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DEPARTMENT OF JUSTICE

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February 14, 2018

The Honorable Kendall M. Kelley
Circuit Judge, Branch 4
Brown County Circuit Court
100 South Jefferson Street
Green Bay, WI 54301

Re: Columbia County Case No. 13 JD 11, Dane County Case No. 13 JD 9, Dodge County Case No. 13 JD 6, Iowa County Case No. 13 JD 1, Milwaukee County Case No. 13 JD 23. Related Cases: 2013 AP 2504-W through 2013 AP 2508-W, 2014 AP 296-OA and 2014 AP 417-W through 2014 AP 421-W

Dear Judge Kelley:

At a hearing on February 1, 2018, you read into the record a series of questions related to your authority as the John Doe Judge in the case numbers listed above. You invited any interested party to file a brief by April 1, 2018, concerning your authority to act and answering the questions you posed.

Instead of waiting for the April 2018 deadline, I would like to answer some of these questions and then to provide you with some additional information that perhaps may short-circuit your remaining concerns.

The current John Doe investigation under these case numbers is closed, and has been since July 2015. *See State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶11, 363 Wis. 2d 1, 866 N.W.2d 165.

Because the investigation is closed, the John Doe statute (amended in 2015) has little bearing on your role in this case. In fact, the crimes alleged to have been investigated during the John Doe proceedings can no longer be the subject of a John

Doe proceeding, and neither can the leak of secret materials from the John Doe proceeding. *See* Wis. Stat. § 968.26.

It is therefore understandable that you would question what role you could possibly have in a case that is closed related to an investigation that can no longer proceed under a statute that has been effectively repealed.

The Wisconsin Supreme Court answered your question on November 23, 2016. As you indicated at the opening of the hearing, you have not yet had a chance to read the relevant material related to your new role as the John Doe judge. Therefore, I will provide some background and point you to some key documents.

After the Supreme Court closed the John Doe investigation in 2015, it ordered the then-John Doe Special Prosecutor, Francis Schmitz, to take certain actions. *State ex rel. Three Unnamed Petitioners v. Peterson,* 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49. For example, the Supreme Court ordered Mr. Schmitz to collect evidence obtained through the John Doe investigation, and then to file that material with the clerk. *Id.* at ¶ 37. Mr. Schmitz partially complied with this order and delivered some material to the clerk.

As you may know, in September 2016, several hundred pages of sealed and/or secret documents were published by *The Guardian* newspaper. This was an obvious violation of the John Doe Judge's secrecy orders; no one has disputed this point.

In response to this leak, several Unnamed Movants filed a motion in the Supreme Court for the immediate return of property, a criminal investigation, and other post-judgment relief. At that same time, I filed a letter asking for the Supreme Court to appoint a special master to handle the return of property and investigation of the leak. This special master would have been ordered to complete all the tasks that you are now being asked to complete by certain interested parties. The Supreme Court, however (and from my perspective, unfortunately), declined these requests.

Writing specifically concerning the questions you now pose, the Supreme Court wrote that despite the closure of the John Doe investigation, there is a "need for a judge to remain in place over the John Doe II proceedings." Attached Order, pg. 2. This judge (now, you) is needed to "handle the wind-up of the John Doe II investigation pursuant to the directions of this court." Additionally, the Court explained that the John Doe Judge should "resolve future disputes about the matters related to the John Doe II investigation and proceedings." The Court specifically said that this directive includes handling "disputes regarding the John Doe II evidence."

Finally, the Court directed that "all motions regarding the John Doe II investigation and proceeding must be filed with the John Doe II judge in the first instance."

Following these explicit instructions and directives, your predecessors (Judge Wambach and Judge Hue) issued several orders concerning a variety of matters related to the evidence and the leak investigation, including search warrants. All of these orders are sealed, but they are available to you in the court file. These orders will help you understand what types of actions your predecessors took under the authorities granted by the November 2016 order.

