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Francis D. Schmitz

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

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|--------------|--|
| 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.

We have before us a supervisory writ petition and related motions filed by three unnamed petitioners who are seeking relief in a John Doe investigation that spans five counties. In a prior order, we narrowed the remaining issues to be addressed to the petitioners' request to certify this matter to our supreme court, their motion to unseal certain documents, and their claims that the John Doe judge clearly violated a plain legal duty by: (1) consolidating John Doe investigations from multiple counties and judicial administrative districts into a single proceeding;

(2) appointing a special prosecutor without satisfying the criteria set forth in WIS. STAT. § 978.045(1r); (3) authorizing a special prosecutor who is not accountable to the electors of any county to act in multiple counties; and (4) subjecting all those with access to documents in the John Doe proceedings to secrecy orders. The special prosecutor, the John Doe judge, and the chief judges of each of the relevant judicial administrative districts have filed responses addressing those issues. We have also received—and will accept for filing—a reply from the petitioners. Based upon all of the parties’ submissions, we are not persuaded that this writ presents any issues appropriate for certification. For the reasons discussed below, we reject the petitioners’ four remaining arguments on the merits and deny the petition for a supervisory writ. We do, however, grant the petitioners’ largely unopposed request to unseal a number of the documents that have been filed in this court.

The petitioners first argue that John Doe investigations that were initiated in multiple counties have been illegally consolidated into a single proceeding. This argument erroneously conflates the terms “investigation” and “proceeding.” What has occurred here is that five separate John Doe proceedings were initiated by the district attorneys of five counties as the result of a joint investigation into conduct that could potentially result in criminal charges being filed against different individuals or entities respectively residing or headquartered in each of those counties. Because the same or integrally related conduct was being investigated by each of the five district attorneys, involving the same or substantially overlapping witnesses and documents, and because the Attorney General declined to handle the multi-jurisdictional investigation, the district attorneys sought to have the same judge and special prosecutor

appointed to handle each John Doe proceeding. The John Doe judge, in turn, issued some joint orders and subpoenas that related to all five John Doe proceedings.

While it is certainly fair to characterize the investigation described above as a single coordinated effort, it does not follow that the individual John Doe proceedings have been consolidated. To the contrary, the respondents inform us that no consolidation order has been issued, and we note that the anticipated end result of each of the John Doe proceedings will involve a separate determination by the John Doe judge as to whether criminal charges are warranted against any individual or entity residing or headquartered in the county of that specific proceeding. We further observe that it is not improper—or indeed, that unusual—for courts to hold joint proceedings or to issue joint orders in non-consolidated cases that share a common factual basis, raise the same legal issue or involve overlapping parties. The petitioners have not pointed to any legal authority that would bar a John Doe judge from employing the same practices used by courts in various contexts, such as joint hearings in criminal cases or joint oral arguments in related civil cases, to advance the cause of judicial efficiency here. In sum, we conclude that the parallel John Doe proceedings focusing on various targets who may have interacted with other targets in different counties have not been “consolidated” merely because the same judge and special prosecutor have been appointed to handle each of them or because the John Doe judge has issued joint orders or subpoenas rather than duplicative ones when the same information is being conveyed or sought in more than one of the proceedings.

Turning to the second issue, the petitioners’ arguments about whether any of the statutory criteria for appointing a special prosecutor under WIS. STAT. § 978.045(1r) were satisfied in any of the five counties miss the mark because the prior John Doe judge did not rely on that statutory

subsection to make the appointments. Instead, the prior judge expressly stated that she was making the appointments pursuant to her inherent judicial authority under *State v. Cummings*, 199 Wis. 2d 721, 735-36, 546 N.W.2d 406 (1996); and *State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451 (WI App 2001). Because we are satisfied that the prior judge did have inherent authority to appoint a special prosecutor under *Cummings* and *Carlson*, we are not persuaded that she violated any plain legal duty in making the appointment here—regardless whether the statutory criteria were also met.

In *Cummings*, the Wisconsin Supreme Court held that John Doe judges are not limited to the exercise of those powers enumerated in the John Doe statute itself or even to those powers conferred on all judges by other statutes, but rather may exercise any power “necessary to fulfill the jurisdictional mandate” of conducting a John Doe proceeding. *Cummings*, 199 Wis. 2d at 736, 733-38. Similarly, the Wisconsin Supreme Court has also recognized that the power to appoint a special prosecutor is an inherent power of the judiciary that may be used when necessary “to enable the judiciary to accomplish its constitutionally or legislatively mandated functions.” *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 16-17, 531 N.W.2d 32 (1995).

In *Carlson*, this court held that, when a court appoints a special prosecutor on its own motion under WIS. STAT. § 978.045(1g), it may do so for any reason so long as it states the cause on the record. *Carlson*, 250 Wis. 2d at 571-72. The petitioners attempt to limit the holding of *Carlson* to *only* those situations in which the appointment of a special prosecutor is made on the court’s own motion. However, the statutory section being interpreted in *Carlson* explicitly refers to appointments made at the request of a district attorney, as well as to appointments made on the

court's own motion. WIS. STAT. § 978.045(1g). We therefore read *Carlson* more broadly than do the petitioners, to apply to all appointments made under subsection (1g). Our reading of *Carlson* is in line not only with the Wisconsin Supreme Court's holding in *Friedrich* that the judiciary has inherent power to appoint a special prosecutor when necessary, but also with a prior discussion by this court in *State v. Bollig*, 222 Wis. 2d 558, 569-70, 587 N.W.2d 908 (Ct. App. 1998) about the proper interpretation of the subsections of WIS. STAT. § 978.045.

