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Francis D. Schmitz

You are hereby notified that the Court has entered the following order:

2013AP2504-W	In the Matter of John Doe Proceeding: State of Wisconsin ex rel. Three Unnamed Petitioners v. the Honorable Gregory A. Peterson, John Doe judge, the Honorable Gregory Potter, Chief Judge and Francis D. Schmitz, as Special Prosecutor (L.C. # 2013JD11)
2013AP2505-W	In the Matter of John Doe Proceeding: State of Wisconsin ex rel. Three Unnamed Petitioners v. the Honorable Gregory A. Peterson, John Doe judge, the Honorable James P. Daley, Chief Judge and Francis D. Schmitz, as Special Prosecutor (L.C. # 2013JD9)
2013AP2506-W	In the Matter of John Doe Proceeding: State of Wisconsin ex rel. Three Unnamed Petitioners v. the Honorable Gregory A. Peterson, John Doe judge, the Honorable Gregory Potter, Chief Judge and Francis D. Schmitz, as Special Prosecutor (L.C. # 2013JD6)
2013AP2507-W	In the Matter of John Doe Proceeding: State of Wisconsin ex rel. Three Unnamed Petitioners v. the Honorable Gregory A. Peterson, John Doe judge, the Honorable James J. Duval, Chief Judge and Francis D. Schmitz, as Special Prosecutor (L.C. # 2013JD1)
2013AP2508-W	In the Matter of John Doe Proceeding: State of Wisconsin ex rel. Three Unnamed Petitioners v. the Honorable Gregory A. Peterson, John Doe judge, the Honorable Jeffrey A. Kremers, Chief Judge and Francis D. Schmitz, as Special Prosecutor (L.C. # 2012JD23)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Three unnamed petitioners who assert various involvements in John Doe investigations that they allege are currently pending in five counties have filed a joint petition seeking supervisory writs of mandamus and prohibition relating to each of those investigations. In conjunction with their writ petition, the petitioners have also filed motions seeking: (1) to consolidate these matters and waive any additional filing fees; (2) to file the petition and a supporting affidavit with exhibits under seal; (3) to unseal the memorandum supporting their

petition and their stay motion; (4) to stay any further actions in the alleged John Doe investigations while this writ is pending; and (5) to certify one or more of the issues presented to the Wisconsin Supreme Court. Additionally, one of the forms of relief sought in the writ petition itself is for this court to “take custody of the entire record in the John Doe proceeding below,” including a number of specified documents.

We are cognizant that this order, publicly released, by necessity acknowledges that the petitioners have alleged the existence of five John Doe investigations that may be subject to secrecy orders. We do not issue this order under seal because the writ petition is focused on legal questions that are not specific to any one particular investigation, or to the facts related to any investigation. Broadly speaking, the writ petition challenges the appointment procedures and authority of the John Doe judge(s) and special prosecutor(s) overseeing the alleged investigations. The petitioners ask this court to invalidate all prior actions taken by any John Doe judge who acted in more than one county or outside of his or her judicial administration district or by any special prosecutor who was appointed without satisfying the statutory criteria, and to prohibit any coordinated, multi-county John Doe investigations going forward. We emphasize that nothing in this order will identify the petitioners or the subject matter of the investigations to which they refer.

In light of the petitioners’ allegations that certain documents they have respectively received listed John Doe docket numbers for all five counties, we agree that it would be appropriate to handle these matters together in a consolidated writ petition. To facilitate the consolidation, the chief judge of this court has by separate order transferred the Milwaukee

County petition to District IV of this court. Accordingly, we will require only one filing fee to be paid.

We also agree with the petitioners that it is appropriate to file the petition and supporting affidavit and exhibits under seal in order to protect against any inadvertent disclosure of information covered by any secrecy orders that may have been issued by a John Doe judge. However, because we currently have access to only the documents that the petitioners have provided us, we conclude that it would be premature to exempt the memorandum, stay motion, or any other document from the seal at this time. Once we have obtained responses and reviewed all of the relevant materials in camera, we can address what if any documents submitted to this court should remain under seal going forward. *See State ex rel. Unnamed Petitioner No. 1 v. O'Brien*, 2003 WI 30, ¶71, 260 Wis. 2d 653, 660 N.W.2d 260.

Under WIS. STAT. RULE 809.52, this court has broad discretion to grant a stay during the pendency of a writ petition “upon the terms and conditions it considers appropriate.” Whether a stay is appropriate requires a case-by-case analysis in which we may take into account the potential harms that could result in the presence or absence of a stay, as well as the petitioners’ likelihood of success.

As to the potential harm here if a stay is granted, the Wisconsin Supreme Court has emphasized “that writs stemming from John Doe proceedings should not become a vehicle for delaying a John Doe proceeding.” *State ex rel. Unnamed Petitioner No. 1*, 206 Wis. 2d 653, ¶49. As to the potential harm in the absence of a stay, the petitioners allege that they or others face the possibility of being required to comply with demands, orders, subpoenas, or warrants

issued by a John Doe judge or a special prosecutor who the petitioners believe to be acting beyond statutory authority. Thus, there are potentially significant harms that could stem either from granting or from denying a stay, depending on the ultimate outcome of the petition.

