

UNDER SEAL

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

UNDER SEAL

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Case No. 2013AP002504 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

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

Respondents.

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Case No. 2013AP002505 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,  
John Doe Judge, THE HONORABLE JAMES P. DALEY,  
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

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Case No. 2013AP002506 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

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

Respondents.

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Case No. 2013AP002507 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,  
John Doe Judge, THE HONORABLE JAMES J. DUVALL,  
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

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Case No. 2013AP002508 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

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

Respondents.

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AFFIDAVIT IN SUPPORT OF THE RESPONSE  
OF THE SPECIAL PROSECUTOR  
(FILED UNDER SEAL)

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STATE OF WISCONSIN )

) ss.

MILWAUKEE COUNTY )

John T. Chisholm, being first duly sworn on oath, deposes and says

that:

1. I am the District Attorney of Milwaukee County.

2. I make this Affidavit in support of a Response to a Petition for a Supervisory Writ filed in the court of appeals in the above encaptioned matters.

3. In August 2012, a John Doe investigation was commenced in Milwaukee County Case No. 12JD000023. This investigation involved allegations of campaign finance law violations under Chapter 11 of the Wisconsin Statutes. Judge Barbara A. Kluka was assigned to hear this John Doe proceeding. Although the Milwaukee County District Attorney's Office had jurisdiction to both investigate and ultimately prosecute certain of the suspected criminal violations of Chapter 11, it was also clear that the activity in question happened outside of Milwaukee County and involved the residents of four other Wisconsin counties across the state, *viz.*, Columbia, Dane, Dodge and Iowa Counties.

4. Because of the statewide nature of the investigation and because the investigation involved issues of statewide importance, on January 18, 2013, in a meeting in Madison, Wisconsin, I tendered the John Doe investigation to the Wisconsin Department of Justice and Attorney General J.B. Van Hollen.

5. On June 5, 2013, I received a letter from Attorney General J.B. Van Hollen. Attorney General Van Hollen declined involvement, citing conflict of interest principles and the appearance of impropriety. He recommended the involvement of the Government Accountability Board (GAB), which he viewed as an entity with appropriate jurisdiction.

6. On June 26, 2013, at the offices of the Government Accountability Board in Madison, Wisconsin, I met with the District Attorneys for the Counties of Columbia, Dane, Dodge and Iowa. At that time, I explained to them the nature of the investigation, including the fact that the Attorney General had refused tender of this investigation and that subject(s) of this investigation lived within their counties. I also discussed with the elected District Attorneys my view that a single attorney with authority across all five counties should be appointed to handle this matter before a single John Doe judge.

7. Between the dates of July 12, 2013 and July 18, 2013, with the knowledge and approval of the local District Attorneys, I met with the Presiding Judges of the Counties of Columbia, Dane and Iowa. Representatives of the Government Accountability Board also attended these meetings. As with the District Attorneys, I explained my views

regarding the need for the commencement of the John Doe proceedings in the four “new” counties, the need for a single judge and the need for a single prosecutor to oversee the investigation. The Presiding Judges were provided with the same materials provided to the elected District Attorneys, *i.e.*, the Milwaukee County Affidavits dated August 10, 2012 (with exhibits) and December 10, 2012 (without exhibits).

8. On July 9, 2013, I spoke by phone with Presiding Judge John Storck of Dodge County. Judge Storck declined the opportunity to meet in person. By phone, I provided Judge Storck with the same information I provided to the District Attorneys and the other Presiding Judges.

9. I understand that the District Attorneys for the Counties of Columbia, Dane, Dodge and Iowa subsequently commenced a John Doe investigation in their respective counties.

10. I understand that the Director of State Courts thereafter issued an order appointing Judge Barbara A. Kluka to hear the John Doe proceedings in the Counties of Columbia, Dane, Dodge and Iowa.

11. Attached to this Affidavit as Exhibit A is a true and correct copy of a letter signed I signed along with the District Attorneys of Columbia, Dane,

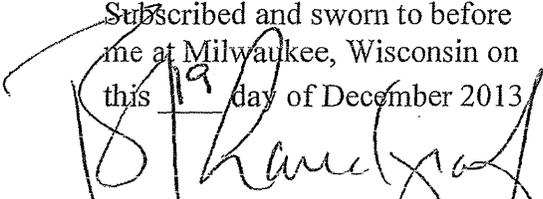
Dodge and Iowa Counties dated August 21 / 22, 2013 to John Doe Judge

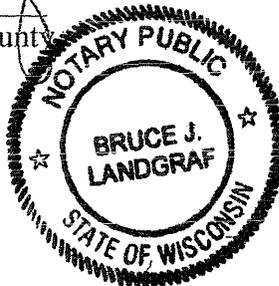
Barbara A. Kluka.