As noted above, your charge is to "handle the wind-up of the John Doe II," which would necessarily include matters related to the "John Doe II evidence." This is not a question about conducting a John Doe investigation, or handling matters from a John Doe investigation, but handling the *wind-up* of this investigation by dealing with the evidence from the closed investigation and resolving disputes related to the now closed investigation. One of the core responsibilities in this role is to handle the proper disposition of the evidence, whether that evidence is presently located at the Wisconsin Supreme Court clerk's office or within multi-national data centers operated by Google and Dropbox, as explained below.

From the Department of Justice's perspective, there are two outstanding matters, one of which I have decided to resolve on my own.

First, in December, the Department requested that you refer Attorney Shane Falk to the Office of Lawyer Regulation for knowing and repeated violation of Judge Peterson's January 27, 2014, order. We originally referred this matter to the John Doe Judge because we believed that such a referral would be the most logical and appropriate, given your predecessors active involvement in winding up the John Doe as ordered by the Supreme Court.

Given the pending questions, however, concerning your authority and the related delay (to at least April 1, 2018, and beyond), I have decided to refer Shane Falk directly to OLR myself. In this referral, we will attach emails derived from search warrants, along with a redacted version of the John Doe Judge's Stay of Proceedings, dated January 27, 2014. This order and these emails may be used by the Department under the February 15, 2017, order from Judge Wambach, which provides that the Department may "make use of such materials in their investigation and to the extent necessary for the performance of their duties as investigators and prosecutors."

Therefore, because of my decision to make this referral, the Department no longer requires your assistance related to the OLR referral.

Second, the Department also requested that you issue an order to show cause pursuant to Wis. Stat. § 785.03(1) directing certain individuals to comply with the Supreme Court order requiring complete divestment of John Doe evidence or face sanctions pursuant to Wis. Stat. § 974.04(1). The Department filed this request under seal because the letter identified the address of one Dropbox account and seven email accounts that were active at the time. These accounts contain secret and/or sealed materials, and, at the time of that letter, they were located on third-party servers. The letter asked the John Doe Judge for remedial contempt; in other words, the John Doe Judge should order the individuals who created and own these accounts to close them and to ensure that no secret and/or sealed materials remain on Google or Dropbox servers.

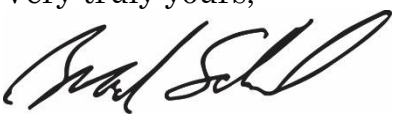
Given the Supreme Court's directive for the John Doe Judge to "handle the wind-up of the John Doe II" and "resolve future disputes about the matters related to the John Doe II investigation and proceedings," we believe these pending tasks concerning remedial contempt are plainly within your authority. In fact, you are the only person who can complete these tasks since the Supreme Court directed that these matters be taken to you "in the first instance." Moreover, Supreme Court precedent imposes upon you a "clear duty" to investigate possible violations of a secrecy order, *see State v. O'Connor*, 77 Wis. 2d 261, 282, 252 N.W.2d 671 (1977), which would necessarily include the former GAB's decision to place secret materials on third-party servers without authorization. *Id*. ("If it is brought to the attention of the judge that the secrecy of the proceeding is threatened, the judge has a clear duty to inquire into the matter and take such steps as may be appropriate.")

As a final matter, all of the evidence and materials gathered by Attorney Schmitz and the Department are presently in the custody of the clerk of the Wisconsin Supreme Court. It is our understanding that some individuals may want you to take action to return this property (or at least to provide access) to those victims of this illegal investigation. I strongly support this action, so long as special procedures are in place to ensure that the victims' property (i.e. email accounts) are not disclosed to third parties. I believe a special master, appointed by the Court, could carefully dispatch such duties.

Finally, I recommend the unsealing of all orders, motions, and briefs in the John Doe files, as well as the former GAB and Milwaukee County Gmail accounts,

with proper redactions to protect the privacy those private individuals whose personal information appears within those papers. Such an order will allow the public to see at last the full scope of the activities undertaken as part of this investigation.

