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SUPREME COURT OF WISCONSIN
Case No. 2013AP2504 - 2508-W
Case No. 2014AP296-OA
Case No. 2014AP417 - 421-W

STATE OF WISCONSIN *ex rel.* THREE UNNAMED PETITIONERS,

Petitioner,

v. Case No. 2013AP2504 - 2508-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

STATE OF WISCONSIN *ex rel.* TWO UNNAMED PETITIONERS,

Petitioner,

v. Case No. 2014AP296-OA

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

RESPONDENT - SPECIAL PROSECUTOR'S RESPONSE TO MOVANT NO. 2'S NOTICE OF STATUTORY CHANGES

[CAPTION CONTINUED ON FOLLOWING PAGE]

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

Petitioner,

v. Case No. 2014AP417 - 421-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

and

EIGHT MOVANTS,

Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

The Special Prosecutor and Respondent, Francis D. Schmitz, files this response to the "Notice of Statutory Changes" dated October 28, 2015 filed by Movant No. 2[1] in the above captioned cases. The "Notice of Statutory Changes" is a misnomer; the filing should be considered a motion because it seeks to expand the relief sought in prior filing(s) with the Court.

The Movant assumes in the "Notice" that Wisconsin Act 64 is retroactive in its entirety. The Movant's assumption is legally wrong. On the face of the statute, Wisconsin Act 64 demonstrates a legislative intent

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[1] Inasmuch as only Movant No. 2 has filed this Notice, it will be referenced as "Movant" hereafter.

that it have no retroactive applicability, but for the provisions of section 12j. That section provides that changes to Wis. Stat. §968.26(4)(a) are applicable to secrecy orders issued prior to the effective date of Act 64.[2] Since only Section 12j and Wis. Stat. Section 968.26(4)(a) are expressly retroactive, by necessary inference and pursuant to standard rules of statutory construction, all other provisions have only prospective application. *See* Section II.B below. Additionally, the legislative history of the Act supports such a reading. *See* Section II.C below.

Moreover, as to all sections of Act 64 including Section 12j, if the legislation were to be construed as having retroactive applicability, it would violate the separation of powers doctrine. This is because the retroactive application of Act 64 would invalidate pre-existing court orders which were valid and lawful at the time such orders were entered. *See* Section III below.

Finally, all forms of relief requested in the Notice should be denied. These requests duplicate – in substantial part – various post-decision

[2] Section 12j provides: " (1) A secrecy order entered under section 968.26 of the statutes that is in effect on the effective date of this subsection may apply only to persons listed in section 968.26(4)(a) of the statutes, as created by this act. A secrecy order covering persons not listed in section 968.26(4)(a) of the statutes, as created by this act, is terminated on the effective date of this subsection."

requests made by the Movant. Discussed in Sections IV and V below, the passage of Act 64 does not bolster these requests, and they should be denied.

I. WISCONSIN ACT 64

Wisconsin Act 64, which makes substantive changes to John Doe proceedings commenced under Wisconsin Statutes §968.26, was recently approved by the legislature and signed into law by Governor Walker. The changes to the statute became effective on October 24, 2015, the date of publication. The relevant changes to the statute are described below.

1. **John Doe Judges.** After October 24, 2015, no permanent or temporary reserve judge may issue the orders required of a "judge" in a John Doe proceeding.

2. **Special Prosecutors.** After October 24, 2015, no special prosecutor may be appointed to assist the district attorney in "John Doe proceedings" unless the judge determines that the appointment is justified by one of the eight factors in the special prosecutor statute, Wis. Stat. § 978.045(lr)(bm).

3. **Notice to Parties Whose Communications Were Seized.** After October 24, 2015, "[i]f property was seized during a [John Doe], the judge shall, at the close of the proceeding, order notice as he or she determines to be adequate to all persons who have or may have an interest in the property." *See* Wis. Stat. § 968.26(7).

4. **Secrecy Orders.** After October 24, 2015, secrecy orders "may apply to only the judge, a district attorney or other prosecuting attorney who participates in a proceeding under this section, law enforcement personnel admitted to a proceeding under this section, an interpreter who participates in a proceeding under this section, or a reporter who makes or transcribes a record of a proceeding under this

section. No secrecy order under this section may apply to any other person." *See* Wis. Stat. 968.26(4)(a).

5. **Offenses Subject to a John Doe Investigation.** After October 24, 2015, a John Doe investigation is limited to any Class A, B, C, or D felonies in chs. 940 to 948 and 961, Stats., certain specified Class E, F, G, or I felonies, felony murder, racketeering, or a solicitation, conspiracy, or attempt to commit such offenses. Previously, any crime could be the subject of a John Doe investigation. Crimes under Chapter 11, the campaign finance regulations, and Chapter 12, the election laws, are now excluded.

6. **Search Warrants.** After October 24, 2015, a search warrant may only be issued by a judge not presiding over the John Doe proceeding.