As to the likelihood of success, this court may issue a supervisory writ of mandamus or prohibition when: (1) an appeal would be an utterly inadequate remedy; (2) the duty of the circuit court is plain; (3) its 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 are not only prejudicial but also involve extraordinary hardship; and (5) the request for relief was made promptly and speedily. *State ex rel. Dressler v. Racine County Circuit Court*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

The petitioners raise six primary claims: (1) there is no statutory authority to appoint or assign a reserve judge to preside over a John Doe proceeding; (2) there is no statutory authority to consolidate before a single judge John Doe investigations that have been initiated in separate counties or in judicial administration districts supervised by different chief judges; (3) there is no statutory authority to authorize the same lawyer to act as a special prosecutor in consolidated or coordinated John Doe investigations involving multiple counties; (4) there was no authority to appoint a special prosecutor in any of the five John Doe proceedings at issue here because it is not apparent to petitioners that any of the criteria set forth in WIS. STAT. § 978.045(1r) was satisfied for any of the relevant counties; (5) secrecy orders issued by the John Doe judge in these matters exceeded the judge's statutory authority under WIS. STAT. § 968.26; and (6) the

John Doe judge circumvented the statutory functions of the clerks of court in five counties by requiring certain documents to be sent to a post office box.

As we now explain, the first and sixth claims so plainly lack merit that we deny them in this order without ordering a response. *See* WIS. STAT. RULE 809.51(2).

As to the first claim, the statute authorizing the chief justice of the Wisconsin Supreme Court to appoint reserve judges explicitly provides that reserve judges appointed to renewable six month terms “shall perform the same duties as other judges.” WIS. STAT. § 753.075. The petitioners do not point to any other statute that would limit the ability of reserve judges to oversee John Doe investigations. Rather, the petitioners present an argument that John Doe judges ought to be accountable through elections, as a matter of public policy. Such an argument should be addressed to the legislature and does not establish the clear violation of a plain legal duty as required for this court to issue a supervisory writ.

As to the sixth claim regarding the use of a post office box, it is well established that a John Doe judge acts as a tribunal, exercising the inherent authority of his or her judicial office rather than presiding over a circuit court of record. *State ex rel. Unnamed Petitioner No. 1*, 206 Wis. 2d 653, ¶¶23, 54. The petitioners point to no provision in WIS. STAT. § 59.40(2) or WIS. STAT. § 753.30—which generally set out the duties of a circuit court clerk—that would require the clerk to file or maintain documents for a John Doe judge outside of those that are filed in an “action or proceeding.” The Supreme Court Rules do direct a clerk to retain all papers deposited “in proceedings commenced as John Doe actions.” SCR 72.01(26). However, the term “proceeding” in a John Doe action refers to the judge’s examination of witnesses pursuant to

WIS. STAT. § 968.26(3). *See* WIS. STAT. § 968.26(1). The Wisconsin Supreme Court has suggested a John Doe judge should “be mindful” of the need to “create a record for possible review,” precisely because there is no formal mechanism to have a clerk maintain a record of John Doe investigations. *See State ex rel. Unnamed Petitioner No. 1*, 206 Wis. 2d 653, ¶57; *cf.* WIS. STAT. § 753.26 (requiring a circuit court judge to keep all records “of the court” at the county seat). How a John Doe judge goes about creating and maintaining such a record would appear to involve the exercise of discretion, which cannot be compelled by mandamus. We therefore conclude that the petitioners have failed to establish that the John Doe judge or special prosecutor clearly violated a plain legal duty, or interfered with a plain legal duty of any clerk of a circuit court, by directing that subpoena responses or other communications with the John Doe judge or special prosecutor be sent to a post office box.

Each of the petitioner’s four remaining claims for relief appears to rely upon one or more propositions that lack direct factual support in the materials provided with the writ petition.

In their second claim, the petitioners contend that there is no authority to consolidate John Doe investigations that were commenced in different counties—or as they term it, to create a “supercircuit” proceeding in which a judge is acting outside of his or her county or judicial administrative district. However, the petitioners have presented no documents to show that the John Doe investigations at issue here have in fact been formally consolidated, as opposed to running parallel to one another, or that there have been any joint proceedings at which a John Doe judge was examining witnesses in one jurisdiction about whether a crime had been committed in another.

Similarly, in their third claim, the petitioners contend that there is no authority to appoint a single special prosecutor to handle John Doe proceedings in multiple counties or judicial administrative districts, but they present no documents to show that any authority in any one of the involved counties or administrative districts has purported to appoint a special prosecutor to act in one of the other counties. Again, the petitioners fail to acknowledge the possibility that these are parallel John Doe investigations that could ultimately result in charges in more than one county.