Very truly yours,



Brad D. Schimel
Wisconsin Attorney General

BDS:dpl:pwc

Enclosure

c: Interested Parties

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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November 21, 2016

To:

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Dodgeville, WI 53533

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Milwaukee County Clerk of Circuit Court
901 N. 9th St., Rm. G-8
Milwaukee, WI 53233

*Additional Parties listed on Pages 15-17

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

Nos. 2013AP2504-2508-W Three Unnamed Petitioners v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

2014AP296-OA Two Unnamed Petitioners v. Peterson
L.C.#s2012JC23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

2014AP417-421-W Schmitz v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

The court has pending before it two motions: (1) the motion of Unnamed Movants Nos. 6 & 7 for immediate supervised return of property and for criminal investigation, and (2) the motion of Unnamed Movant No. 2 for post-judgment relief. The former special prosecutor (Attorney Francis D. Schmitz) and the Intervenors (District Attorneys John T. Chisholm, Ismael R. Ozanne, and Larry E. Nelson) have filed joint responses to each of the motions. In addition, Attorney General Brad D. Schimel has filed a letter regarding some of the subjects raised in the pending motions.

Among other things, one or both of the pending motions request the termination of the John Doe II[1] judge and the appointment of a special master, an order from this court for the investigation of leaks of John Doe evidence and documents in violation of the secrecy orders entered by the John Doe II judges, and the modification of this court's December 2, 2015 opinion and order regarding the submission under seal of John Doe II (and certain John Doe I) evidentiary materials to the clerk of this court.

We deny the two pending motions and all of their requests for relief from this court in their entirety. We address here the three points described above that are raised in the pending motions and in the Attorney General's letter.

First, we reject any call for the termination of the John Doe II judge and essentially the replacement of the John Doe II judge with a special master appointed by and answerable to this court. It is true that the John Doe II investigation has been closed since the issuance of our decision on July 16, 2015. The closure of the investigation, however, does not mean that there is no need for a judge to remain in place over the John Doe II proceedings. As the current motions demonstrate, there remains a need for a John Doe II judge to handle the wind-up of the John Doe II investigation pursuant to the directions of this court and to resolve future disputes about matters related to the John Doe II investigation and proceedings, including disputes regarding the John Doe II evidence. Accordingly, all motions regarding the John Doe II investigation and proceedings must be filed with the John Doe II judge in the first instance.

Second, we reject any request for this court to conduct or to order a criminal investigation of the leaks of John Doe evidence and matters covered by the John Doe II secrecy orders. It is true that the judicial branch has authority to protect and enforce its orders. In our tri-partite form of government, however, it is the executive branch that investigates and prosecutes potential crimes. The executive branch remains free, subject to the applicable laws governing that branch, to investigate and/or prosecute criminally individuals who may have unlawfully disclosed John Doe evidentiary materials in potential violation of criminal statutes, if they apply. Under these circumstances, it is not for this court to investigate or prosecute crimes, nor is it for this court to direct a co-equal branch of government to do so.

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[1] As we did in our December 2, 2015 opinion and order, we use the term "John Doe II" to refer to the John Doe proceedings and the now-closed accompanying investigation in five counties that was initially presided over by Reserve Judge Barbara A. Kluka, then was presided over by Reserve Judge Gregory Peterson, and since February 2016 has been presided over by Judge David J. Wambach. We use the term "John Doe I" to refer to the earlier John Doe proceeding and investigation in Milwaukee County (Case No. 10JD7) that was presided over by Reserve Judge Neal Nettesheim.

Finally, we reject any call for this court to modify the provisions of our December 2, 2015 opinion and order regarding the submission of the John Doe II (and certain John Doe I) evidentiary materials to the clerk of this court. The former special prosecutor has deposited sealed boxes with the clerk of this court and has filed an affidavit attesting to his compliance with those provisions. Accordingly,

IT IS ORDERED that the motion of Unnamed Movants Nos. 6 & 7 for immediate supervised return of property and for criminal investigation is denied.

IT IS FURTHER ORDERED that the motion of Unnamed Movant No. 2 for post-judgment relief is denied.

ANN WALSH BRADLEY, REBECCA GRASSL BRADLEY, and DANIEL KELLY, J.J., did not participate.