II. WISCONSIN ACT 64 APPLIES PROSPECTIVELY, EXCEPT FOR §968.26(4)(a), AS REFERENCED IN NON-STATUTORY SECTION 12j.

A. Legislation is presumed to apply prospectively.

Generally, "legislation is presumed to apply prospectively unless the statutory language reveals, by express language or necessary implication, an intent that it apply retroactively." *Schulz v. Ystad*, 155 Wis.2d 574, 597, 456 N.W.2d 312, 320 (1990), citing *Chappy v. LIRC*, 136 Wis.2d 172, 180, 401 N.W.2d 568 (1987). The court in *Ystad* observed that

> the presumption against retroactive legislation has its basis in the characteristics of legislation and concepts of justice. *See Employers Insurance v. Smith,* 154 Wis. 2d 199, 221-223, 453 N.W.2d 856, 865 (1990). *Strong common-law tradition defines the legislature's primary function as declaring law to regulate future behavior.* Thus, as a matter of justice, no law should be enforced before people can learn of its existence

> and conduct themselves accordingly. In short, retroactivity disturbs the stability of past transactions.

Ystad, 155 Wis.2d at 597 (emphasis added). That presumption applies to this legislation, and the presumption is consistent with applying Act 64 changes to John Doe proceedings commenced after its effective date.

B. By its express terms, Wisconsin Act 64 applies prospectively, with the exception of Wis. Stats. §968.26(4)(a) which was expressly retroactive.

That Act 64 applies prospectively follows from the fact that the legislature expressly made Section 12j retroactive. Section 12j provides:

> Section 12j. Nonstatutory provisions. (1) A secrecy order entered under section 968.26 of the statutes that is in effect on the effective date of this subsection may apply only to persons listed in section 968.26(4)(a) of the statutes, as created by this act. A secrecy order covering persons not listed in section 968.26(4)(a) of the statutes, as created by this act, is terminated on the effective date of this subsection.

Pre-existing secrecy orders only apply to persons listed in the newly effective provisions of Wis. Stat. §968.26(4)(a). In so drafting Act 64, the legislature demonstrated an intent that all other aspects of the enactment apply prospectively.

Although the law of retroactive application of a statute is often cast in terms of "procedural" versus "substantive" changes,[3] it is legislative intent that controls. As this court explained in *State v. Haines*, 261 Wis.2d 139, 146-147, 661 N.W.2d 72, 75, 2003 WI 39, ¶12,

> In *Betthauser* [*v. Med. Protective Co.*, 172 Wis.2d 141, 149, 493 N.W.2d 40 (1992)], this court declined to retroactively apply a statute of limitations due to the lack of any legislative intent to apply the statute retroactively, not because the statute was characterized as substantive instead of procedural. A statute may be applied retroactively if (1) *by express language or necessary implication, the statutory language reveals legislative intent for retroactive application*; or (2) the statute is remedial or procedural rather than substantive.

Id. (emphasis added).

Both by express language and by necessary implication, the terms and provisions of Act 64 are – in part – retroactive. That part is Section 12j; the balance of the statute, by necessary implication is to be applied prospectively only. Had it intended to make the other sections of Act 64 retroactive, the legislature would have expressly referenced those changes in the non-statutory provision (12j). The absence of any reference to the

[3] Procedural or remedial statutes, rather than substantive statutes, are generally given retroactive effect unless contracts would be impaired or vested rights disturbed. *Betthauser v. Medical Protective Co.*, 172 Wis.2d 141, 149, 493 N.W.2d 40 (1992).

remaining provisions demonstrates, by necessary implication, that the legislature intended all remaining provisions apply prospectively only.

The rules of statutory construction support this view. A law is to be construed so that no word or clause is surplusage. *Johnson v. State*, 76 Wis.2d 672, 251 N.W.2d 834 (1977). If this court were to construe all Act 64 provisions as retroactive, such a construction would render the provisions of section 12j as redundant and surplusage. Such a construction must be avoided.

Finally, another rule of statutory construction - *expressio unius est exclusion alterius* - is applicable here. That is, express mention of one matter excludes other similar matters not mentioned. *See Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept. of Natural Resources*, 2004 WI 40, 270 Wis.2d 318, 336, 677 N.W.2d 612, 621, ¶17 fn. 11. Because the legislature solely referenced 968.26(4)(a) with respect to retroactivity in section 12j, the principle of *expressio unius est exclusion alterius* would exclude all other provisions of Act 64 not mentioned from having retroactive applicability.

C. The history of Act 64 reflects that the legislature intended only the revisions to Wis. Stat. § 968.26(4)(a) to have retroactive application.

As set forth below, the legislative history of Act 64 supports the proposition that only Section 968.26(4)(a) is retroactive.[4] The legislature considered the issue of the "prospective" versus "retrospective" application of the Act. While initial proposals for amendments to the legislative bill provided for prospective-only application of Act 64, the final version of Act 64 had limited retroactivity. Section 12j only affects Wis. Stat. § 968.26(4)(a). This history demonstrates a legislative decision on the retroactive application of the Act.

