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STATE OF WISCONSIN
SUPREME COURT

Nos. 2013AP2504-W through 2508-W,
14AP296-OA, and
14AP0417-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.

BRIEF OF PETITIONER
AND 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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ISSUES

Generally as this Court framed them in its December 16, 2014 order, the issues that petitioner and Unnamed Movant No. 7 addresses are:

1. Did the Director of State Courts have lawful authority to appoint a reserve judge, the Hon. Barbara Kluka, as the John Doe judge to preside over a multi-county John Doe proceeding? (Issue 1)

   Below, the Wisconsin Court of Appeals, District IV, dismissed this issue summarily, and did not order respondents to address it. That court did not address this issue on the merits, either, in its January 30, 2014 order.

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

   Below, the court of appeals did not address this issue in the January 30 order.

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? (Issue 3)

   Below, phrasing differences aside, the court of appeals answered yes.

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) but none of the nine grounds for appointing a special prosecutor under WIS. STAT. § 978.045(1r) apply; (c) no charges have yet been issued; (d) the district attorney in each county has not refused to continue the investigation or prosecution of any potential charge; and (e) no certification that no other prosecutorial unit was able to do the work for which the special prosecutor was sought was made to the Department of Administration? (Issue 4)

   Below, the court of appeals answered yes.

5. If, *arguendo*, there was a defect in the appointment of the special prosecutor in the John Doe proceedings at issue, what effect, if any, would that have on the competency of the special prosecutor to conduct the investigation, or the competency of the John Doe judge to conduct these proceedings? (Issue 5)

   The court of appeals did not address this issue directly, but held that any possible "procedural flaw" would affect at most the availability of state funds for the special prosecutor's compensation, not render the actions of the special prosecutor void *ab initio*.

6. Did the affidavits underlying the warrants issued in the John Doe proceedings provide probable cause to believe that evidence of a criminal violation of WIS. STAT. §§ 11.27, 11.26(2)(a), 11.61(1), 939.31, and 939.05 would be found in the private dwellings and offices of the two individuals

whose dwellings and offices were searched and from which their property was seized? (Issue 14)

The court of appeals did not address this issue. The John Doe judge answered no, when he ordered seized property returned in his January 10, 2014 order.

STATUTES PRINCIPALLY INVOLVED

Wisconsin Statute § 968.26 provides in full:

(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.

(2)

(a) Except in par. (am), in this subsection, "district attorney" includes a prosecutor to whom a judge has referred the complaint under par. (am).

(am) If a person who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within the judge's jurisdiction, the judge shall refer the complaint to the district attorney or, if the complaint may relate to the conduct of the district attorney, to another prosecutor under s. 978.045.

(b) If a district attorney receives a referral under par. (am), the district attorney shall, within 90 days of receiving the referral, issue charges or refuse to issue charges. If the district attorney refuses to issue charges, the district attorney shall forward to the judge in whose jurisdiction the crime has allegedly been committed all law enforcement investigative reports on the matter that are in the custody of the district attorney, his or her records and case files on the matter, and a written explanation why he or she refused to issue charges. The judge may require a law enforcement agency to provide to him or her any investigative reports that the law enforcement agency has on the matter. The judge shall convene a proceeding as described under sub. (3) if he or she determines that a proceeding is necessary to determine if a crime has been committed. When determining if a proceeding is necessary, the judge may consider the law enforcement investigative reports, the records and case files of the district attorney, and any other written records that the judge finds relevant.

(c) In a proceeding convened under par. (b), the judge shall subpoena and examine under oath the complainant and any witnesses that the judge determines to be necessary and appropriate to ascertain whether a crime has been committed and by whom committed. The judge shall consider the credibility of the testimony in support of and opposed to the person's complaint.

(d) In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds

sufficient credible evidence to warrant a prosecution of the complaint. The judge shall consider, in addition to any testimony under par. (c), the law enforcement investigative reports, the records and case files of the district attorney, and any other written reports that the judge finds relevant.

(3) The extent to which the judge may proceed in an examination under sub. (1) or (2) is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses, or argue before the judge. Subject to s. 971.23, if 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. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085.

Wisconsin Statute § 978.045 provides in full:

(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, on a form provided by that department, 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, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury proceedings or John Doe proceedings under s. 968.26, in proceedings under ch. 980, or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exists:

(a) There is no district attorney for the county.

(b) The district attorney is absent from the county.

(c) The district attorney has acted as the attorney for a party accused in relation to the matter of which the accused stands charged and for which the accused is to be tried.

(d) The district attorney is near of kin to the party to be tried on a criminal charge.

(e) The district attorney is physically unable to attend to his or her duties or has a mental incapacity that impairs his or her ability to substantially perform his or her duties.

(f) The district attorney is serving in the U.S. armed forces.

(g) The district attorney stands charged with a crime and the governor has not acted under s. 17.11.

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

(i) A judge determines that a complaint received under s. 968.26(2)(am) relates to the conduct of the district attorney to whom the judge otherwise would refer the complaint.

(2)

(a) The court shall fix the amount of compensation for any attorney appointed as a special prosecutor under sub. (1r) according to the rates specified in s. 977.08(4m)(b).

(b) The department of administration shall pay the compensation ordered by the court from the appropriation under s. 20.475(1)(d).

(c) The court, district attorney and the special prosecutor shall provide any information regarding a payment under par. (b) that the department requests.

(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 an appointment, but is not subject to the appointment procedure under subs. (1g) and (1r) or to the compensation under sub. (2). 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.

(b) A law firm or other employer employing an attorney who is appointed as a public service special prosecutor may continue to pay, for a period of not more than 4 months, the salary and fringe benefits of the attorney while he or she serves under par. (a). If the public service special prosecutor receives any such payments, the prosecutor's law firm and the prosecutor are subject to the following restrictions:

1. The law firm may not participate in any of the cases in which the public service special prosecutor participates.

2. The public service special prosecutor may not consult with any attorney in or employee of the law firm about any criminal case in which the public service special prosecutor participates except as necessary to ensure compliance with this subsection.

(c) An attorney serving as a public service special prosecutor under par. (a) is considered to be a public employee for purposes of s. 895.46. A law firm or employer described under par. (b) is not liable for any acts or omissions of a public service special prosecutor while acting in his or her official capacity or performing duties or exercising powers under par. (a).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Many of these issues have statewide importance. This Court should follow its usual practice, allowing oral argument and publishing its decision.

STATEMENT OF THE CASE

Procedural Posture. The Court has consolidated three separate cases for briefing and argument. In order of filing, those are: a petition for supervisory writs of prohibition and mandamus that three unnamed petitioners (including this one) filed in the Wisconsin Court of Appeals on November 14, 2013;[1] an original action that two unnamed petitioners (again including this one) filed in this Court on February 7, 2014; and a petition for supervisory writs of prohibition

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1 Because related John Doe cases spanned five separate counties, the clerk's office assigned five appellate case numbers, Nos. 2013AP2504-W through 2013AP2508-W. For clarity, petitioner refers to these as one case.

and mandamus that special prosecutor Francis D. Schmitz filed in the Wisconsin Court of Appeals on February 21, 2014.[2]

The Court of Appeals ruled only on the first, *Three Unnamed Petitioners*. After paring down the issues on which it sought responses from the John Doe judge, five chief judges, and the special prosecutor, it issued an order denying the remaining claims on the merits on January 30, 2014. Appendix (App.) 1-12, 19-27.[3] The three unnamed petitioners timely petitioned for review, which this Court granted on December 16, 2014.