Dated this 19<sup>th</sup> day of December 2013.

  
\_\_\_\_\_  
John T. Chisholm  
District Attorney  
Milwaukee County  
State Bar No. 1023023

Subscribed and sworn to before  
me at Milwaukee, Wisconsin on  
this 19 day of December 2013

  
\_\_\_\_\_  
Notary Public, Milwaukee County  
State of Wisconsin  
My commission is permanent.



**COPY**

FILED

AUG 29 2013

CIRCUIT COURT  
COLUMBIA COUNTY

August 21, 2013

Honorable Barbara A. Kluka  
Reserve Judge  
[REDACTED]  
Kenosha, WI 53140

Re: In The Matter of a John Doe Proceeding  
Columbia County Case No. 13JD000011 ✓  
Dane County Case No. 13JD000009  
Dodge County Case No. 13JD000006  
Iowa County Case No. 13JD000001  
Milwaukee County Case No. 12JD000023

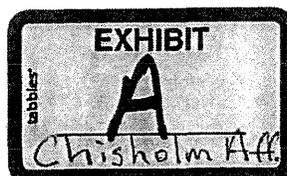
Dear Judge Kluka:

This letter follows the filing of a Petition to Commence a John Doe investigation in the case numbers referenced above. Of course, as you know, you have been assigned to hear John Doe proceedings in each of these five jurisdictions and you have also been appointed to act in that capacity by the Office of the Director of State Courts.

The John Doe Petition and supporting papers generally allege illegal campaign coordination between the Friends of Scott Walker, a campaign committee, and certain special interest groups organized under the auspices of IRC 501(c)(4).

By operation of §978.05(1), the responsibility for the prosecution of the crimes alleged in the John Doe Petition is fractionated across the offices of five different Wisconsin prosecutors. In reality, however, the investigation is one overall undertaking and should be managed by one prosecutor with general authority in all five counties. To proceed otherwise would unduly complicate, if not cripple, the investigation.

With this letter, we seek to apprise you of the legal and factual circumstances that make it appropriate to appoint a Special Prosecutor to handle this overall investigation. A special prosecutor is needed to review the allegations and, if charge(s) are well founded, then the Special Prosecutor should be authorized to proceed with said charge(s) through to



Honorable Barbara A. Kluka  
August 21, 2013  
Page 2

disposition. We submit you have the authority to make this appointment on your own motion and as part of your authority to efficiently administer an effective John Doe investigative proceeding.<sup>1</sup>

We begin by noting that in January of 2013, the Attorney General of the State of Wisconsin was requested to undertake the investigation and the potential prosecution of these campaign finance crimes. In a letter dated May 31, 2013, the Attorney General declined to assume responsibility for the investigation, primarily citing a conflict of interest and secondarily citing the appearance of impropriety. His letter to District Attorney John Chisholm is attached to this correspondence.

In his letter, the Attorney General states that – to the extent certain screening mechanisms might be employed to overcome the obstacles of conflict of interest and the appearance of impropriety – such devices should not be used in this investigation. He bases this conclusion on the availability of the Government Accountability Board (GAB) as a statewide agency intended to handle issues arising under the campaign finance laws. See the AG letter at page 2 (“This is because there is no necessity, at this time, for my office's involvement because there are other state officials who have equal or greater jurisdictional authority without the potential disabilities I have mentioned.”)

The Attorney General, however, does not address the fact that – to the extent this is a *criminal* investigation – the GAB is no substitute for a statewide criminal justice authority. Plain and simple, the GAB lacks authority to criminally prosecute anyone. Consequently, mindful that its investigation may compromise a related criminal inquiry by a prosecutor, the only rational course of action for the GAB (and the course actually taken here) is to involve – at the outset – the office of the affected prosecuting attorneys. Of course, the Attorney General's suggestion (*i.e.*, that a referral to the GAB is the solution) does not resolve the problem that caused Milwaukee prosecutors to refer the matter to him in the first instance. That is, the investigation was referred to avoid the fracturing of the investigation and prosecution across the offices of five local prosecutors.