Senate Bill 43, Amendment 3 dated March 12, 2015, included a proposed Section 11g providing that "[t]his act first applies to requests or complaints made on the effective date of this subsection." However, Senate Bill 43, amendment 6 dated September 30, 2015, proposed Section 12j as quoted above.[5] Amendment 6 made certain portions of Senate Bill 43 pertaining to John Doe secrecy orders retroactive. Senate Bill 43,

[4] This is not to say that there is an ambiguity in the statute. As stated in *State ex. rel Kalal*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110, Wisconsin's statutory construction law generally adheres to a methodology of relying first and primarily on intrinsic sources of statutory meaning, confining resort to extrinsic sources of legislative intent (such as legislative history) to cases in which the statutory language is ambiguous. *Id.* at 661-662, 681 N.W.2d at 123, 2004 WI 58, ¶43.

amendment 6 (Section 12j) was thereafter adopted and enacted into law.[6] For this reason, the history of Act 64 establishes that the legislature rejected a prospective-only application and chose "limited retroactivity." Stated another way, the legislative history of Act 64 supports the conclusion that Act 64 is prospective only, except as set forth in Section 12j.

III. THE SEPARATION OF POWERS DOCTRINE REQUIRES THAT ACT 64 ONLY HAVE PROSPECTIVE APPLICATION.

Beyond consideration of matters of legislative intent, there is yet another reason to apply the general provisions of Act 64 on a prospective-only basis. To apply all of Act 64's provisions retroactively, including Section 12j, would violate the doctrine of separation of powers. The application of Act 64 to *any and all* John Doe proceedings commenced prior to the effective date of the legislation would invalidate standing court orders predating Act 64. As to such court orders existing on the effective date of Act 64, a legislative mandate upsetting these settled orders would impermissibly invade the separate powers of the legislative and judicial branches of Wisconsin government. Such a construction of Act 64 would render the Act unconstitutional.

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[5] *See* footnote 2.

[6] The legislative history of corresponding Assembly Bill 68 does not have any similar amendment.

Whether a statute violates the doctrine of separation of powers presents a question of law. *State v. Chvala*, 2004 WI App. 53 ¶44, 271 Wis.2d 115, 678 N.W.2d 880 *citing Barland v. Eau Claire County*, 216 Wis.2d 560, 572, 575 N.W.2d 691 (1998) In *Chvala*, the court explained:

> The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another. Each branch has a core zone of exclusive authority into which the other branches may not intrude. In these core areas, "*any* exercise of authority by another branch of government is unconstitutional." However, the majority of governmental powers lie within areas of shared authority, where the powers of the branches overlap. In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of power.

Id. (citations omitted)(emphasis supplied).

In *Joni B. v. State*, 202 Wis.2d 1, 9-11, 549 N. W. 2d 411, 414 (1996), the court reviewed 1995 Wis. Act 27. That Act restricted the authority of the court to appoint counsel, except in certain CHIPS proceedings. In *Joni B.*, the court discussed the procedure for determining whether a legislative enactment improperly infringes on the judiciary. First, the court must examine whether the Constitution grants the legislature

subject matter jurisdiction over the area encompassed by the challenged statute. Then, the court must determine whether the subject matter of the statute also falls within the judiciary's constitutional grant of power. If judicial authority is exclusive, any legislative intrusion is prohibited. However, if it is shared, "the legislature may not place an unreasonable burden on or substantially interfere with the judiciary's exercise of that power." *Id.* at 10, 549 N.W.2d at 414.

The court found a separation of powers violation in *Joni B.* Although the court did not find that the statute affecting the appointment of counsel infringed upon the inherent authority of the court, the Act was nevertheless invalidated because the court determined the level of legislative intrusion to be intolerable. The court stated,

> In this case, we need not decide whether the power to appoint counsel is exclusive to the judiciary or shared with the legislature, since the level of intrusion here is impermissible under either scenario. Any intrusion is prohibited if the judicial authority is exclusive, and even if the power is viewed as shared, the legislature may not place an unreasonable burden on or substantially interfere with the judiciary's exercise of that power."

Id.

The full extent of Act 64's impact on standing court orders in John Doe proceedings throughout the State of Wisconsin is unknown to the

Special Prosecutor. However, one need look no further than the five John Doe proceedings[7] presently before the court in order to conclude that retroactive application of Act 64 would present an unreasonable burden and would substantially interfere with the exercise of judicial authority.

The lawful exercise of judicial authority as seen in each of the five John Doe proceedings cannot be defeated by a subsequent legislative enactment like Act 64. To find otherwise would ratify the authority of the legislature to nullify judicial orders not to their liking. Such a retroactive application of Act 64 would substantially interfere with the authority of the judiciary. An act that defeats the prior exercise of judicial authority is contrary to the limitation on legislative powers. *See State v. Holmes*, 106 Wis.2d 31, 69, 315 N.W.2d 703, 721 (1982)(When the exercise of administrative and legislative power has so far invaded the judicial field as to embarrass the court and impair its proper functioning, the court will be compelled to maintain its integrity as a constitutional institution.).