This Court also accepted the two unnamed petitioners' original action the same day, by the same order. It consolidated that case with *Three Unnamed Petitioners* for briefing and argument.

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Again, that petition resulted in five appellate case numbers, Nos. 2014AP417-W through 2014AP421-W. Petitioner refers to all as one case. Note that the *Two Unnamed Petitioners'* original action received only one appellate case number, No. 2014AP296-OA.

3

The appendix cited here is not the Joint Appendix, but rather the separate appendix that Unnamed Movant Nos. 6 and 7 submit together, abbreviated "App." When Unnamed Movant No. 7 cites the Joint Appendix, the abbreviation is "J.A.".

Finally, petitioner and several other movants sought bypass to this Court after the special prosecutor filed his petition for supervisory writs. Those petitions for bypass stayed action in the Court of Appeals. This Court granted bypass by the same December 16, 2014 order and consolidated the third case with the first two for briefing and argument.

Facts. Petitioner draws this statement of facts from the briefs of the special prosecutor and the respondent judges in the Court of Appeals below. The affidavits of Francis D. Schmitz and John T. Chisholm, with attached exhibits, that accompanied the special prosecutor's responsive brief in *Three Unnamed Petitioners* supply additional facts. Finally, petitioner also draws from the Court of Appeals decision and REDACTED own petition and supporting memorandum. All sources are in the record, although some remain sealed in whole or in part.

On August 10, 2012, REDACTED. The chief judge of the First Judicial District appointed the Hon. Barbara A. Kluka, a reserve judge,

to oversee that John Doe investigation in Milwaukee County. REDACTED.

In January 2013, Milwaukee County District Attorney John Chisholm met with then-Attorney General J.B. Van Hollen and his staff. He proposed that Van Hollen's office take over the investigation because it extended to other counties and, under the special venue provisions of WIS. STAT. §§ 11.61(2), 971.19(12), any criminal prosecutions would have to occur in a defendant's home county. Van Hollen took the request under consideration.

On May 31, 2013, Van Hollen wrote to Chisholm, declining to participate in the investigation. He suggested that Chisholm turn to the Government Accountability Board (GAB), given its expertise in the area of campaign finance law, its statewide powers, and its ability to refer proposed criminal charges to an appropriate district attorney. App. 54-57.

In June 2013, Chisholm met at the GAB's offices with four other district attorneys. Eventually in the summer of 2013, all four of those

district attorneys (in Columbia, Dane, Dodge, and Iowa Counties) REDACTED.

On August 21, 2013, REDACTED

By this time, Schmitz already was a special investigator for the GAB. R231:5, ¶ 5.A (Dane Co. John Doe record), J.A. 276. REDACTED

REDACTED For his part, the purportedly independent special prosecutor has an office and a direct telephone line within the Milwaukee County District Attorney's office. He also has an e-mail address in a domain reserved to employees of Wisconsin district attorneys' offices, da.wi.gov.

Shortly before October 3, 2013, REDACTED

Later in October 2013, Judge Kluka recused herself with a one-word explanation that she had a "conflict." In November 2013, according to this Court's December 16, 2014 order, the chief judge of the First Judicial District (covering only Milwaukee County) appointed

the Hon. Gregory A. Peterson as the successor John Doe judge.[4] App. 148.

On November 14, 2013, petitioner and two others filed a petition for supervisory writs in the Court of Appeals under WIS. STAT. § 809.51. Generally, they challenged the appointment of the special prosecutor as improper in the first instance and also as improperly extending to a single, unified John Doe investigation in five counties. They also challenged the appointment of a reserve judge as the John Doe judge and that judge's role in the same five-county group.

The Court of Appeals issued a preliminary order on November 22 that dismissed some of petitioners' claims without a response, but that invited responses on four issues from the special prosecutor and from the John Doe judge and the four chief judges of the affected judicial administrative districts. Specifically, the Court of Appeals ordered the first two respondents to address "at a minimum" these issues: (1) both the factual basis and legal authority for the

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[4] REDACTED Petitioner defers to this Court's December 16, 2014 order, but notes this discrepancy.

assignment of a single reserve judge to handle John Doe investigations in multiple counties or administrative districts; (2) the basis for the appointment of a special prosecutor and the scope of his authority to act in multiple counties or judicial administrative districts; (3) the scope of the secrecy orders; and (4) whether any of the petitioners' submissions to the Court of Appeals should remain under seal. App. 1-12.

The special prosecutor filed his own responsive brief and the Attorney General's office filed a responsive brief on behalf of all respondent judges. Petitioners then filed a reply brief.

On January 30, 2014, the Court of Appeals issued its final order. It denied the petition on all grounds, but unsealed certain documents. As relevant here, on the issues that this Court elected to review, that decision held that a John Doe judge has inherent authority to appoint a special prosecutor before charging in such an investigation, for any stated reason and without constraint of WIS. STAT. § 978.045, provided that the Department of Administration receives notice. App. 19-27.

Likewise, the special prosecutor may serve concurrent appointments in all five counties, the Court of Appeals concluded. App. 24-25. Further, the fact that the special prosecutor is not an elected district attorney had "no legal significance" to the writ proceeding. App. 25.

The Court of Appeals also held that while there may be a single, coordinated John Doe *investigation*, it does not follow that the John Doe *proceedings* in five counties have been consolidated. That court held that five separate John Doe proceedings remain,[5] notwithstanding the fact that one John Doe judge is handling all of them and has issued some joint orders and subpoenas. App. 21-22.

Finally, the Court of Appeals held that the scope of the John Doe secrecy orders was limited properly to those who were granted some degree of access to the John Doe proceedings. App. 25. This Court is not reviewing that issue. It also is not reviewing the Court of Appeals'

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5 Note that this Court, on December 16, 2014, ordered a John Doe record assembled only by the Milwaukee County and Dane County Clerks of Court.

decision to unseal certain documents, mostly after agreement of the parties. App. 26.

Meanwhile, on January 10, 2014, Judge Peterson, REDACTED

More recently, the John Doe judge REDACTED

ARGUMENT

At the outset, this Court confronts a secret proceeding (or proceedings) in an *ad hoc*, five-county amalgam, something like a supercircuit that the legislature never drew. That five-county John Doe investigation is overseen by an unelected judge, himself appointed by an official who exceeded his authority. An unelected special prosecutor appointed in direct, plain conflict with the controlling statute controls the investigation. His appointment serves notions of convenience and cosmetic appearance, rather than cures any genuine conflict for elected officials. Serious procedural failings leave a special prosecutor with no proper role and a John Doe judge with no competence to proceed outside Milwaukee County.

I. RESERVE JUDGES MAY NOT BE APPOINTED TO PRESIDE OVER MULTI-COUNTY JOHN DOE INVESTIGATIONS. (Issues 1 and 2)

A. *Standard of Review.*

The first two issues this Court frames both are questions of law, concerning at their core whether a judge properly executes her powers and jurisdiction. Review is independent or *de novo*. ***State ex rel. Individual Subpoenaed v. Davis,*** 2005 WI 70, ¶¶ 14-17, 281 Wis. 2d 431, 439-40, 697 N.W.2d 803, 806-07; ***State v. Cummings,*** 199 Wis. 2d 721, 733, 546 N.W.2d 406, 410 (1996).