John Doe investigations were never intended to be run by a committee of prosecutors. The inefficiency of a five-county investigation is well illustrated by the amount of time it has taken to get to this point after the Attorney General's May 31, 2013 refusal to act. That is, it has taken all of June, all of July and half of August to advance these five John Doe investigations to a point where a procedural matter, *i.e.*, the appointment of a centralized independent Special Prosecutor, can be addressed. This investigation cannot efficiently and effectively continue in this fashion.

Moreover, and just as the Attorney General himself recognized, the partisan political affiliations of the undersigned elected District Attorneys will lead to public allegations of impropriety. Democratic prosecutors will be painted as conducting a partisan witch hunt and Republican prosecutors will be accused of “pulling punches.” An independent Special Prosecutor having no partisan affiliation addresses the legitimate concerns about the appearance of impropriety.

For all of these reasons, the John Doe Judge should entertain, on its own motion and in the exercise of its inherent authority, the appointment of an attorney to serve in the role of a prosecutor who has authority across all involved counties. The Attorney General having disqualified himself, an attorney is required to act in his place.

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<sup>1</sup> See *State v. Cummings*, 199 Wis.2d 721, 735, 546 N.W.2d 406, 411 (1996) (finding the John Doe judge has authority to issue search warrants and noting that the John Doe “statutes should be interpreted in a manner which support their underlying purpose.”)

The authority for the appointment of a Special Prosecutor is found at Wisconsin Statutes §978.045 and has been discussed in *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 562 and *In re Bollig*, 222 Wis.2d 558, 587 N.W.2d 908 (1998). Although §§978.045(1g) and (1r) appear to limit an appointment of a Special Prosecutor to the circumstances listed in subsection (1r), these statutory sections have not been so interpreted by the courts. Rather, in *State v. Carlson*, *supra*, these statutory subsections have been liberally interpreted to allow for the appointment of Special Prosecutors in circumstances not expressly addressed by the precise terms of subsection (1r). The *Carlson* court wrote:

In the case at bar, the appointment was made by the court on its own motion. A plain reading of the statute tells us that when a court makes this appointment on its own motion, *all that is required* of the court is that it enter an order in the record “stating the cause therefor.” Wis. Stat. § 978.045(1r). Then, the appointed special prosecutor may “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.” *Id.* In short, if a court makes a special prosecutor appointment on its own motion, it is constrained only in that it must enter an order in the record stating the cause for the appointment.

*Carlson*, 2002 WI App 44 at ¶9 (emphasis in original)(footnotes omitted).

We additionally and respectfully submit that a John Doe judge has the inherent, if not express,<sup>2</sup> authority to appoint a Special Prosecutor here. Considerations of investigative efficiency and economy require an attorney to serve in the role that would otherwise have been provided by the Office of the Attorney General. Such an appointment allows for the orderly progression of the overall John Doe investigation and is justified for that reason. See *State v. Cummings*, 199 Wis.2d 721, 735, 546 N.W.2d 406, 411 (1996).

We therefore recommend the appointment of Attorney Francis D. Schmitz as Special Prosecutor. Attorney Schmitz formerly served for nearly thirty years as a federal prosecutor. He has served as the Deputy United States Attorney for the Eastern District of Wisconsin, and he has also worked in Washington D.C. on sensitive national security investigations and issues related to Homeland Security. He currently practices law as a private attorney in Waukesha County.

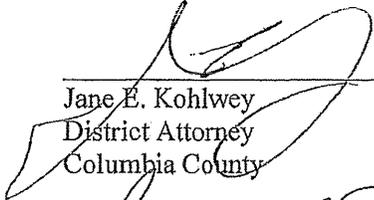
Attorney Schmitz should be empowered to investigate the possible crimes that are more fully described in John Doe papers filed herein. Further, Attorney Schmitz should be authorized to determine if criminal charges are appropriate and if he so determines, he should be given the authority to issue charges and proceed through to disposition with any such charges.