[7] On November 11, 2013, the Honorable Judge Gregory Peterson was appointed as the John Doe Judge in the five parallel John Doe proceedings - Milwaukee County Case No. 10JD000007 and 12JD000023, Columbia County Case No. 13JD000011, Dane County Case No. 13JD000009, Dodge County Case No. 13JD000006, and Iowa County Case No. 13JD0000001 (hereafter John Doe II). Honorable Judge Neal Nettesheim was appointed as the John Doe Judge with respect to 2010JD000007 (hereafter John Doe I) on or about May 5, 2010. Francis D. Schmitz was appointed as the Special Prosecutor by the Honorable Judge Barbara Kluka in John Doe II on August 23, 2013.

To successfully claim that the entirety of Act 64 is retroactive, the Movant must convince the court that the legislature may, consistent with the doctrine of separation of powers, "undo" multiple court orders entered during the course of the underlying John Doe proceedings. Those orders include:

1. Order for the appointment of the Honorable Gregory Peterson as John Doe Judge;
2. Order for the appointment of the Honorable Neal Nettesheim as a John Doe Judge;
3. Order for the appointment of Francis D. Schmitz as a special prosecutor;
4. Order for Qualified Use and Dissemination (related to Archer proceedings by Judge Nettesheim);[9]
5. Secrecy Order entered by the Honorable Judge Barbara Kluka.

The legislature, consistent with the doctrine of separation of powers, cannot retroactively invalidate court orders and disqualify judges presiding over pending cases. Such a construction would require judicial reassignments in *any pending John Doe proceeding throughout the state* in which a reserve

judge is presiding. This is judicial substitution by legislative mandate and it is difficult to think of a more disruptive and intrusive legislative action. This is all the more true in a proceeding being handled by a Judge like Judge Peterson who was assigned to these proceedings over two years ago. For these reasons, the retroactive application of the "reserve judge" portion of Act 64 would violate the separation of powers between the legislative and judicial branches of Wisconsin government, rendering the act unconstitutional.

For similar reasons, the legislature is not empowered to invalidate a special prosecutor appointment previously made by the court in a pending John Doe investigation. If Act 64 is given general retroactive applicability, it would infringe upon the constitutional office of the District Attorney in the Administrative Branch, and consequently the authority of a special prosecutor. *See* Art. VI. §4 Wis. Constitution. The Special Prosecutor was appointed for specific reasons by Judge Barbara Kluka. By court order, the Special Prosecutor was given a mandate to investigate and, if appropriate, prosecute certain crimes. That appointment by the John Doe Judge was upheld by this court. The legislature is not empowered to interfere with

[9] The Movant claims that this Order is invalidated by Act 64. The Special Prosecutor disagrees and asserts that Act 64 does not at all address Orders of this type. *See infra* at

that appointment and that decision. If this legislative authority were sanctioned, little imagination is required to foresee the abuses which could be wrought upon judicial proceedings. It might even be possible for powerful litigants to undo the decisions of the judiciary in pending cases where decisions have been made not entirely to their liking. Legislative interference with a pending special prosecutor appointment stands on the same footing as "judicial substitution by legislative fiat." It is an unreasonable interference with the operation of the judiciary.

In sweeping fashion and without regard to the individual circumstances that might exist throughout the state, Act 64 purports to invalidate secrecy orders employing common language as sanctioned by this court in *In re John Doe Proceeding*, 2003 WI 30, ¶62, 260 Wis.2d 653, 660 N.W.2d 260 (A permissible secrecy order issued in a John Doe proceeding may properly encompass information concerning questions asked, answers given, transcripts of the proceedings, exhibits produced during the proceedings, or other matters observed or heard in the secret session at a John Doe Proceeding.). Notably, the Act purports to reach all current secrecy orders, not merely those in open, pending proceedings.

Section IV.D.

Act 64 encompasses any "secrecy order entered under section 968.26 of the statutes that is in effect on the effective date of this subsection," and further provides, "[a] secrecy order covering persons not listed in section 968.26(4)(a) of the statutes, as created by this act, is terminated on the effective date of this subsection." *See* Section 12j. Closed John Doe investigations nevertheless have secrecy orders that remain in effect, and it is common for the closing order to so state. Certainly, in Act 64, it would have been easy to specify John Doe investigations that were pending and open as of the effective date of the subsection, but that is not the language the legislature employed. Consequently, Act 64 and Section 12j purport to alter an unknown number of John Doe proceedings throughout the State – both pending and closed.

In that unknown number of proceedings, judges have commonly promised witnesses that their testimony will remain secret. These witnesses have also been told that they also must maintain secrecy regarding what they see or hear during the course of a hearing.[10] By virtue of these standard secrecy orders and John Doe witness instructions, subjects of John Doe investigations have been given reason to believe that, absent

[10] *See* Wis. JI - Criminal SM-12.

further court order or absent the filing of criminal charges, a witness (Witness A) who learns the investigation concerns a specific subject (Subject B) will not publish the fact that Subject B is (or was) being investigated. A judicial officer who enters orders creating a reasonable expectation of secrecy among a community of witnesses or subjects should not have such settled orders – including orders in closed proceedings – overturned by legislative enactment. The Special Prosecutor submits that Section 12j will have its most disruptive effect in closed John Doe investigations where no charges have been filed. In those cases, including (somewhat curiously) closed investigations involving Wisconsin politicians, "Witness A" will be free to publish the fact that Subject B was being investigated for some crime, although Subject B was never charged.