However, petitioner and two other unnamed petitioners raised these issues initially in a petition for supervisory writs, challenging orders that established this John Doe investigation and its unusual contours in five counties. To prevail on a petition for supervisory writs, a petitioner must demonstrate that: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is

made promptly and speedily." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 649, 681 N.W.2d 110, 117, quoting *Imposition of Sanctions in Alt v. Cline*, 224 Wis. 2d 72, 96-97, 589 N.W.2d 21, 30 (1999).

Petitioner and the two others met the first requirement as a matter of law. This Court has held that, because the actions of a John Doe judge are not directly appealable, a petition for a supervisory writ is the proper way to challenge them. *In re John Doe Proceeding*, 2003 WI 30, ¶¶ 41-48, 260 Wis. 2d 653, 680-82, 660 N.W.2d 260, 273-75.

This procedural challenge to the very legitimacy of the current John Doe proceeding satisfied the last three requirements, too. The investigation was constituted in direct contravention of Wisconsin statutes and without authority. The John Doe judge, district attorneys, and special prosecutor all had a plain duty to comply with Wisconsin statutes in the conduct of a statutorily-constituted investigation, and they plainly failed that duty. Petitioner and others had their homes searched and possessions seized. They still face a wide-ranging

criminal investigation without a basis in law. And they came to the Court of Appeals promptly to ask that court to prevent irreparable harm from occurring.

Petitioner meets the requirements for supervisory writs. Petitioner proceeds now to the legal questions.

B. *The Director of State Courts May Not Appoint a Reserve Judge to Preside Over a Five-County John Doe Investigation.*

Wisconsin law allows secret, judicially-led criminal investigations on an inquisitorial model under this state's unusual John Doe mechanism.[6] It further equips John Doe investigations with the

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Apparently, only three other states allow or once allowed a closely similar John Doe or inquisition procedure: Kansas, Michigan, and South Dakota. KAN. STAT. §§ 22-3101 through 22-3105 (inquisition); MICH. COMP. L. § 767.3 (one-man grand jury); ***State v. Smith***, 56 S.D. 238, 228 N.W. 240 (1929); ***State ex rel. Poach v. Sly***, 63 S.D. 162, 257 N.W. 113, 116-17 (1934) (South Dakota's John Doe investigation). Functionally, in recent decades the list has shrunk to two: petitioner found no record of South Dakota using such a procedure since ***Poach*** in 1934, and that state repealed the authorizing statute in 1979. S.D. COMP. L. § 23-20-10 (before 1979). But Kansas and Michigan retain their loosely similar procedures. *See, e.g.,* ***Matter of Investigation into Homicide of T.H.***, 23 Kan. App.2d 471, 932 P.2d 1023 (1997). On the other hand, an Arizona appellate court has interpreted that state's rules of criminal procedure not to allow a general one-man grand jury inquiry where the identity of the alleged perpetrator is unknown. ***Rodriguez v. Pima County Superior Court***, 123 Ariz. 555, 558-59, 601 P.2d 318, 321-22 (Ct. App. 1979).

tools of a judge in chambers: power to issue warrants and criminal complaints; power to issue subpoenas; power to enter sealing and secrecy orders; power to adjourn; and power to administer and enforce oaths. WIS.STAT. §§ 968.26(2)(c), (2)(d), (3); *see also* ***State v. Cummings***, 199 Wis. 2d 721, 733-35, 546 N.W.2d 406, 410-11 (1996) (power of a John Doe judge to issue search warrants).

But Wisconsin law does not allow the odd construct here. This Court need not mark today the outer limits of a legitimate John Doe probe. Whatever those bounds, this five-county proceeding in the hands of an unelected judge and an unauthorized special prosecutor exceed the bounds of a John Doe judge's competency and the legitimate authority of either the Director of State Courts or a chief judge in one judicial administrative district.

1. By his own estimation, the special prosecutor oversees a "single, overall investigation." He puffed that unity, explaining, "Five proceedings in five counties led by five prosecutors is wasteful and inefficient." *Three Unnamed Petitioners*, Special

Prosecutor's Response at 2, 10, 17 (December 20, 2013). So his brief supported what the captions of subpoenas *duces tecum*, search warrants, and the progress of the investigation strongly intimated: this is one proceeding, spanning an awkward amalgam of five counties.[7]

Notably, the special prosecutor offered only convenience, REDACTED, to justify this assemblage of five counties. Wisconsin law provides nothing authorizing this innovation.

But Wisconsin law does provide a specific, practical solution to the problems of efficiency and perceptions that the REDACTED. The Government Accountability Board has statewide authority to investigate the supposed campaign finance violations at issue here—and substantial expertise in that tricky area of law. If the GAB finds probable cause to believe that a violation has occurred, it

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[7] The respondent judges disagreed. They took a cue from a comment in the Court of Appeal's November 22, 2013 order and contended that "the five John Doe investigations at issue have not been formally consolidated, as opposed to merely running parallel to one another." Judges' Response at 16 (December 23, 2013). While petitioner knows of no order "formally" consolidating these proceedings into one, the special prosecutor's repeated concessions that the investigation is unitary are well taken. Indeed, REDACTED. In substance, even if not in form, this is one John Doe proceeding in five counties, not five running abreast.

may refer the matter to the district attorney where the violator resides. WIS. STAT. § 5.05(2m)(c)11. If that district attorney either refuses or fails to act within 60 days, the GAB may go to the district attorney in a contiguous county instead. WIS. STAT. § 5.05(2m)(c)15. That would solve every problem the five district attorneys feared—except relieving their own public accountability, which is no problem at all. And it would do so within, rather than without, Wisconsin law.

The Attorney General explained this to the district attorneys in June 2013, REDACTED. The five prosecutors and the John Doe judge then promptly ignored his advice.

2. The Court of Appeals agreed this is one "investigation," but viewed it as five separate "proceedings." App. 21-22. Whatever the definitional distinctions between an investigation and a proceeding, those are distinctions that make no real difference. For all that appears, this *ad hoc* amalgam is a construct of no more than convenience.

That construct undermines the public accountability to local electorates that is the essential justification for trust in Wisconsin district attorneys and judges. This investigation or proceeding is under control of a special prosecutor not lawfully appointed, and under watch of a judge who has no authority to superintend such a five-county construct. Regardless of its convenience, then, the roles of this special prosecutor and John Doe judge plainly are contrary to Wisconsin law. They leave the judge without competence outside the original county, Milwaukee.

3. Petitioner does not challenge Judge Kluka's initial appointment there. The problem arose later, when the Director of State Courts extended that appointment to four more counties in one functionally-consolidated proceeding or investigation. Here, the director appointed a reserve judge to conduct a John Doe investigation in five scattered counties casually integrated or knit together as if into one supercircuit. Nothing in the Wisconsin statutes or reported cases

begins to authorize an *ad hoc* creation like that, on the say-so of any official or officials.[8]

The Director of State Courts certainly has no such authority, statutory or otherwise. Section 758.19, his sole statutory footing, provides nothing even close. WIS. STAT. § 758.19.