¶1 SHIRLEY S. ABRAHAMSON, J. *(dissenting).* I do not join the instant order rejecting "any call for the termination of the John Doe II Judge [presently Jefferson County Circuit Court Judge David Wambach]" because the order does not provide sufficient clarification or guidance for the John Doe II Judge and other interested persons.

¶2 In sum, I write separately dissenting to the instant order for two reasons.

¶3 First, the order is premature. The court needs to address several pending questions of law before it turns over the "wind-up" of the John Doe II investigation and proceedings to a John Doe II Judge.

¶4 The three justices issuing this unsigned order, Chief Justice Roggensack and Justices Ziegler and Gableman, submerge outstanding legal issues they refuse to decide in an attempt to be free (at least for a while) from the myriad issues arising from the John Doe II proceedings they attempted to terminate in July 2015 and then again in December 2015.

¶5 Because the three justices are unwilling to come to grips with remaining undecided legal issues, the John Doe proceedings will continue to consume significant court time. Review will be sought in this court of John Doe II Judge rulings; the nature of these future review proceedings is left unresolved.

¶6 As I have written before, an order of this court addressing in piecemeal fashion the multiple issues facing the court "begets further generations of motions and orders, leaving room for further inconsistencies and changes of course."[2]

¶7 Second, the order is flawed. The instant order fails to address several discernible issues raised by the two motions and the letter from the Attorney General referenced in the instant order and is replete with ambiguities.

¶8 I begin by setting forth four legal issues the court has refused to decide. The court's refusal to decide the following legal issues renders the instant order premature:

A. The instant order is premature because the legislature's 2015 amendments to the John Doe statute raise significant questions of law regarding which iteration of the John Doe statute governs the John Doe II wind-up proceedings.

B. The instant order is premature because it fails to provide for the appointment of a successor John Doe II Judge. Judge Wambach has announced his retirement from the bench as of March 31, 2017. If the 2015 amendments to the John Doe statute apply, a reserve judge cannot be a John Doe II Judge.

C. The instant order is premature because the John Doe II wind-up proceedings before Judge Wambach have been going on for more than six months. If the 2015 amendments to the John Doe statute apply, an extension of the John Doe II beyond six months requires a majority of judicial administrative district chief judges to find good cause for extension.

D. The instant order is premature because the two motions at issue are sealed. The motions should be unsealed and filed in open court files, with redactions as needed, so that the public knows the contents of the motions and can understand and evaluate the instant order.

¶9 After discussing the premature nature of the instant order, I then explore what I perceive as flaws in the instant order that should be corrected to assist the John Doe II Judge and other interested persons during the forthcoming John Doe II proceedings. Finally, I object to the court's procedure in issuing this order.

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[2] See my separate writing concurring in part and dissenting in part to an order dated February 5, 2016, in the John Doe trilogy.

I

¶10 The court's refusal to decide the following legal issues renders the instant order premature.

A

¶11 The instant order is premature because the legislature's 2015 amendments to the John Doe statute raise significant legal questions of statutory interpretation and constitutional law regarding the applicability of the 2015 amendments to the John Doe II wind-up proceedings. (The John Doe II proceedings began in 2012 and the 2015 amendments to the John Doe statute took effect on October 25, 2015.)[3] These questions of law must be decided to determine which iteration of the John Doe statute governs the John Doe II proceedings before Jefferson County Judge David Wambach as the John Doe II Judge.

¶12 The very documents appointing Judge David Wambach as the John Doe II Judge demonstrate the confusion about the applicable law.

¶13 Jefferson County Circuit Court Judge Wambach was appointed the John Doe II Judge on February 12, 2016. A document appointing a John Doe Judge has previously been treated as a public record under the public records law. The document appointing Judge Wambach does not seem to have been made publicly available. I attach one of the appointment documents hereto as Attachment A. The other appointment documents for the other "John Doe counties" are the same.