In *Bollig*, we explained that a special prosecutor can be appointed under WIS. STAT. § 978.045(1g) for any reason—either on the court's own motion or at the district attorney's request—whenever the Department of Administration is notified that no other prosecutorial unit is available so that the department may give prior approval for the special prosecutor's compensation. *Bollig*, 222 Wis. 2d at 569-70. In contrast, an appointment by the court under subsection (1r) can be made for only limited reasons, but does not require any prior compensation approval from the department, while an appointment by a district attorney under WIS. STAT. § 978.045(3)(a) does not even require court approval if the special prosecutor serves without compensation. *Id.* We reasoned that what is essential for a special prosecutor appointment, aside from the compensation issue, is only that either a district attorney or circuit court has authorized the appointment. *Id.* at 570-72. Thus, we held that a defect in an order appointing a special prosecutor can be cured nunc pro tunc and does not deprive the court of competency to proceed on actions initiated by the special prosecutor. *Id.*

Here, each of the appointment orders issued by the prior John Doe judge contained a statement that the Attorney General had declined to conduct a multi-jurisdictional investigation, and it appears that copies of all the orders were sent to the Department of Administration. It

therefore appears that the requirements of WIS. STAT. § 978.045(1g) were substantially satisfied, and that the John Doe judge could properly order—for any reason, including efficiency—both the appointments and directions for the special prosecutor’s compensation. Moreover, even assuming for the sake of argument that there was some procedural flaw in the appointment orders or notification process from a statutory standpoint, such a flaw would at most affect the availability of state funds for the special prosecutor’s compensation. It would not, as the petitioners contend, render the actions of the special prosecutor void *ab initio* because the John Doe judge had inherent judicial authority independent from that stemming from the statute to make the appointments in order to effectuate the judge’s mandate.

Regarding the petitioners’ third argument about the special prosecutor’s authority to act in multiple counties, we reiterate that the John Doe judge issued five separate appointment orders—one for each proceeding. The petitioners cite no authority prohibiting the same prosecutor from concurrently serving multiple appointments in related proceedings. Additionally, the fact that the special prosecutor appointed here is not an elected district attorney has no legal significance to this writ proceeding because any attorney licensed to practice in this state may serve as a special prosecutor, thus assuming all the powers of a district attorney. WIS. STAT. § 978.045(1r).

With respect to the petitioners’ fourth argument about the scope of the secrecy orders, we are satisfied that the orders at issue are properly limited to those who have been granted some degree of access to the John Doe proceeding. The orders use standard language that is well within the discretion of a John Doe judge, as discussed in *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 118 N.W.2d 939 (1963).

As to unsealing documents that have been filed in the writ proceeding before this court, we conclude that the only documents that need to remain sealed at this time are those that would identify subjects of one or more of the John Doe proceedings, specific information that has been gathered or is being sought by a subpoena or search warrant, or other details of the investigation. Consistent with our view, the parties appear to agree that the petitioners' memorandum in support of their supervisory writ, the petitioners' motions to seal and unseal, the petitioners' motion to consolidate the writ petitions and waive additional filing fees, the petitioners' request for certification, the special prosecutor's response and his motions to seal and unseal and serve redacted materials upon the petitioners, the orders appointing the original and successive John Doe judges, a redacted copy of the district attorneys' joint letter to the original John Doe judge requesting the appointment of a special prosecutor, the orders appointing the special prosecutor, and the response of the John Doe judge and chief judges may all be unsealed. There also appears to be no dispute that the petition for a supervisory writ, the affidavits supporting the writ petition, Exhibit 1 to the writ petition, the affidavits and all exhibits other than the appointment orders and redacted district attorneys' letter accompanying the Special Prosecutor's response, the petitioners' supplemental filing, and attachments related to an order issued by the John Doe judge while this matter has been pending should remain sealed. The Special Prosecutor also requests that the petitioners' motion for a stay remain sealed because "the substantive issue regarding the Motion to Stay has already been determined." That is not the criterion for whether a document should be subject to public inspection, and since the John Doe judge does not oppose release of that motion, we are not persuaded that the stay motion reveals any information that would violate a secrecy order.

Accordingly,

IT IS ORDERED that the motion to certify this matter to the Wisconsin Supreme Court is denied.

IT IS FURTHER ORDERED that the consolidated petitions for a supervisory writ are denied.

IT IS FURTHER ORDERED that the special prosecutor shall file and serve a redacted copy of the affidavits and materials accompanying his response, consistent with this order.

IT IS FURTHER ORDERED that the clerk of this court shall place the following documents under seal in a manila envelope: (1) the petition for a supervisory writ; (2) the affidavit supporting the writ petition; (3) Exhibit 1 to the writ petition; (4) the affidavits and exhibits accompanying the Special Prosecutor's response; and (5) the petitioners' supplemental filing and attachments related to an order issued by the John Doe judge while this matter has been pending. All other documents, including the redacted materials from the special prosecutor once they are filed, may be placed in a correspondence file open to public inspection.

Diane M. Fremgen
Clerk of Court of Appeals