Neither do the Supreme Court Rules that are his other source of authority. While the Director of State Courts may make "interdistrict judicial assignments at the circuit level," *see* WIS. SCR 70.01(2)(f), SCR 70.10, those rules do not sanction this appointment for three reasons. First, they apparently concern only "active judges." WIS. SCR 70.10; *see also* WIS. SCR 70.01(2)(f) (referring to "assignments at the circuit level").

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Petitioner considers below the lack of electoral accountability through the political process when a special prosecutor replaces a district attorney. The accountability concerns do not end there, though. A reserve judge also is unaccountable to the electorate, serving as she does simply at the pleasure of the Chief Justice of the Wisconsin Supreme Court. WIS. STAT. § 753.075.

More, this five-county amalgam also complicates accountability within the hierarchy of the judicial branch. Because the five counties here straddle appellate districts (Districts I and IV), it was not even clear which district of the Wisconsin Court of Appeals properly should have considered the *Three Unnamed Petitioners* case below.

Second, and more basic, the power to assign a judge from one judicial district to serve temporarily in another judicial district comes nowhere near incorporating a power to concoct a judicial post that covers more than one circuit, spanning several judicial districts. The legislature establishes circuits, not the judiciary—let alone the Director of State Courts. WIS. STAT. § 753.06.

Third, nothing in the Supreme Court Rules suggests that the Director of State Courts has a power to appoint reserve judges that is broader than his power to make interdistrict assignments of active judges. *See* WIS. SCR 70.10, 70.23(1).

Statutes governing the reach of judges and prosecutors also at least implicitly refute such power. The statutes specifically divide this state into judicial circuits, none of which looks like this assemblage. WIS. STAT. § 753.06. Circuit courts in turn have power to hear and determine "all civil and criminal actions and proceedings," but only "within their respective circuits." WIS. STAT. § 753.03. Nothing provides a whit of support for the notion that a magistrate

sitting as a John Doe judge may assert any broader jurisdiction in five circuits than could a circuit court itself.

The appointment of the original John Doe judge exceeded legitimacy, then, when the Director of State Courts first stretched to empower that judge in counties beyond Milwaukee. The five-county appointment and role was beyond any authority or power conferred on the Director of State Courts or, for that matter, on the judiciary.

C. *A Chief Judge in One Judicial District Certainly May Not Make Such an Appointment Extending to Four Counties in Other Judicial Districts.*

The chief judge of the First Judicial District, encompassing only Milwaukee County, WIS. SCR 70.17(1), surely had no greater authority than the Director of State Courts to appoint a successor John Doe judge in four counties outside his judicial district.[9] The duties of a chief judge are limited to administration of judicial business "within the district." WIS. SCR 70.19. Interdistrict judicial assignments in circuit courts explicitly are the prerogative of the Director of State Courts, not of a chief judge. WIS. SCR 70.23(1). And, as petitioner argues above, such "interdistrict" appointments do not extend to the multi-circuit construct here anyway.

While petitioner does not contest the appointment of Judge Peterson in Milwaukee County, then, that county's chief judge had no authority to appoint a successor John Doe judge outside that county,

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[9] Here, petitioner relies on this Court's implicit assertion in Issue 2 of the December 16, 2014 order that the chief judge of the First Judicial District in fact appointed Judge Peterson to preside over all five counties. In candor again, as petitioner noted in footnote 4 above, REDACTED.

which is its own judicial district. But even if the Director of State Courts made that appointment, Judge Peterson's purported appointment in four other counties was as bootless as Judge Kluka's before it.

II. THE SPECIAL PROSECUTOR'S APPOINTMENT WAS UNLAWFUL FROM THE START. (Issue 4)

A. *Standard of Review.*

The Court's fourth issue also presents only questions of law. The Court reviews those independently or *de novo*. ***State ex rel. Individual Subpoenaed,*** 2005 WI 70, ¶¶ 14-17, 281 Wis. 2d at 439-40, 697 N.W.2d at 806-07; ***Cummings,*** 199 Wis. 2d at 733, 546 N.W.2d at 410.

B. *Overview.*

Since at least 1969, this Court has made clear that criminal charging decisions ordinarily reside with district attorneys—not with the judiciary—before charges are filed. ***State ex rel. Kurkierewicz v. Cannon,*** 42 Wis. 2d 368, 166 N.W.2d 255 (1969). In that realm,

Wisconsin's elected 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) (referring to "the quasi-judicial charging discretion of the district attorney"). 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. He or she answers to no one for that charging decision other than voters, with one exception: the position of 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 answer for 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.

True, the John Doe statute co-exists. It does not violate the separation of powers doctrine, ***State v. Unnamed Defendant,*** 150 Wis. 2d 352, 441 N.W.2d 696 (1989), even though John Doe judges play

a robust role in those proceedings in determining whether to file criminal charges. But it does not follow that a John Doe judge may replace an elected district attorney with a more (or less) aggressive private attorney of her choice when the district attorney has not refused to act and has no recognized conflict.

This case raises that systemic or structural concern. In their August 21, 2013 letter to Judge Kluka, REDACTED

That was a fundamental mistake. The risk of public criticism comes with any elective office, and indeed is an important hedge on the power of a district attorney. ***State ex rel. Kurkierewicz,*** 42 Wis. 2d at 378, 166 N.W.2d at 260 ("[a district attorney] is answerable to the people, for if he fails in his trust he can be recalled or defeated at the polls"). And recoiling from public scrutiny is different than recusing on grounds of a genuine ethical or other true conflict.

District attorneys hold a constitutional office, WIS. CONST. Art. VI, § 4, and a powerful one at that. They properly are accountable to voters in a relatively small polity—typically only one county—for

their exercise of prosecutorial discretion and their allocation of office resources. Judges have their own realm, which generally does not extend to deciding which possible investigations to pursue and how.

Petitioner now turns to the specific failings of this special prosecutor's appointment. It is unsupportable.

C. *No Statutory Authority.*

Responding in the Court of Appeals below, the special prosecutor quoted *In re Commitment of Bollig*, 222 Wis. 2d 558, 571, 587 N.W.2d 908, 913 (Ct. App. 1998), on a key point. "[T]he central purpose of appointments under § 978.045(1r)," *Bollig* noted, "is to assure that the State will not have to pay for the services of a special prosecutor under circumstances not anticipated in the statute." Special Prosecutor's Response at 24 (December 20, 2013).

With that much, petitioner agrees. And the state here is paying for a special prosecutor under circumstances not anticipated in the statute.

The decision below misreads the special prosecutor statute, and renders important parts of that statute useless. In doing so, it compounds a mistake that the Court of Appeals made in ***Bollig*** and in ***Carlson***, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451.

Section 978.045(1g) reads in relevant part: "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.*" (Italics added). So, while either a court or a district attorney may initiate a special prosecutor's appointment once they take the steps necessary to consider the public expense, in both cases the appointment is under subsection (1r) of the statute. There is no ambiguity.

In turn, § 978.045(1r) provides nine specific conditions, at least one of which must exist to support appointment of a special prosecutor. The special prosecutor here all but conceded that none of the nine conditions existed, *see* Special Prosecutor's Response Brief at

22 (December 20, 2013), and the Court of Appeals did not suggest that any of those nine conditions exist.

Rather, that court held that reliance on § 978.045(1r) "miss[es] the mark because the prior John Doe judge did not rely on that statutory subsection to make the appointments." App. 22-23. When a judge acts on her own motion, she may appoint a special prosecutor "for any reason," the court held. App. 23. The judge only has to state the cause on the record.