¶14 The assignment of Judge Wambach as John Doe II Judge describes the assignment as "Case reassigned per Wis. Stat. 968.26(1b)(b)." This reference to Wis. Stat. 968.26(1b)(b) is a reference to a provision newly created in the 2015 amendments to the John Doe statute. A subsection numbered § 968.26(1b)(b) did not exist prior to the enactment of the 2015 amendments. New § 968.26(1b)(b) excludes reserve judges from being appointed as John Doe Judges.

¶15 This reference to the 2015 amendments in an "administrative appointment document" (signed by Chief Justice Patience Roggensack and Denis Moran, Interim Director of State Courts) cannot be viewed as a decision by the justices participating in the John Doe trilogy

[3] See 2015 Wis. Act 64 amending Wis. Stat. § 968.26. This Act was enacted October 23, 2015, and published on October 24, 2015. The effective date of 2015 Wis. Act 64 was October 25, 2015. An act takes effect the day after publication. Wis. Stat. § 991.11 (2013-14).

on the applicability of the 2015 amendments.[4] But the appointment documents do evidence the muddle about the applicability of the 2015 amendments to the John Doe II proceedings.

¶16 Determining which version of the John Doe statute governs the John Doe II proceedings is important because several 2015 amendments significantly change the John Doe statute and John Doe proceedings. For example, the 2015 amendments state that no secrecy order under the John Doe section of the statutes "may apply to any other person" than government officers and employees who participate in a John Doe proceeding. See 2015 Act 64, section 6 creating § 968.26(4).[5]

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[4] Judge Wambach is the John Doe II Judge only, not the John Doe I Judge. See n.1 of the order. Note 1 uses the past tense to describe Reserve Judge Neal Nettesheim as the John Doe I Judge. Is there a John Doe I Judge presently available to preside over any wind-up John Doe I proceedings?

[5] Section 6 of 2015 Act 64 provides as follows:

SECTION 6. 968.26 (4) of the statutes is created to read:

968.26 (4) (a) The judge may enter a secrecy order upon a showing of good cause by the district attorney. A secrecy order under this paragraph 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.

(b) If a judge enters a secrecy order under par. (a), the judge shall terminate that secrecy order if any person applies to the judge for the termination and establishes that the good cause shown under par. (a) no longer exists. If a judge terminates a secrecy order entered under par. (a), the identity of the subject of the proceeding under this section may not be disclosed without the subject's consent, except as provided in par. (c).

(c) If a criminal complaint is filed following a proceeding in which the judge entered a secrecy order, the order is terminated at the initial appearance and s. 971.23 governs disclosure of information from a proceeding under this section.

(d) Any person who violates a secrecy order entered under par. (a) is subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

¶17 The 2015 amendments also explicitly provide that section 6 of the Act creating Wis. Stat. § 968.26(4) is effective on October 25, 2015, and affects John Doe secrecy orders then in existence. Section 12j of the 2015 amendments is a non-statutory provision declaring that newly created § 968.26(4) applies to secrecy orders in existence as of October 25, 2015:

> **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.

¶18 The instant order directs the John Doe II Judge to act "pursuant to the directions of this court." Yet the court provides no directions. For example, the court does not direct the John Doe II Judge or the movants regarding the effect of new section 6 and the other 2015 amendments on the John Doe II proceedings. Is it a violation of the constitutional separation of powers doctrine for the legislature to overturn an existing secrecy order of the court or John Doe II Judge?

¶19 The applicability of the 2015 amendments to the John Doe statute is not a new issue for this court. It was presented to the court more than a year ago. On October 28, 2015, Unnamed Movant No. 2 filed a "Notice of Statutory Changes," advising the court of the 2015 amendments to the John Doe statute effective October 25, 2015.

¶20 The "Notice" treated the 2015 amendments to the John Doe statute as retroactive, that is, as applicable in their entirety to John Doe II proceedings. Unnamed Movant No. 2 also asked that the court grant various forms of relief.

¶21 Special Prosecutor Schmitz advised the court on October 30, 2015, that he considered Movant No. 2's "Notice" a motion seeking an order from this court and that he would respond. He did.[6]

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[6] This response was filed under seal in this court. The Department of Justice attached an excerpt of this response to the brief dated August 2016 that it filed (representing John Doe II Judge Wambach) in the United States Supreme Court. The brief urged the Court to deny the Petition for Certiorari. By an order dated September 20, in which three justices participated, a redacted version of the response of the Special Prosecutor was unsealed and placed in the open files in this court.