Of course, statutes are to be construed in a manner avoiding any construction that would render it unconstitutional.[11] Act 64 must be prospective "(b)ecause under our system of constitutional government, no one of the co-ordinate departments can interfere with the discharge of the

[11] This Court has ruled that, "[w]e must not construe a statute to violate the constitution if it can possibly be construed consistent with the constitution." *Norquist v. Zeuske*, 211 Wis.2d 241, 250, 564 N.W.2d 748, 752 (1997).

constitutional duties of one of the other departments . . . ." *Goodland v. Zimmerman*, 243 Wis. 459, 468, 10 N.W.2d 180 (1943).

IV. WHILE THE MOVANT'S NOTICE REPEATS REQUESTS FOR RELIEF PREVIOUSLY ASSERTED, THE PASSAGE OF ACT 64 DOES NOT HELP THE MOVANT'S EARLIER ARGUMENTS.

A. The Movant's previous arguments for the replacement of a reserve judge with the appointment of a "Special Master" now take the form of a request for substitution of that reserve judge with an elected judge.

In its Notice at Paragraph 2, page 4, Movant implicitly and expressly advances a series of arguments seeking to replace the sitting reserve John Doe judge, all of which the court should reject.

First, Movant contends that a reserve judge may no longer preside over a John Doe proceeding. From this premise, the Movant incorrectly concludes that Judge Peterson may no longer preside over the John Doe investigation. Much of the Notice overall, including Paragraph 2, is predicated on the Movant's mistaken belief that the entirety of Act 64 has retroactive application. As explained in Section II above, Act 64 is not retroactive, and this is certainly true with respect to provisions relating to reserve judges.

Second, this argument is the most recent incarnation of a previous request for the appointment of a "Special Master." The Special Prosecutor has previously argued that the mechanics of closing the John Doe proceeding should be addressed to the John Doe judge, not to this court. *See* the Special Prosecutor's Reply Brief dated September 2, 2015 at page 9. The Movant initially filed requests respecting closure of the investigation with the John Doe judge; this is where the request for relief still belongs. If the Movant believes that the presently appointed John Doe judge should – for some reason – be disqualified from continuing, that issue should be raised before the John Doe judge and not this court.

Third, the Movant argues that the proceedings known as "John Doe I" should be addressed by the court and thereby implies that this court has authority over John Doe I proceedings. In a series of emails to the Chief Justice, the Movant made direct contact with the court outside the context of these proceedings requesting relief pertaining to John Doe I.[12] Subsequently, the Movant inserted a request for such relief in its response to the Motion for Reconsideration.

[12] The Special Prosecutor has previously requested that all such direct communications with the court be made part of this record. However, to date, at least as far as the Special Prosecutor knows, those direct email communications remain outside this record.

In a letter to the court dated August 13, 2015 thereafter filed as Exhibit A to the Reply Brief dated September 2, 2015,[13] the Special Prosecutor has addressed at length the reasons why this court should not entertain requests for relief pertaining to John Doe I. No material fact or circumstance has changed since the Special Prosecutor submitted his Reply Brief. Certainly, there is nothing related to the passage of Act 64 that provides this court any legal basis to assert jurisdiction over John Doe I proceedings.

B. The Movant's earlier arguments for the disqualification of the Special Prosecutor now take the form of an argument that Act 64 disqualifies this Special Prosecutor.

Without any analysis or discussion, the Movant asserts that the Special Prosecutor "is no longer qualified to serve as a special prosecutor in this investigation" because of the passage of Act 64. Notice, paragraph 2, pages 4-5. As argued above in Section II, Act 64 is not retroactive, especially as it relates to the appointment of special prosecutors.

This claim is the latest challenge to the authority of the special prosecutor. The legality of the Special Prosecutor's appointment has

[13]The letter of August 13, 2015 was referenced in the September 2, 2015 Reply Brief on page 9, section C as Exhibit A. An amended filing on September 3, 2015 included that letter, as the incorrect exhibit had been included with the September 2, 2015 Reply Brief.

already been litigated, and appellate courts twice affirmed that appointment by the John Doe Judge. In the September 2, 2015 Reply Brief at pages 2-5, the Special Prosecutor addressed claims that he had no authority to file the Motion to Reconsider. The reasons stated there are equally applicable in the context of this newest submission concerning special prosecutor authority. Furthermore, if the Movant's argument was valid, it would allow the legislature to end the appointment of a special prosecutor investigating them, or their political allies.

C. The Movant requests that pursuant to Wis. Stat. § 968.26(7) notice be given to parties whose email accounts have been seized.