That reading of the statute, like *Carlson's* before it, inexplicably overlooks the clear statutory instruction in subsection (1g) that special prosecutor appointments are "under" subsection (1r) whether a court acts on its own motion or on a district attorney's request. On the Court of Appeals' reading, it is hard to know what purpose subsection (1r) would serve, other than when a special prosecutor is appointed "at the request of a district attorney to assist the district attorney" in various functions. WIS. STAT. § 978.045(1r). Subsection (1r) otherwise does not suggest that its conditions are

confined to appointments at a district attorney's request; it states that judges "may appoint" special prosecutors when any of the conditions exists. If the directive to subsection (1r) is read out of subsection (1g) every time a court acts on its own motion, there is no reason a court ever should choose to rely on subsection (1r): it simply could ignore a district attorney and act on its own.

The Court of Appeals' reading here founders in two other ways, as well. First, it is plainly wrong factually: Judge Kluka did not act on her own motion, but rather REDACTED. Factually, the respondent judges were quite correct to concede below that Judge Kluka acted at the request of the district attorneys. Judges' Response Brief at 8, 20 (December 23, 2013). The record allows no other plausible factual conclusion.

Second, if there was any doubt as a legal matter, only subsection (1r) refers to appointment of a special prosecutor in John Doe proceedings. The specific terms of § 978.045(1r) should trump the more general terms of § 978.045(1g).

There was no statutory authority to appoint this special prosecutor. The state is paying for an unelected special prosecutor in five counties under circumstances that the legislature never anticipated, just as ***Bollig*** warned against.

D. *No Case Law Authority.*

Together, in John Doe investigations this Court and the legislature have struck a delicate balance between executive and judicial functions in initiating a criminal prosecution. *See, e.g.,* ***State v. Washington,*** 83 Wis. 2d 808, 823, 266 N.W.2d 597, 605 (1978) ("We do not view the judge as orchestrating the investigation. The John Doe judge is a judicial officer who serves an essentially judicial function"). The decision below upsets that balance.

Unsurprisingly, no Wisconsin appellate court ever has held that a Wisconsin judge has inherent authority to appoint a special prosecutor on her own motion *before* a criminal complaint is issued. Every Wisconsin case invoking the judiciary's inherent authority to appoint a special prosecutor has arisen *after* charging (when petitioner

recognizes that a judge rightly must consider the public interest in the parties' agreement or a prosecutor's unilateral decision to dismiss or reduce a criminal case, once commenced). *See* ***Guinther v. City of Milwaukee,*** 217 Wis. 334, 258 N.W. 865 (1935); ***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) (sparse factual statement, but special prosecutor appointed in contempt proceeding); ***State v. Carlson,*** 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451; ***In re Commitment of Bollig,*** 222 Wis. 2d at 571, 587 N.W.2d at 913; ***State v. Lloyd,*** 104 Wis. 2d 49, 56-57, 310 N.W.2d 617, 622 (Ct. App. 1981).[10]

10

Arguably, the Court of Appeals has split on the question of judicial power to appoint a special prosecutor outside WIS. STAT. § 978.045. One case clearly endorses such an inherent power. ***Lloyd,*** 104 Wis. 2d at 56-57, 310 N.W.2d at 622. A more recent one suggests in dictum that courts have no such power. ***In the Interest of Jessica J.L.,*** 223 Wis. 2d 622, 630, 589 N.W.2d 660, 664 (Ct. App. 1998) (Roggensack, J.) (concerning a court-appointed guardian *ad litem,* but noting, "Furthermore, the only attorneys who may prosecute a sexual assault on behalf of the State in circuit court are a district attorney or a special prosecutor appointed pursuant to § 978.045, STATS.").

Until now Wisconsin cases have considered appointment of a special prosecutor only after charging, that is. The Court of Appeals' decision below extends to John Doe judges the power early in a pre-charging investigation to replace a district attorney who is available and has no cognizable legal conflict, for any reason that judge may choose to state. The only proviso is that the judge must notify the Department of Administration, if the special prosecutor is to draw public funds. And even there, the court below excused strict statutory compliance with WIS. STAT. § 978.045(1g), which requires that a court request assistance of other prosecutorial units before appointing a special prosecutor. App. 24-25. ***Bollig*** also made clear that the Department of Administration must give prior approval for a special prosecutor's compensation. ***Bollig,*** 222 Wis. 2d at 569, 587 N.W.2d at 912. The John Doe judge took neither step here, but the Court of Appeals concluded that the statute's requirements were "substantially satisfied" all the same. App. 25.

This was a sharp departure from Wisconsin cases.

1. Not surprisingly, then, the earlier cases do not salvage this appointment. *Carlson* applies when a court appoints a special prosecutor on its own motion. The trial court in *Carlson* clearly did that. *See Carlson*, 2002 WI App 44, ¶¶ 8-9, 250 Wis. 2d at 57-71, 641 N.W.2d at 455-56. The John Doe judge here just as clearly did not.[11]

Carlson also necessarily concerns appointments of a special prosecutor after a charge is filed, not before. The trial court there appointed a special prosecutor only after the state filed a drunk driving charge and elected to proceed with a refusal hearing. *Id.* at ¶¶ 2-4, 250 Wis. 2d at 567-68, 641 N.W.2d at 454; *see also Lloyd*, 104 Wis. 2d at 56-57, 310 N.W.2d at 622 (special prosecutor appointed after charge filed). The John Doe judge here appointed a special prosecutor *before* any charges were filed.

11

Again, while the special prosecutor relied on *Carlson* and thus implicitly on WIS. STAT. § 978.045(1g), the respondent judges rightly conceded that § 978.045(1r) applies instead, because the appointment of the special prosecutor came "at the request of the five district attorneys." Judges' Response at 20.

Allowing this appointment to stand would expand *Carlson* well beyond its facts and bring it into direct conflict with the longstanding rule that, before charging, courts have no control over prosecutorial decision making. *See* ***Kenyon,*** 85 Wis. 2d at 45, 270 N.W.2d at 164; ***State ex rel. Kurkierewicz,*** 42 Wis. 2d at 380, 166 N.W.2d at 261. A judge who picks a special prosecutor more to her taste before charging violates that core principle.

2. The special prosecutor and respondent judges all turned then to ***State v. Cummings,*** 199 Wis. 2d 721, 546 N.W.2d 406 (1996). *Cummings* has nothing to do with appointing a special prosecutor. That a John Doe judge may issue and seal a search warrant—both tasks long entrusted to judges generally—gives no reason to think that the same judge may pick a prosecutor more to her taste than the local district attorney early in a criminal investigation, for any reason under the sun. That is not a prerogative ever entrusted to Wisconsin judges, in any capacity, at very least until after a district attorney files a charge.

E. *No Public Policy Justification.*

Without statutory or decisional support, the special prosecutor relied heavily on judicial efficiency, a John Doe judge's broad discretion, and "common sense." Special Prosecutor's Response at 4. A "unified, efficient, and effective proceeding" "could only be facilitated by the appointment of a special prosecutor." Special Prosecutor's Response at 11; *see also* Judges' Response at 20. Anything else would be "chaotic." Special Prosecutor's Response at 16.