¶22 Unnamed Movant No. 2 filed a reply to the Special Prosecutor's response regarding the "Notice of Statutory Change."[7]

¶23 Now, take a one-year step forward from Unnamed Movant No. 2's October 28, 2015 "Notice of Statutory Changes" to a letter from Unnamed Movant No. 2 to this court dated October 14, 2016. This October 14, 2016 letter is not sealed. It is in the open court files. The letter declares that section 6 of the 2015 amendments to the John Doe statute topples the secrecy orders issued by the previous John Doe II Judges and by this court in a March 27, 2015, order and that "the secrecy orders do not—and cannot—apply to Unnamed Movant No. 2."

¶24 In the instant order, the court ducks the questions of statutory and constitutional law presented to the court more than a year ago (and just last month) regarding the applicability of all or part of the 2015 amendments to John Doe II proceedings. The instant order is premature because the John Doe II Judge and other interested persons need to know which version of the John Doe statute governs the wind-up proceedings before they engage in these proceedings.

B

¶25 The instant order is also premature because it fails to provide for the appointment of a successor John Doe II Judge on Judge Wambach's imminent retirement as a circuit court judge for Jefferson County.

¶26 Judge Wambach has announced that he will retire as of March 31, 2017, about four months from now. I do not anticipate that the wind-up John Doe II proceedings will be completed by then, especially in light of several actions pending in federal courts that may stimulate motions for release of John Doe II records.

¶27 Even if Judge Wambach is eligible as a reserve judge to be assigned as the John Doe II Judge (contrary to the 2015 amendments to the John Doe statute), his appointment as a reserve judge before 75 days elapse after his retirement is problematic. See Wis. Stat. § 40.26(5).

[7] In view of the 2015 amendments to the John Doe statute and Unnamed Movant No. 2's "Notice," Assistant Attorney General Rice wrote the court on behalf of John Doe Judges Peterson and Nettesheim, stating that the two John Doe judges would not take further action until the Supreme Court determines that it is appropriate for them to proceed.

¶28 Does it make sense for Judge Wambach to continue to preside over the John Doe proceedings from the date of the instant order until March 31, 2017, and then hand the baton off to another judge, or have the John Doe II proceedings deferred for 75 days?

C

¶29 The instant order is also premature because it is not clear that the wind-up John Doe II proceedings can continue immediately upon the issuance of the instant order.

¶30 The 2015 amendments to the John Doe statute, if applicable to the pending John Doe II proceedings, can be read to provide that no John Doe proceeding may last longer than 6 months unless "a majority of judicial administrative district chief judges find good cause for the extension and identification of the vote of each judge is available to the public." Wis. Stat. § 968.26(5) (2013-14).[8]

¶31 The John Doe proceedings have lasted more than six months since they began in 2012; since October 25, 2015 (the effective date of the 2015 amendments); and since John Doe II Judge Wambach was appointed on February 12, 2016.

¶32 Is a majority vote of the judicial administrative district chief judges necessary under the 2015 amendments to the John Doe statutes to continue the John Doe II proceedings? If so, is the provision constitutional? Shouldn't this question of law be decided by this court before it issues the instant order?

D

¶33 The instant order is premature because the two motions at issue are sealed. The motions should be unsealed and filed in the open court files, with redactions as needed, so that the public knows the contents of the motions and can understand and evaluate the instant order. The Attorney General's letter that the instant order addresses is unsealed and available to the public.

¶34 The two motions referenced in the order (and related documents) were automatically sealed without court order and without any attempt to provide redacted copies to the public.

[8] A member of this court has lobbied the legislature to revise this provision.

¶35 Proposals to release (with and without redactions) these sealed documents have taken a back seat to issuance of the instant order, although no emergency exists requiring the release of the instant order on Monday, November 21, 2016. (More about this later.)