The Movant requests that the court order service of notice under Wis. Stat. § 968.26(7). Notice, paragraph 4, page 5. Once again, this argument assumes the retroactivity of Act 64, a proposition which the Special Prosecutor disputes.

Clearly, the Movant seems anxious to have this court mandate the future course of every detail of the closure of the investigation. As the Special Prosecutor has urged before, preemption of the discretion of the John Doe judge on matters such as this is unwise. Even if we were to assume Wis. Stat. § 968.26(7) applied retroactively, the Movant is asking the court to enter a specific order in a factual vacuum. The Movant wants

this court to order notice to "all parties whose documents, statements, or communications were seized, obtained, or recorded . . . ." Notice, page 8. On the basis of the record before this court, the court has no way of knowing the full nature and extent of the items and materials gathered in the course of this investigation. Nevertheless, the Movant urges the court to rule that a recorded conversation is "property" within the meaning of the statute. Similarly, as the court knows, email accounts were seized in the course of the investigation. If a Gmail account is obtained by order of the John Doe judge, does Google hold the property interest in that account? If the Gmail account pertains to Person A and Person A sends an email to Person B, does Person A have a property interest in the Gmail account? Does Person B have an interest in the Gmail account such that notice is required, even though Person B's email account (which might be held by Time Warner, for example) was never seized? How broadly should the word "interest" be construed? Unquestionably, the media has an "interest" in the email accounts and bank records seized during the course of this investigation. Are media outlets entitled to be notified of what was seized? While certainly the Special Prosecutor thinks not, the point to be made is that the decision regarding notice under Section 968.26(7) is one best left to

a judicial officer familiar with the items seized; it should not be made in a vacuum.

D. The Movant's prior requests to modify the secrecy order of the John Doe judges now take the form of a claim that Act 64 requires this.

Noted above in Section III, the Special Prosecutor submits that, to the extent Act 64 and Section 12j purport to "undo" secrecy orders entered in every pending and closed John Doe proceeding in the history of the State, such an enactment is unconstitutional as an unreasonable and unduly burdensome infringement upon judicial authority. The Movant contends, nevertheless, that Act 64 prohibits judges from entering orders allowing for the use of John Doe materials in a second, related judicial proceeding. Presumably, the Movant would contend that such Orders are barred as it may relate to additional lawsuits the Movant (or others) may bring against the Special Prosecutor and/or persons associated with the investigation. This section addresses that specific claim. The Special Prosecutor asserts that the newly constituted Section 968.26 does not address the issue of judicial authority to enter an order allowing for the use of John Doe materials in a second, related judicial proceeding.

At paragraph 5.b (Page 6) of its Notice, based upon the passage of Act 64, the Movant asserts it will no longer be possible for John Doe judges to grant prosecutors' ex parte requests to disclose previously secret filings or evidence. Consistent with this position and as set forth at pages 8-9 of its Notice, the Movant seeks an "order prohibiting the further use or disclosure of evidence seized or obtained in John Doe I or II." This request is predicated on the Movant's reading of the newly enacted statute at Wis. Stat. 968.26(4). Without explanation, the Movant implies that a John Doe judge no longer has discretion over the terms and conditions of secrecy in a John Doe proceeding, specifically involving the release of John Doe records and evidence in a separate but related judicial proceeding. In fact, Act 64 does nothing to change a John Doe judge's discretion over the secrecy of a John Doe proceeding, especially as it relates to the use of secret materials in a separate judicial proceeding.

Both the old and the new versions of Wis. Stat. 968.26 are phrased in terms of secrecy orders which "may" be entered by the John Doe judge. To be sure, the newly enacted John Doe statute addresses the termination of the secrecy order. Likewise, it addresses a circumstance where a criminal complaint is filed following a John Doe investigation. The statute, however,

does not address the use and disclosure of John Doe materials in a separate, related judicial proceeding. In fact, the newly enacted statute is silent on the issue of if, when, and how John Doe materials may be used in a second proceeding.

The Special Prosecutor's letter to the court, dated August 13, 2015 (and submitted as Exhibit A to his Reply Brief on September 3, 2015), submits that a John Doe judge had full authority to enter an order specifying the terms and conditions under which John Doe materials may be used in a second, related judicial proceeding. See Letter, pages 5-6. Such an order did not, in any way, contravene the provisions of the former statute.

Likewise, a Use and Disclosure Order allowing the use of John Doe materials in a second judicial proceeding would not contravene the provisions of the new statute. While the Special Prosecutor submits that no John Doe I matters are properly before this court, Judge Nettesheim's Use and Disclosure Order, as discussed in my August 13, 2015 letter, is useful as an example under the new statute. In that circumstance, Judge Nettesheim authorized the use of John Doe materials in a federal civil rights lawsuit brought by Cynthia Archer under Title 42, section 1983 of the

United States Code. Judge Nettesheim did not terminate the secrecy order in John Doe I when he entered his Use and Disclosure Order. In other words, were it applicable to John Doe I, Section 968.26(4)(b) – pertaining to "termination" of a secrecy order – would not apply. Even after entry of the Use and Disclosure Order, the general secrecy order remained in effect for John Doe I. Moreover, Cynthia Archer was never charged with a crime. Consequently, the provisions of Section 968.26(4)(c) would not apply. Stated another way, judicial authorization of the use and disclosure of John Doe materials in a second proceeding is not governed by either subsection (4)(b) (termination of secrecy order) or 4(c) (subsequent filing of criminal charges) of the newly created statute. In this context, discretionary authority remains. The Movant is legally wrong to suggest otherwise.