1. At first blush, what could be more appealing than this theme? Here, in a case of "statewide importance," App. 121, ¶ 4, Democratic district attorneys would face withering criticism as witch hunters, while Republican district attorneys would face equally harsh attacks for pulling punches. REDACTED Why not an independent, non-partisan special prosecutor to spare them indignity, and to avoid "the possible appearance of impropriety"? Special Prosecutor's Response at 25.

The superficial appeal fades quickly.

District attorneys wield great power. As one curb on that power, we elect district attorneys. To assure accountability, in Wisconsin we do that regularly and in small locales. Every four years, most prosecutors must convince a majority of just one county's voters to retain them.

District attorneys make their cases to voters in November, not in April. They are partisan officials. They could run for non-partisan offices, but those elections come in springtime. Or, if they dislike the cacophony that public criticism can seem, lawyers need not run for district attorney at all.

If they do run, though, public questions about prosecutorial actions and motivations come with the turf; they are an important hedge on a district attorney's power. A district attorney who cannot convince a majority of the county's voters that he or she is using prosecutorial power rightly, and allocating scarce resources wisely, should not retain the job. And a district attorney who cannot bear the taunts of a minority is one who also may not be a good bet to do the right thing, when that is not easy.

None of the five district attorneys here claimed any actual conflict in handling this investigation. They could not. REDACTED Judges' Response at 3-4, 8-10. REDACTED. *See also* Judges' Response at 22 n.4.

No, the district attorneys have sought only to conceal their involvement, and so to avoid criticism, by working behind the special prosecutor. Little wonder "[t]he Special Prosecutor has always worked with the express authorization of all five of the District Attorneys." Special Prosecutor's Response at 18. District attorneys' offices are evading the public accountability that Wisconsin law intends for them because of the unelected special prosecutor. Seeking to avoid the possible appearance of impropriety, they instead have assured that appearance.

2. With this preface, petitioner turns to public policy. The special prosecutor and judges appealed repeatedly to the new venue provisions for prosecutions under Chs. 5 through 12 as support for a special prosecutor in one consolidated investigation.

They also conceded that this investigation concerns campaign finance. The special prosecutor and judges cited the new venue provisions as cabining this John Doe investigation:

> Except as otherwise provided in ss. 5.05(2m)(c)15. and 16. and (i), 5.08, and 5.081, all prosecutions under this section shall be conducted *by the district attorney for the county where the defendant resides* or, if the defendant is a nonresident, by the district attorney for the county where the violation is alleged to have occurred. * * *

WIS. STAT. § 11.61(2) (italics added); *see also* WIS. STAT. § 978.05(1).

But statutes usually express public policy most safely and here the very statutes cited for the appointment thwart it, not support it. Obviously, a special prosecutor is not "the district attorney for the county where the defendant resides," let alone the district attorney in five such counties. WIS. STAT. § 11.61(2). Here the appointment orders REDACTED. While a special prosecutor properly appointed under § 978.045(1r) expressly acquires "all of the powers of the district attorney," both the special prosecutor and the Court of Appeals insisted that § 978.045(1r) had nothing to do with this appointment.

The next question is when a special prosecutor may substitute for the district attorney, then. Section 5.05 answers that question. On crimes that the Government Accountability Board investigates (including these), a board referral goes to the district attorney "for the county in which the alleged violator resides." WIS. STAT. § 5.05(2m)(c)15., referring to subdivision 11 (quoted here). If that district attorney either refuses or fails to commence prosecution within 60 days, the board has two choices only: (a) go to the district attorney for a contiguous county, WIS. STAT. § 5.05(2m)(c)15.; or (b) go to the Attorney General. WIS. STAT. § 5.05(2m)(c)16.

Petitioner assumes for the sake of argument that WIS. STAT. § 5.05(2m)(c)17. also plays a role here.[12] That subdivision disables the GAB from referring a criminal case to a district attorney "if a special prosecutor is appointed under s. 978.045 in lieu of the district attorney specified in subd. 11."

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A district attorney may investigate and prosecute violations of Chs. 5 through 12 even if the GAB does not launch an investigation. ***State v. Jensen***, 2010 WI 38, ¶ 34, 324 Wis. 2d 586, 605-06, 782 N.W.2d 415, 424-25.

But that provision gives the special prosecutor no help. It specifically applies *only* to special prosecutors appointed under § 978.045. And petitioner has demonstrated that § 978.045 provides no authority for this special prosecutor's appointment. Even the John Doe judge never cited § 978.045 in her orders appointing the special prosecutor: she relied only on ***Carlson, Cummings,*** and inherent authority. App. 138-47.

Far from supporting the special prosecutor's appointment, then, the relevant statutes and the public policy they express establish plain rules to the contrary. Their violation is clear, and convenience does not control. "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." ***State v. Jensen,*** 2010 WI 38, ¶ 40, 324 Wis. 2d 586, 610, 782 N.W.2d 415, 427.

F. *No Competence.*

Finally, petitioner thinks it clear that the unjustifiable appointment of this special prosecutor, contrary to statute, case law, and public policy, deprived the John Doe judge of competency to proceed. This was not the niggling mistake in *Bollig*—an otherwise wholly proper appointment of a special prosecutor under § 978.045(1r) that came one day after he filed a petition under Ch. 980. *Bollig*, 222 Wis. 2d at 571, 587 N.W.2d at 913. No, this was an appointment of a special prosecutor that had no lawful basis at the outset, during its course, or even today. It undermined the fundamental accountability that prosecutors must have, for it enabled five elected district attorneys to duck the democratic safeguards that come with their office. Notice to the Department of Administration was deficient. And it allowed a secret investigation into non-crimes to spin its way through five counties for almost eighteen months now.

Disregard of the special prosecutor statute was thorough. REDACTED. WIS. STAT. § 978.045(2)(a) (requiring pay pursuant to

§ 977.08(4m)(b), which sets a $50 rate in court and less for time spent out of court or traveling).[13]

Just as the technical mistake in ***Bollig*** did not deprive that court of competency to proceed, then, this fundamental disregard of statute and case law did deprive the John Doe judge of competency to proceed outside Milwaukee County. There alone, perhaps that district attorney's ongoing, significant involvement was enough to support REDACTED. But elsewhere, the John Doe judges here had no competency to act in this investigation.

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Compare other state rates. Special prosecutors ordinarily earn an hourly rate of only $50 in court, $40 outside court, and $25 while traveling. WIS. STAT. §§ 977.08(4m)(b); 978.045(2)(a). Counsel appointed through the State Public Defender are paid $40 an hour. WIS. STAT. § 977.08(4m)(c). Even guardians *ad litem* and others working at state supreme court rates receive only $70 per hour. WIS. SCR 81.02(1).

III. A JOHN DOE JUDGE HAS NO COMPETENCY TO CONVENE A JOHN DOE INVESTIGATION OVER FIVE COUNTIES, AT LEAST IF LED BY ONE COUNTY'S DISTRICT ATTORNEY. (Issue 3)

A. *Standard of Review.*

This third issue, too, presents only questions of law. The Court owes no deference to any lower court and decides these questions *de novo*. ***State ex rel. Individual Subpoenaed,*** 2005 WI 70, ¶¶ 14-17, 281 Wis. 2d at 439-40, 697 N.W.2d at 806-07; ***Cummings,*** 199 Wis. 2d at 733, 546 N.W.2d at 410.