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<sup>2</sup> §978.045(1r) grants authority to “courts of record” for the appointment of Special Prosecutors. However, John Doe judges are not courts of record. *State v. Washington*, 83 Wis.2d 808, 828, 266 N.W.2d 597, 607 (1978). On the other hand, the third sentence of §978.045(1r) provides that a “judge” (rather than a “judge of a court of record”) may appoint a Special Prosecutor at the request of a district attorney in “John Doe proceedings under 968.26.” Consequently, §978.045(1r) may be express authority for the appointment of a Special Prosecutor in John Doe investigations.

We are authorized by Attorney Schmitz to represent that, if appointed, he will accept and will serve as a Special Prosecutor. Attorney Schmitz has agreed to work for an hourly rate of \$130.

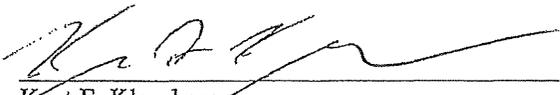
Very truly yours,

  
\_\_\_\_\_  
Jane E. Kohlwey  
District Attorney  
Columbia County

8/22/13  
Date

  
\_\_\_\_\_  
Ismael R. Ozanne  
District Attorney  
Dane County

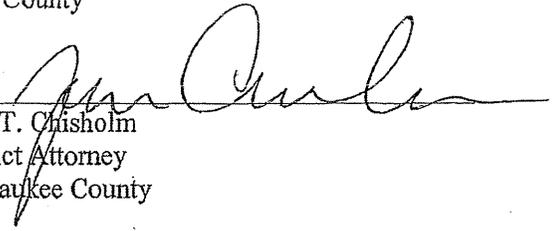
8-21-13  
Date

  
\_\_\_\_\_  
Kurt F. Klomberg  
District Attorney  
Dodge County

8/22/13  
Date

  
\_\_\_\_\_  
Larry E. Nelson  
District Attorney  
Iowa County

8/22/13  
Date

  
\_\_\_\_\_  
John T. O'Neil  
District Attorney  
Milwaukee County

8/21/2013  
Date

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Enclosure

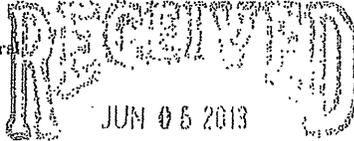


STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Kevin M. St. John  
Deputy Attorney General

Steven P. Means  
Executive Assistant



May 31, 2013

114 East State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

Office of District Attorney  
Milwaukee, WI 53233

Mr. John T. Chisholm  
District Attorney, Milwaukee County  
821 West State Street, Room 405  
Milwaukee, WI 53233

RE: Request for Assistance Relating To Campaign Finance Investigation

Dear District Attorney Chisholm:

Earlier this year, we met with you at your request to discuss the developments in a John Doe investigation relating to potential campaign finance violations involving campaign coordination (and thus the possibility that at least one non-candidate committee and possibly Friends of Scott Walker filed false reports with the Government Accountability Board). Deputy District Attorney Kent Lovern, Deputy Attorney General Kevin St. John, and DCI Administrator David Matthews also attended that meeting. You were concerned that the investigation was leading to subjects outside of your office's prosecutorial jurisdiction, and thus were seeking the assistance of the Department of Justice.

For the following reasons, we decline assistance at this time.

First, I am concerned about potential conflicts of interests that arise by virtue of our ongoing representation of Scott Walker in his official capacity as Governor. I have previously stated the basis of my concern in a December 3, 2010 correspondence relating to a prior investigation, and those concerns do not need to be repeated in detail here. While it is not clear that this investigation will indicate that Governor Walker has violated any Wisconsin laws, it is reasonably foreseeable that this may be a subject of the investigation. When lawyers have conflicts, client confidence that the lawyer is acting in their interest can erode and clients will be less willing to share information that is essential to providing sound legal advice.

Second, even in the absence of a true conflict by virtue of my representation of Governor Walker in his official capacity, I am concerned about the perception that my office can not act impartially, thus undermining public confidence in the investigation as a whole, particularly if the investigation does not result in an enforcement action. These perceptions may arise because of the general governmental relationship between the Administration and the Department of

Justice or because of my personal relationship with the Governor.

I know that you appreciate this concern. In the past, you have requested my office review criminal complaints that were related to actions by the Milwaukee County Executive in his personal capacity and criminal complaints involving the conduct of a former state representative with whom you were personally acquainted.