¶36 In order for the public to understand the instant order and the present status of the John Doe II proceedings, the two motions at issue should be unsealed (with redactions, if needed) before the instant order denying the motions is released.

II

¶37 I turn to describe several flaws in the instant order. More defects in the instant order will become obvious as the John Doe II proceedings go forward, as will the premature nature of the instant order.

(1)

¶38 The instant order is flawed because the narrative in the instant order states that motions regarding the John Doe II investigation and proceedings must be filed with the John Doe II Judge in the first instance, but the "It is Ordered" language in the instant order denying the two motions does not use this language. It uses different language. Unfortunately this difference in language raises an ambiguity in the order.

(2)

¶39 The instant order is flawed because the narrative in the instant order denies the two pending motions and all of their requests for relief from this court in their entirety, but the "It is Ordered" language denying the two motions does not use this language. It uses different language. Unfortunately, this difference in language raises an ambiguity in the order.

(3)

¶40 The instant order is flawed because it does not state where motions regarding this court's orders and decisions are to be filed (in contrast with its statement about where motions regarding the John Doe II Judge's orders and decisions are to be filed). Should the movants and the John Doe II Judge assume that motions regarding this court's orders and decisions are to be filed in this court? Is not this court better able to interpret and apply its orders and decisions to specific facts than the John Doe II Judge?

(4)

¶41 The instant order is flawed because it does not address whether the John Doe II Judge may conduct or order a criminal investigation of the leaks or undertake contempt proceedings. Although the instant order rejects any request that this court conduct or order a criminal investigation of the leaks as contrary to the Wisconsin constitutional separation of powers doctrine, the instant order is silent about the powers of the John Doe II Judge regarding investigation into the leaks and contempt proceedings.

¶42 The instant order does not comment on John Doe II Judge Wambach's letter dated September 22, 2016, to a movant. The letter is, in my opinion, unnecessarily filed under seal in its entirety. Does the letter constitute a ruling from which review in this court may be sought?

(5)

¶43 The instant order is flawed because it does not determine whether filings with the John Doe II Judge after this court agreed to decide the John Doe trilogy of cases and filings with the John Doe II Judge after this court terminated the investigations and the United States Supreme Court denied certiorari are subject to the John Doe II secrecy order.[9]

¶44 These filings are apparently maintained under seal in the John Doe II files kept by the respective clerks of each circuit court.[10]

¶45 Wasn't the purpose of the secrecy orders to protect the conduct of the John Doe II investigation and the identity of persons who became involved in the investigation? The investigation is now completed. To the extent that these filings do not fall within the purpose of the secrecy orders, shouldn't the filings be open with redactions as needed?

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[9] Nor is the authority of the John Doe Judge II over John Doe I material resolved in the instant order.

[10] As I understand it, the records of the John Doe II proceedings filed in Milwaukee and Dane counties before this court took the John Doe trilogy of cases were transmitted to the office of the Clerk of the Supreme Court. The records of the John Doe II proceedings filed in Iowa, Columbia, and Dodge counties are on file in the office of the clerk of circuit court in those counties.

(6)

¶46 The order is flawed in that it does not fully address the import of comments in the letter of the Attorney General dated October 27, 2016. This letter is not filed under seal and is available for public view.[11]

¶47 The Attorney General's letter generously offers to assist any special master the court appoints in place of the John Doe II Judge in further investigation and in responding to legal issues raised.

¶48 Because the instant order denies any request to appoint a special master, the instant order is silent with regard to the Attorney General's offer of assistance to a special master.

¶49 The Department of Justice has over these many months played a role in the proceedings, albeit limited, representing the John Doe II Judge in his official capacity in this court and in the United States Supreme Court. Nothing in the record reveals that the Department of Justice has conducted investigations for a John Doe II Judge or has given legal advice to a John Doe II Judge with regard to the John Doe II Judge's executing his or her duties as a John Doe II Judge.

¶50 Then-Attorney General Van Hollen declined to have the Department of Justice become involved in the John Doe II investigation because of personal as well as institutional relationships of the Attorney General and the Department of Justice with various persons involved in the John Doe II proceedings. These relationships continue with the present Attorney General.