For their fourth claim, the petitioners contend that none of the criteria set forth in WIS. STAT. § 978.045(1r) has been satisfied for any of the involved counties. However, the petitioners do not purport to know what authority appointed the special prosecutor, for which county or counties the special prosecutor serves, whether any district attorney may have cited a conflict of interest due to the nature of the investigations, or whether there might be other special prosecutors or district attorneys involved in any of the investigations.

For their fifth claim, the petitioners allege that the John Doe judge has issued orders that purport to “bind to secrecy all unknown persons who may see a subpoena or search warrant.” However, that is not an accurate characterization of any of the orders included with petitioners’ writ materials, which are each limited with respect to whom they apply and to what proceedings they apply. And, the petitioners do not purport to know whether any additional secrecy orders may have been issued.

Given our outright denial of two of the petitioners’ six claims, and the uncertain factual basis for the remaining four claims, we are not persuaded that a stay is warranted.

Ordinarily, we would dismiss a writ petition that failed to provide a factual basis for the claimed relief. We recognize, however, that the special nature of a John Doe investigation limits the petitioners' ability to gather the necessary documents without court intervention. Additionally, this court needs access to all available secrecy orders and some explanation as to the status of the alleged investigations in order to evaluate the pending motion to seal the petition and some of the supporting materials. However, as we have discussed above, there is no automatic mechanism for maintaining or obtaining records from a John Doe investigation. We therefore conclude that it is necessary to have one or more of the respondents provide us with a response and documents in their possession.

Our need for a response faces several logistical problems. First, the petitioners' certificate of service shows that the only person they served with a copy of their writ petition and motions was a prior John Doe judge, who is no longer a party to this action. The current respondents identified in the amended caption will obviously need copies of the writ materials in order to respond to them. Second, the certificate of service indicates that the petitioners have no address for either the John Doe judge or the special prosecutor aside from the post office box mentioned above. Third, it is not clear what, if any, actual involvement the chief judges of the various administrative districts may have had in any of the appointments being challenged in this writ petition, and whether any or all of them have been exempted from any applicable secrecy orders. Fourth, we do not know which of the named respondents might be in possession of relevant records. Our directives below therefore include some flexibility to cover various contingencies.

For the foregoing reasons,

IT IS ORDERED that the motion to consolidate these matters into a single writ proceeding and to waive all but one of the filing fees is granted.

IT IS FURTHER ORDERED that the motion to file the writ petition under seal is granted and the motion to exempt the memorandum in support of the petition from the seal is denied, for such time as the underlying John Doe investigations are still pending and any relevant secrecy orders issued by the John Doe judge(s) are still in effect, or until further order of this court following an in camera inspection of any documents any party asks this court to order to remain under seal.

IT IS FURTHER ORDERED that the motion to stay all further proceedings in the underlying John Doe investigations is denied at this time. Proceedings may continue in any or all of these matters unless and until this court orders otherwise.

IT IS FURTHER ORDERED that the requests in the writ petition for orders prohibiting any reserve judge to serve as the John Doe judge and prohibiting either a John Doe judge or a special prosecutor from using a post office box for the delivery of documents related to the investigations are denied, and no responses are required on those issues.

IT IS FURTHER ORDERED that the John Doe judge and special prosecutor must respond to the four remaining issues in the writ petition and the motions to seal and unseal various documents. At a minimum, they should address: (1) both the factual basis and legal authority for the 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 this court should remain under seal. They should also provide this court with copies of any materials in their possession relevant to these issues.

IT IS FURTHER ORDERED that the chief judges of the four judicial administrative districts at issue may, but need not, respond to the writ petition. The chief judges shall be exempt from this court's order sealing the petitioner's writ materials so that they may evaluate whether to participate. If the chief judges need access to any other materials that may be subject to a secrecy order in order to prepare any response that any of them elects to submit, and they do not already have access to the John Doe investigations, they should seek an exemption from the John Doe judge.

IT IS FURTHER ORDERED that the respondents shall confer with one another to determine whether they intend to file a joint response or separate responses addressing the issues most relevant to each of them; and who will be representing them. The respondents shall then, within five business days of this order, notify opposing counsel as to how they can each be served. The petitioners shall then have an additional three business days to serve the writ petition and all accompanying materials upon the respondents. The respondents shall then have twenty days to file the responses required by this order.

IT IS FURTHER ORDERED that if any of the respondents believe that some or all of their own submissions should remain confidential, they should file the submissions under seal

and present this court with arguments as to why they should remain under seal and for how long. To the extent possible, the substance of the response(s) should focus on the general legal issues regarding the scope of the authority of the John Doe judge and special prosecutor, and should not identify the petitioners or the subject matter of any ongoing investigations.

And finally,

IT IS FURTHER ORDERED that the motion to certify one of more issues in this matter to the Wisconsin Supreme Court shall be held in abeyance until we have received the response(s) of the respondents.

Diane M. Fremgen
Clerk of Court of Appeals