Especially since the revisions to the John Doe statute appear to be modeled after the Federal Rules of Criminal Procedure at Rule 6(e), it is appropriate to consider federal law as applied to these circumstances. In relevant part, Rule 6(e)(2) delimits who may be bound by a secrecy order:

> (2) Secrecy. (A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).
> (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
> (i) a grand juror;

(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

However, the grand jury secrecy rule is not unconditional. Rule 6(e)(3)(E)(i) provides:

> (E) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-jury matter:
> (i) preliminarily to or in connection with a judicial proceeding;

This has long been the rule in the federal courts. See *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 220 (1979) ("[R]ecognition of the occasional need for litigants to have access to grand jury transcripts led to the provision in Fed.Rule Crim.Proc. 6(e)(2)(C)(i) that disclosure of grand jury transcripts may be made 'when so directed by a court preliminarily to or in connection with a judicial proceeding.'").

And despite complaints about unidentified persons (apparently made by Movant on behalf of others not a party to these proceedings) who were not afforded an opportunity to be heard prior to the entry of Judge Nettesheim's Use and Disclosure Order (Notice, page 6), even the federal

rules allow for an ex parte application for use in a second related proceeding by the Government.[14]

As recognized by the federal rules, release of secret investigative materials may indeed be appropriate for use in a second, related proceeding. Such a release may occur without respect to the termination of any secrecy order and without the filing of criminal charges. The federal rules acknowledge the legitimacy of a request and order for use in a second proceeding. By analogy to the federal rules, inasmuch as such authority is not denied to John Doe judges under revised Section 968.26, it is reserved to their discretion.

[14] Fed. R. Crim. P. 6(e)(3)(F) states: "Unless the hearing is exparte – as it may be when the government is the petitioner – the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) an attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate." (Emphasis added)

V. THE "UNRESOLVED ISSUES" AND THE SPECIFIC REQUESTS FOR RELIEF ADVANCED BY THE MOVANT ARE NO MORE PERSUASIVE NOW THAN WHEN ADVANCED PRIOR TO THE PASSAGE OF ACT 64.

A. The improper use of John Doe materials

At page 7 of its Notice, the Movant identifies certain "Unresolved Issues," one of which discusses the "use" of John Doe materials. Suggesting that the Special Prosecutor plans "to use unlawfully seized materials to initiate an 'action independent of the John Doe proceeding,' " and asserting that the Special Prosecutor is combing through "troves" of John Doe evidence, the Movant repeats a request for an order prohibiting the Special Prosecutor for pursuing "theories not articulated in the search warrants." In support of its claim that the Special Prosecutor is improperly examining evidence and planning alternative theories of prosecution, the Movant cites the Special Prosecutor's Motion for Reconsideration at page 21.

Especially because Judge Peterson has entered orders prohibiting further examination of John Doe evidence, the Special Prosecutor is at a loss to understand the Movant's position, i.e., that the Special Prosecutor's arguments in the Motion for Reconsideration at page 16 et seq., (including page 21) equate to a "sinister" plan to sift through troves of John Doe

evidence and formulate alternative theories of prosecution. Unlike this Movant, [15] the Special Prosecutor has consistently obeyed the orders of this Court and Judge Peterson. There are no plans to change that practice. There is no danger that there will be a clandestine search for forbidden materials for the purpose of forming some alternate theory of prosecution.

The Special Prosecutor's position in the Motion for Reconsideration at page 21 does not remotely resemble the characterizations as contained in the Movant's Notice at page 6-7. Page 21, cited by the Movant, is contained within a section entitled in relevant part, "Further Review by the United States Supreme Court May Lead to a Resumption of the Investigation either in the Context of a John Doe Investigation or Independent Thereof." Motion to Reconsider, page 16. The entire section from which the Movant quotes assumes that this court's decision will be overturned by the United States Supreme Court and for that reason, a destruction order should be stayed.

[15] [REDACTED].

In the Motion to Reconsider at page 20-21, the Special Prosecutor contended that an order for destruction must be stayed pending review by the United States Supreme Court notwithstanding the fact that the order was affirmed as an exercise of the John Doe judge's discretion. At page 21, it states that, "[t]he Special Prosecutor acknowledges that Judge Peterson, in the exercise of his discretion, may for some reason – presently unknown – decide not to continue the John Doe proceeding, even if the Special Prosecutor would prevail before the United States Supreme Court."