B. *Merits.*

1. Petitioner starts with the effect that this unlawful appointment to a five-county assemblage had on the John Doe judge's competency to proceed outside Milwaukee County. Assuming that Judge Kluka had authority to sit as a John Doe judge in the REDACTED, she and others had no authority to expand her role to a John Doe investigation that the special prosecutor concedes is unified in five counties. The current John Doe judge necessarily has no greater

authority than did Judge Kluka. His authority is in Milwaukee County only, if anywhere.

Although the state constitution assures subject matter jurisdiction for circuit courts, failure to comply with a statutory mandate may result in something narrower: a loss of competency, which may prevent a court from adjudicating a specific case before it. *Interest of Kywanda F.*, 200 Wis. 2d 26, 33, 546 N.W.2d 440, 444 (1996); *see also In re Termination of Parental Rights to Joshua S.*, 2005 WI 84, ¶ 16, 282 Wis. 2d 150, 159, 698 N.W.2d 631, 635. When failure to comply with a statutory mandate is "central to the statutory scheme," competency may lapse. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 10, 273 Wis. 2d 76, 681 N.W.2d 190. By these standards, the John Doe judge lost competency here.[14]

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[14] This Court very recently seemed to suggest that harmless error doctrine may not apply when a circuit court loses competency. *State v. Harrison*, 2015 WI 5, ¶¶ 84-87 (January 22, 2015). *Harrison* involved a different statute that conferred a personal right on criminal defendants, though.

Initially, recall that a John Doe judge is not a "court" at all. ***State ex rel. Individual Subpoenaed v. Davis***, 2005 WI 70, ¶ 24, 281 Wis. 2d 431, 443, 697 N.W.2d 803, 808 ("Statutory powers afforded a court are not necessarily afforded a John Doe judge"); ***State v. Schober***, 167 Wis. 2d 371, 379-80, 481 N.W.2d 689, 692-93 (Ct. App. 1992) (John Doe tribunal acts as a judge, not as a court); ***State ex rel. Jackson v. Coffey***, 18 Wis. 2d 529, 534-35, 118 N.W.2d 939, 942-43 (1963). The John Doe judge therefore does not start with the assurance of subject matter jurisdiction that the constitution gives circuit courts. WIS. CONST. Art. VII, § 8. Rather, only the John Doe statute enables the judge to act.

2. Here, the cumulative effect of the acts outside statutory authority surely is "central" to basic limitations that the legislature has imposed on John Doe inquiries, and indeed on all judicial functions. This was an unelected reserve judge, responsive to no electorate. The John Doe judge then purported to act in five counties at once, aided by an unlawfully appointed special prosecutor. That John Doe judge ignored—or at least refashioned—the statutory

functions of Clerks of Court, constitutional officers themselves who assure regularity of judicial business within the basic unit of one circuit, performing largely statutory duties. WIS. CONST. Art. VII, § 12(1); WIS. STAT. §§ 59.40(2), 753.26, 753.30, 753.32. This whole assemblage was structurally foreign to the basic lines by which Wisconsin circuit courts are organized, in part to assure responsiveness to relatively small, local electorates.

This Court would have great difficulty establishing a logical stopping point if individual reserve judges were free, on their own or at the invitation of a misguided Director of State Courts or of a presumptuous chief judge in one county, to create a five-county monolith, operating in secret with a hand-picked, unelected special prosecutor for convenience, and conducting business from a post office box. That is what happened here. If a reserve judge can REDACTED in five scattered counties, then why not in, say, 10? Or for that matter, in all 72 of the state's counties? And if months are fine, why not years?

Once the boundaries of geography and office that the constitution and the legislature have drawn are crossed or cease to have meaning, a judge no longer is a judge as the entire constitutional and statutory scheme conceives that office. He or she instead is a roving inquisitor under cover of secrecy; in short, a potential despot. Loss of competency is the least sufficient stricture this Court can apply to assure that a John Doe judge remains within the basic limits of that purely statutory office.

IV. BECAUSE NEITHER THE JOHN DOE JUDGE NOR THE SPECIAL PROSECUTOR HAD COMPETENCY TO PROCEED, EVERYONE MUST RETURN TO THE POSITIONS THEY OCCUPIED BEFORE AUGUST 2013. (Issue 5)

A. *Standard of Review.*

This final procedural issue, like those before it, presents questions of law. Review is *de novo* again. ***State ex rel. Individual Subpoenaed,*** 2005 WI 70, ¶¶ 14-17, 281 Wis. 2d at 439-40, 697 N.W.2d at 806-07; ***Cummings,*** 199 Wis. 2d at 733, 546 N.W.2d at 410.

B. *Merits.*

The special prosecutor's claim that he has done little or nothing more than supervise, Special Prosecutor's Response at 6, gains him little. Supervisors do not escape responsibility by inaction. Even a passive principal overseeing active agents is a principal all the same.

This principal had no lawful authority from the start REDACTED. Likewise, the judge who REDACTED, while purporting to preside over a functionally unified proceeding, did not act lawfully as a judge at all. The actions of both are void outside Milwaukee County and from August 2013 forward. Suppression is proper. *See* ***State v. Hess***, 2010 WI 82, ¶¶ 3, 29-32, 60-63, 327 Wis. 2d 524, 529-30, 538-40, 553-55, 785 N.W.2d 568, 571, 575-76, 583-84.

That remedy will restore all parties to the positions they occupied before August 2013. This means, at a minimum, returning all items REDACTED and denying the state their use.

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

A. *Standard of Review.*

Petitioner assumes now, for purposes of the special prosecutor's challenge, that the John Doe judge had legal competency to proceed in five counties. Petitioner does not concede that; petitioner merely assumes it here, for sake of argument.[15]

Even with that assumption, the special prosecutor's challenge concerning REDACTED requires some procedural clarity. It is not a simple challenge to a judge's refusal REDACTED.

Rather, a first John Doe judge did REDACTED. This Court has held that a John Doe judge has that power. *Cummings*, 199 Wis. 2d at 733-35, 546 N.W.2d at 410-11. But this Court never has held that a John Doe judge has that obligation or duty, even if REDACTED.

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15 Indeed, petitioner concedes only Judge Peterson's competency to proceed in one county, Milwaukee. Petitioner makes no challenge to the propriety of his appointment in that single circuit. Assuming that his appointment in at least that one county was proper, then he was competent REDACTED. But if he was right as a matter of law, then the rule will be the same in other counties.

That is important, because procedurally, petitioner moved REDACTED.

The special prosecutor could not appeal that order, because a John Doe judge REDACTED. Instead, he pursued the remedy that Wisconsin does provide: he petitioned for supervisory writs of prohibition and mandamus in the Wisconsin Court of Appeals. This Court now has accepted bypass of that petition.

But the burden the special prosecutor bears is not just to show that REDACTED, by whatever definition might apply. No; his burden is to show that "(1) he possesses a clear legal right to the relief sought; (2) the duty he seeks to enforce is positive and plain; (3) he will be substantially damaged by nonperformance of such duty; and (4) there is no other adequate remedy at law." ***State ex rel. Robins v. Madden***, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 766 N.W.2d 542, 546; *see also* ***State ex rel. Individual Subpoenaed***, 2005 WI 70, ¶¶ 14-17, 281 Wis. 2d at 439-40, 697 N.W.2d at 806-07; ***In the Matter of a John Doe Proceeding***, 2003 WI 30, ¶¶ 23, 41-48, 260 Wis. 2d 653, 669, 680-83, 660

N.W.2d 260, 273-74. With that procedural posture and standard of review clear, petitioner now considers the merits.

