment of the Special Prosecutor.

VI. IF THERE WAS A DEFECT IN THE APPOINTMENT OF THE SPECIAL PROSECUTOR IN THE JOHN DOE PROCEEDINGS AT ISSUE IN THESE CASES, THAT DEFECT WOULD NOT HAVE ANY EFFECT ON THE COMPETENCY OF THE SPECIAL PROSECUTOR TO CONDUCT THE INVESTIGATION, OR ON THE COMPETENCY OF THE JOHN DOE JUDGE TO CONDUCT THESE PROCEEDINGS.

The fifth John Doe Procedural issue identified by the Supreme Court assumes that there was a defect in the appointment of the Special Prosecutor. The issue is whether that defect would affect either the competency of the Special Prosecutor to investigate or the John Doe Judge to conduct the John Doe proceedings. The answer is "no" for at least three reasons.

First, the court of appeals ruled in *Bollig* that a defect in the appointment of a special prosecutor under Wis. Stat. §978.045 would not affect the competency of the circuit court to proceed, in the absence of actual prejudice. *See Bollig*, 222 Wis. 2d at 560, 569-571. The court

concluded that the circuit court had sufficient reasons to appoint the special prosecutor, that the central purpose of Wis. Stat. §978.045 is only to assure that the State will not have to pay for the service of a special prosecutor under circumstances not anticipated in the statute, and that the legislative history did not indicate that strict compliance was necessary for the circuit court to have competence to proceed. *See id*. at 571.

Second, under the *de facto* officer doctrine, the acts of a *de facto* officer are valid as to the public and third parties, and cannot be attacked collaterally. *See Joyce v. Town of Tainter* , 2000 WI App 15, ¶ 8, 232 Wis. 2d 349, 606 N.W.2d 284.[12] A *de facto* officer is an individual who claims to be in possession of an office, who is performing its duties, and who claims to be such officer under color of an appointment or election. *See id*. at ¶ 7. The *de facto* officer's acts are binding and valid until the individual is ousted from office by a court judgment in a direct proceeding to try title to the office. *See id*. at ¶ 8. In this case, even if there were a defect in the appointment of the Special Prosecutor, he is a *de*

---

[12] *See*, *e.g.*, *Pamanet v. State*, 49 Wis. 2d 501, 507-508, 182 N.W.2d 459 (1971)(a defendant could not collaterally attack the authority of the district attorney to prosecute his case where the district attorney was a *de facto* officer); *Walberg v. State*, 73 Wis. 2d 448, 463-464, 243 N.W.2d 190 (1976) (arrest warrants issued by an individual purporting to be a court commissioner were not subject to collateral attack because of the individual's status as a *de facto* court commissioner); *State v. Petrone*, 166 Wis. 2d 220, 230-231, 479 N.W.2d 212 (1991) (a person could be prosecuted for perjury before a *de facto* judge even if there were technical flaws in the appointment of a reserve judge).

facto officer, his acts are deemed valid, and his acts cannot be attacked collaterally.

Third, Unnamed Petitioner No. 7 in the three consolidated cases before the Supreme Court, and one of the Three Unnamed Petitioners in 2014AP2504-2508-W, concedes that the John Doe judges (Reserve Judge Kluka and Reserve Judge Peterson) did have competency to proceed with the John Doe proceeding in Milwaukee County. This is because of the continued participation of the Milwaukee County District Attorney under the secrecy order entered in that John Doe proceeding (Brief of Unnamed Petitioner No. 7, pp. 29, 53).[13] Unnamed Petitioner No. 7 makes this concession notwithstanding arguments advanced by Unnamed Petitioner No. 7 regarding the alleged inability of a reserve judge to be a John Doe judge, the alleged defects in the appointment of the Special Prosecutor, and the allegedly impermissible coordination of the five John Doe proceedings.

Unnamed Petitioner No. 2 in the three consolidated cases before the Supreme Court, and another of the Three Unnamed Petitioners in 2014AP2504-2508-W, adopts this concession of Unnamed Petitioner No. 7 (Brief of Unnamed Petitioner No. 2, pp. 15-16). So does Unnamed Petitioner No. 1 in the three consolidated cases before the Supreme Court (Brief of Unnamed Petitioner No. 1, pp. 14-15). These unnamed petitioners apparently concede that the John Doe judges had competency to proceed in the John Doe proceeding in Milwaukee County in part because they wish to argue in support of Reserve Judge

[13] A circuit court judge has power to issue writs and other process throughout the state, returnable in the proper county. *See* Wis. Stat. § 753.03.

Peterson's order quashing subpoenas and directing the return of seized property.

CONCLUSION

The three consolidated cases before the Supreme Court arise from separate John Doe proceedings in five counties. The proceedings were not consolidated and there is no single, multi-county proceeding. Reserve Judge Kluka and subsequently Reserve Judge Peterson were lawfully appointed and assigned by Chief Justice Abrahamson to preside over the separate John Doe proceedings.

Reserve Judge Kluka lawfully appointed the same Special Prosecutor in each of the five proceedings, either under Wis. Stat. § 978.045 or in exercise of her inherent judicial authority. A John Doe judge has broad authority and discretion to ensure that John Doe proceedings are conducted in an effective and expeditious manner. *See In Matter of John Doe Proceeding*, 2003 WI 30 at ¶ 52; *State ex rel. Individual Subpoenaed v. Davis*, 2005 WI 70 at ¶ 26; *State v. Washington*, 83 Wis. 2d at 824. Reserve Judge Kluka lawfully exercised that discretion by authorizing the Special Prosecutor to conduct an investigation related to all five John Doe proceedings. Such an investigation is especially appropriate where the same or integrally-related conduct is being investigated, and where the same or overlapping witnesses are involved, in the separate John Doe proceedings.

Even if there was a defect in the appointment of the Special Prosecutor, such defect would not affect the competency of the Special Prosecutor to investigate or the John Doe Judge to

conduct the John Doe proceeding. Further, if the Supreme Court chooses to entertain an additional John Doe procedural issue not identified in its order dated December 16, 2014, the Supreme Court should not overrule *Cummings* or determine that Reserve Judge Kluka was not a neutral and detached magistrate.

The court of appeals properly denied the petitions for supervisory writs in Case Nos. 2014AP2504-2508-W because neither Reserve Judges Kluka and Peterson nor the Chief Judges clearly violated any plain duty. Reserve Judge Peterson and the Chief Judges respectfully request the court affirm the opinion and order of the court of appeals denying the petitions for supervisory writs.

Dated this 5th day of March, 2015.

BRAD D. SCHIMEL
Attorney General

DAVID C. RICE
Assistant Attorney General
State Bar #1014323

Attorneys for Gregory Peterson, Jeffrey Kremers, James Daley, James Duvall, and Gregory Potter

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823
(608) 267-8906 (Fax)
ricedc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 12,214 words.

Dated this 5th day of March, 2015.

_____

David C. Rice
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 5th day of March, 2015.

_____

David C. Rice
Assistant Attorney General