But refusing to continue a John Doe investigation is not the same thing as saying that evidence from that John Doe proceeding may not be used independently of that proceeding. Even if Judge Peterson were to end the John Doe after the Special Prosecutor's success before the United States Supreme Court, the John Doe evidence must be available for use by a prosecutor acting independently and outside the context of the John Doe proceeding. This is so because a district attorney may always proceed independently, without participation of the John Doe Judge, and file a complaint based solely upon evidence obtained through a John Doe proceeding. *See State v. Cummings*, 199 Wis.2d 721, 744-45, 546 N.W.2d 406, 415 (1996) ("[W]e see no reason why a district attorney could not

independently [i.e., without participation of the John Doe Judge] file a complaint based solely upon evidence obtained through a John Doe proceeding, even if it was the district attorney who initiated the John Doe.) *See also State v. O'Connor*, 77 Wis.2d 261, 274, 252 N.W.2d 671, 676 (1977)("If evidence adduced in the [Dane County] John Doe investigation together with information obtained by the authorities from other sources amounts to probable cause, we see no reason why a criminal action may not be initiated by means of a complaint filed with and a warrant issued by any judge or court commissioner having jurisdiction to act in [Milwaukee County].")

B. Notice by an elected judge, designated to replace Judge Peterson and Judge Nettesheim.

The Movant's second "Unresolved Issue" concerns the issuance of a Wis. Stat. § 968.26(7) notice by an elected judge, designated to replace the John Doe judge. *See* Notice, paragraph B. 2, page 7. As argued above, Wis. Stat. § 968.26(7) does not apply to these proceedings and even if it did, the court would be ill advised to enter orders affecting types of evidence with which it is not familiar. *See generally* Section II. *See also* Section IV.C. As argued above in Section II. B and Section III, Act 64 does not and cannot require the replacement of Judge Peterson with an

elected judge. Finally, as argued in prior filings, nothing concerning Judge Nettesheim and John Doe I is presently pending before this court.

C. The Movant's requests for relief contained at pages 8-9 of the Notice.

The Movant makes five requests for relief, some of which are unconnected to any prior section in its Notice. Each of these will be addressed here.

1. The appointment of a judge to oversee the disposition of John Doe II evidence.

Act 64 does not require the replacement of Judge Peterson; provisions regarding the service of reserve judges do not have retroactive application. Moreover, if so applied, Act 64 would violate the doctrine of separation of powers.

2. The filing of a sworn accounting that identifies those who were allowed to view or obtain copies or summaries of those documents.

This request for relief finds no basis in statutory law. Act 64 does not contain any provision requiring any form of "sworn accounting," nor does it require any form of accounting at all. Laws in effect prior to the passage of Act 64 do not either. The manner and form of any John Doe closure should be addressed to the John Doe judge, not this court.

3. Service of notice under Wis. Stat. § 968.26(7).

For the reasons contained in Section II generally and Section IV.C above, these notice provisions do not apply.

4. A sworn statement certifying compliance with Wis. Stat. § 968.26(7).

In addition to the inapplicability of Wis. Stat. § 968.26(7), there is no requirement for a sworn accounting of any kind either in Act 64 or in the case law.

5. An order prohibiting the use and disclosure of John Doe materials in a second, related judicial proceeding.

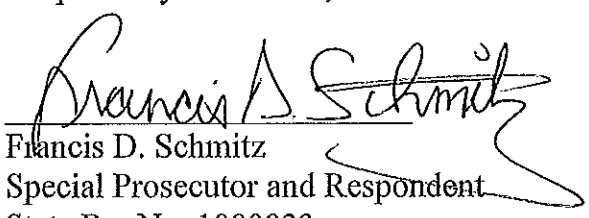
Whether or not provisions regarding secrecy orders are held to be retroactive, nothing in Act 64 addresses the question of the use of John Doe materials in a related, second judicial proceeding. As the Federal Rules of Criminal Procedure recognize at Rule 6(e)(3)(E)(i), grand jury materials may be made available for purposes of a second, related judicial proceeding. The newly enacted Section 968.26 does not prohibit the use of John Doe materials in a second, related proceeding. Not having been denied to him or her, that power remains available to exercise in the discretion of the John Doe judge. *See* Section IV.D above.

VI. CONCLUSION

The provisions of Act 64 cannot abrogate court orders which were lawfully issued under existing statutory authority. Prospective application of the statutory revisions in Act 64 to Wis. Stat. 968.26 and other provisions recognize the authority of the legislature to mandate changes, while ensuring that the legislature is not substantially interfering with the judicial branch. The movant's arguments relying upon the passage of Act 64 represent an attempt to revisit matters previously considered and rejected by the court, such as the removal of the Special Prosecutor, and for the reasons discussed in this response, should be summarily rejected.[16]

Dated this 17th day of November, 2015.

Respectfully Submitted,



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[16] One cannot help but notice that the revisions to Wis. Stat §968.26 parallel arguments previously asserted by the movant and rejected by this court in the underlying John Doe appeals.