B. *Merits.*

If the John Doe judge could proceed at all, the special prosecutor cannot show that REDACTED. ***State ex rel. Robins,*** 2009 WI 46, ¶ 10, 766 N.W.2d at 546.

That 2009 case comes close to disposing of the special prosecutor's claim altogether. There, this Court addressed the question that it had expressly reserved the year before, in ***State ex rel. Hipp v. Murray,*** 2008 WI 67, ¶ 3, 310 Wis. 2d 342, 750 N.W.2d 873, 875: Is a John Doe judge required to call or subpoena every witness that a John Doe petitioner requests?

When the answer came, it was a resounding no. ***State ex rel. Robins,*** 2009 WI 46, ¶¶ 18-28, 766 N.W.2d at 548-50. All six participating justices joined the Court's opinion. The Court explained in summary why a John Doe judge need not call all of a complainant's desired witnesses:

> A judge is to oversee a John Doe hearing in such a way as "to ensure that the proceeding

> is conducted in an orderly and expeditious manner." [Citation omitted]. The only way the judge can do this is to limit not only the scope of an individual witness's examination, but also which witnesses may testify. Wisconsin Stat. § 968.26 cannot be reasonably interpreted otherwise. John Doe judges must not be shackled to a process that frustrates the goal of ascertaining probable cause in an expeditious manner. The statute, then, is susceptible to but one reasonable construction: Wis. Stat. § 968.26 when read as a whole preserves the circuit court's discretion as to which witnesses it will examine in a John Doe proceeding.

Id., 2009 WI 46, ¶ 27, 766 N.W.2d at 550. For those reasons, necessarily the Court reached the same conclusion on the subsidiary question of whether a John Doe judge must issue subpoenas for all witnesses a complainant wishes to produce. *Id.*, 2009 WI 46, ¶ 28, 766 N.W.2d at 550.

Petitioner acknowledges that ***State ex rel. Robins*** only comes close to resolving REDACTED. ***Robins*** also arose from a citizen's complaint under § 968.26(2)(b), not from REDACTED. So the

facts are not identical. But the rationale of ***Robins*** controls all the same.[16]

Any doubt that ***Robins*** may leave on that point, the statute itself removes. The John Doe statute expressly declares the judge's discretion here. WIS. STAT. § 968.26(3) ("The extent to which the judge may proceed in an examination under sub. (1) or (2) is within the judge's discretion"). There is no plain duty to REDACTED, even if the judge could. Necessarily, then, there is no plain duty REDACTED.

In other words, this Court's declaration of a John Doe judge's *power* under ***Cummings*** to issue a search warrant did not import a non-discretionary *duty* to issue one, every time there is or may be probable cause. In ***Robins***, the John Doe judge had the undisputed power to issue the subpoenas the complainant sought. But this Court also made clear the judge's discretion not to issue them, and not to hear witnesses he very well might have exercised discretion to

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Petitioner notes that this Court never expressly distinguished the subsections of § 968.26 in ***State ex rel. Robins***, either. Given the facts this Court outlined, petitioner assumes that the John Doe probe there started under § 968.26(2)(b), not under § 968.26(1). Because the Court addressed only § 968.26 as a whole, perhaps that is a distinction without a difference.

hear. There is no reason to distinguish REDACTED on this point. The overarching duty instead remains to ensure that the proceeding is conducted in an orderly and expeditious manner. And just as the statute "when read as a whole preserves the circuit court's discretion" to stop a parade of witnesses when sound discretion suggests stopping, *id.*, 2009 WI 46, ¶ 27, 766 N.W.2d at 550, so too must it preserve discretion to decline REDACTED.

And if a John Doe judge may decline REDACTED.

This case illustrates vividly the importance of the discretion to bring a John Doe investigation to an "orderly and expeditious" close. Even disregarding REDACTED. If there was anything expeditious and orderly about this investigation, that was only because Judge Peterson exercised his discretion under the statute as he did.

Most importantly, at bottom, if he was competent to proceed at all, the John Doe judge had the discretion he exercised here. The special prosecutor cannot show any "positive and plain" duty

binding the judge instead to allow the special prosecutor REDACTED. *State ex rel. Robins*, 2009 WI 46, ¶ 10, 766 N.W.2d at 546. His claim for the extraordinary remedy of a supervisory writ therefore fails two-fold, without more.

VI. ADOPTION OF OTHER ARGUMENTS.

Petitioner expressly adopts as REDACTED own the briefs of Unnamed Movant No. 1 on Issues 6, 8, and 10; the briefs of Unnamed Movant No. 2 and Unnamed Movant No. 6 on Issues 7.a through 7.d, 9, 11, 12 and 13; and the brief of Unnamed Movant No. 6 on Issues 10 and 14. REDACTED also adopts the statement of the case and statement of facts offered by Unnamed Movants Nos. 4 and 5.

CONCLUSION

Petitioner's REDACTED, as others explain in their briefs. Petitioner has seen core First Amendment speech and association frozen for more than a year. The harm petitioner has suffered is real;

the special prosecutor and John Doe judge rightly have not argued otherwise. Much or all of it was improper, procedurally at very least.

Petitioner therefore asks this Court to hold that (a) the special prosecutor's appointment was unlawful at the outset; (b) neither the Director of State Courts nor the chief judge in the First Judicial District had authority to appoint one John Doe judge to oversee a joint John Doe investigation in five counties; (c) the original John Doe judge had no authority to consolidate John Doe proceedings in five counties into one joint John Doe investigation under her control; (d) for these reasons, the special prosecutor has been without legal authority to act from the beginning, and both John Doe judges have lacked competency to act from the beginning of this five-county investigation or proceeding, outside Milwaukee County; (e) every act of the special prosecutor and of the John Doe judges accordingly is void *ab initio,* from REDACTED forward, and of no legal effect except as to the John Doe judges' orders in Milwaukee County; and (f) all testimony, documents and other items REDACTED; further, the state, through any of its agents or apparent agents (including, but not limited to, the

special prosecutor, the five district attorney's offices, the John Doe judge, the GAB, and any Clerk of Court), REDACTED.

Respectfully submitted,

UNNAMED MOVANT NO. 7, *Petitioner*

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January 30, 2015.

CERTIFICATION

I certify that this joint 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 portions of this brief described in WIS. STAT. §§ 809.19(1)(d), (e), and (f) is 10,805 words. *See* WIS. STAT. § 809.19(8)(c)1.

Dated this ___ day of January, 2015.

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CERTIFICATION UNDER RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this joint brief, excluding the joint appendix, which complies with the requirements of WIS. STAT. § 809.19(12). Electronic filing of a scanned, non-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 of copies of this brief filed with the Court and served on opposing parties.

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CERTIFICATION UNDER RULE 809.19(13)

I hereby certify that:

I have not submitted an electronic copy of the appendix that complies with the requirements of WIS. STAT. § 809.19(13), because the petitioners and unnamed movants together are submitting one joint appendix containing all materials that would be required in an appendix to this brief. My client and I also are joining the appendix that Unnamed Movant No. 6 is submitting jointly on our behalf.

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

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