Third, beyond my relationship with the governor, this investigation is likely to involve subjects who are politically involved on the conservative side of the political spectrum. At this point, I do not know all of the potential witnesses and subjects (and these will only be known with further investigation), but suffice it to say, this is a campaign finance investigation and there are a finite number of conservative-minded political activists, campaign operatives, and major donors in Wisconsin. Therefore, it is reasonable to foresee that if this investigation develops further, it could involve additional individuals with whom I or my campaign have had significant personal or business relationships. This may exacerbate any public perception that my office's involvement in an investigation would be biased.

To be sure, the statutory responsibilities of my office, which include both the legal representation of government officials and the enforcement of certain laws against all individuals and entities (including government officials), by their nature, create the potential for conflicts. In certain cases, the rules of professional conduct might not be strictly applied in order to accommodate statutory commands. *See, e.g.*, SCR Chapter 20, Preamble [18]. In some cases, conflict screens might be established to minimize the potential for conflict.

This is not a matter, however, where such devices should be employed, even if they could be employed effectively. This is because there is no necessity, at this time, for my office's involvement because there are other state officials who have equal or greater jurisdictional authority without the potential disabilities I have mentioned. The Government Accountability Board has statewide jurisdiction to investigate campaign finance violations, which may be civil or criminal in nature. Thus, there is no jurisdictional necessity to involve my office. Should the Government Accountability Board, after investigation, believe these matters are appropriate for civil enforcement, they have the statutory authority to proceed. Should the Government Accountability Board determine, after investigation, that criminal enforcement is appropriate, they may refer the matter to the appropriate district attorney. Only if that district attorney and a second district attorney declines to prosecute would my office have prosecutorial authority. *See generally* Wis. Stat. § 5.05(2m).

In many respects, the Government Accountability Board as a lead investigator and first decisionmaker is preferable in this specific context. First, the potential violations involve statutes that the Government Accountability Board administers. The specific area of campaign finance law that may be applicable in this case, coordination, is not a model of statutory precision or consistency. *Compare* Wis. Stat. § 11.06(7)(a) (specifying nature of oath of independent expenditures to include no "cooperation or consultation" with the supported candidate) *with* Wis. Stat. § 11.06(4)(a),(d) (requiring a candidate "control" or "direct" a contribution to be reportable). The Government Accountability Board's prior involvement administering and advising on these statutes increases the likelihood that they will be applied in

Mr. John T. Chisholm  
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this case in a manner consistent with prior interpretations. Second, this experience will better inform the discretionary determination of whether or not the civil or criminal enforcement is appropriate. Third, as a non-partisan entity, the Government Accountability Board's investigation may inspire more public confidence than an investigation led by partisan-elected officials.

This approach has precedent. Previously, my office made an initial inquiry into the actions of a high ranking Wisconsin government official relating to a potential violation of laws that the Government Accountability Board administers and enforces. The information was shared with the Government Accountability Board and we determined it was appropriate for the Government Accountability Board to conduct further inquiry while my office stepped back due to considerations similar to those expressed in this letter.

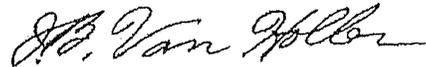
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The decision to decline to be involved at this time is based upon the specific facts and circumstances that have been presented to me. Unlike many circumstances involving investigation of potential criminal activity that transcends multiple jurisdictions, here there is a capable agency with equal statewide jurisdiction, meaning that my decision to decline participation will not undermine the state's ability to enforce the law. Moreover, there is no indication that there is a public safety threat or that there are ongoing violations of the public trust – factors that could augur for force multiplication. In summary, there is no necessity for the Department to exercise a discretionary authority where the exercise of that authority could also disable the Department's ability fulfill its other duties and responsibilities.

Moreover, this decision is made recognizing that conflict and impartiality issues are stressed within the context of the dynamic nature of a campaign financing investigation that could foreseeably involve individuals with whom I have relationships – individuals whose involvement may very well depend on the discretionary decisionmaking of investigators. Should the investigation develop into a more concrete form and potentially require the Department of Justice exercise of a different duty or power, we will revisit the appropriateness of our involvement – as occurred when the 2010 Milwaukee County probe led to particular criminal prosecutions that my office supported in the appellate courts.

Please contact me with any questions concerning this matter or if further explanation is required.

Sincerely,



J.B. Van Hollen  
Attorney General

Mr. John T. Chisholm  
Page | 4

Co: Kent Lovern, Deputy District Attorney  
Kevin St. John, Torney General  
David Matthe strator