¶51 The Attorney General's letter is not the only Department of Justice communication to this court about the John Doe II proceedings. On October 20, 2016, Assistant Attorney General David Rice of the Department of Justice wrote Chief Justice Roggensack on behalf of John Doe II Judge Wambach. This letter is unnecessarily sealed, in my opinion.

¶52 In any event, because of the Attorney General's and Department of Justice's past involvement in the John Doe II proceedings, although limited, and the relationships of the Attorney General and the Department of Justice with various persons involved in the John Doe II

[11] I would suggest that when a request is made to the court, it be made in the form of a motion, rather than as a letter. The court and interested persons know the procedures for responding to a motion.

proceedings, shouldn't the instant order instruct the John Doe II Judge not to accept the Department of Justice's assistance in investigation or legal advice?

(7)

¶53 The instant order is flawed because it is silent regarding whether the John Doe II Judge should keep the wind-up proceedings sealed or as open to the public as possible. The future proceedings before the John Doe II Judge and before this court address matters of great public interest. Why shouldn't further proceedings before the John Doe Judge and this court be open to public scrutiny to the maximum extent possible?

(8)

¶54 The instant order is flawed in failing to explain whether participation in the wind-up proceedings is within the limited tasks the court specifically assigned to and authorized the Special Prosecutor to undertake in State ex rel. Two Unnamed Petitioners v. Peterson, 2015 WI 103, ¶¶30-38, 365 Wis. 2d 351, 875 N.W.2d 49. Shouldn't the authority of the Special Prosecutor be made clear?

III

¶55 Before I conclude this separate writing, I write once again to register an objection to court procedure.

¶56 I advised the justices at closed conference on Monday, November 14, 2016, that I would write to an order that would be drafted. I further explained that I would have limited time to write during the week of November 14 and the week of November 21 in light of planned court activities (the Judicial Conference, which the justices attend, began at 7:30 AM on Wednesday, November 16—with travel on Tuesday, November 15—and ended at noon on Friday, November 18, with travel back to Madison after noon); my writings due shortly on other pending court matters; and Thanksgiving week (during which I would be traveling across the country to be with my family).

¶57 The justices participating in the John Doe II matters received the following e-mail from Patience Roggensack on Tuesday, November 15, at 4:01 PM, relating to court procedure to be followed regarding the instant order:

> I understand that [the commissioners] will be circulating the denial order this afternoon. All separate writings are due Monday, Nov. 21 by noon. The order

with any separate writings that a justice cares to create will be released at 4:00 Nov. 21. Nothing will be released on these motions later.[12]

¶58 This e-mail is unfortunate in two respects. First, it seriously errs in declaring that a justice can be prevented from publicly distributing a writing on a court matter. Second, the e-mail does not even attempt to accommodate in any way a member of the court who is preparing a separate writing. Some might infer that the objective of the e-mail (or at least a natural consequence of the e-mail) is to derail a separate writing.

¶59 The three other participating justices have approved the instant order. The text of the e-mail, like other similar e-mails in other cases, bars those who join the circulated draft (here the instant order) from writing after the set date and time—here noon on Monday, November 21, 2016. Thus the e-mail bars justices from changing the instant order after a separate writing is distributed before noon.

¶60 The e-mail highlights the adoption of a second-rate decision making process for a multi-member court. Communication (whether oral or in writing) among the justices and respect for each other's ideas and work ethic should be nurtured, not curbed, if this court is to improve its reputation and issue excellent work.

¶61 For the reasons set forth I do not join the instant order. I write separately on the merits of the order and to object to the court's procedure.

Diane M. Fremgen
Clerk of Supreme Court

[12] The commissioners circulated the instant order at 4:04 PM on November 15, 2016.

Nos. 2013AP2504-2508-W Three Unnamed Petitioners v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23
2014AP296-OA Two Unnamed Petitioners v. Peterson
L.C.#s2012JC23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11
2014AP417-421-W Schmitz v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

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