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February 5, 2016

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*Additional Parties listed on Pages 17-18

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

On July 16, 2015, this court issued a decision resolving all three matters identified above: an original action (No. 2014AP296-OA) filed by two Unnamed Movants,[1] and two petitions for supervisory writs, one of which was filed by three Unnamed Movants (No. 2013AP2504-2508-W) and the other of which was filed by the former Special Prosecutor, Attorney Francis Schmitz (No. 2014AP417-421-W). All three of these proceedings arose out of and were connected to

[1] We use the term "Unnamed Movants" as it was defined in this court's July 16, 2015 decision.

what has become known as "John Doe II."[2] In the July 16, 2015 decision this court terminated the John Doe II proceedings and investigation.

In each of the proceedings in this court, Attorney Francis Schmitz was a party, either a named respondent (Case Nos. 2013AP2504-2508-W and 2014AP2960-OA), or a named petitioner (Case No. 2014AP417-421-W). He appeared in those actions in his official capacity at the time as a special prosecutor on behalf of the State of Wisconsin.

On December 2, 2015, this court issued a decision denying Attorney Schmitz's motion for reconsideration of the July 16, 2015 decision. As part of that December 2, 2015 decision, this court ruled that Attorney Schmitz's appointment as a special prosecutor had been invalid and terminated his authority to act as a special prosecutor, with the exception of performing certain specified tasks imposed by this court to wrap up the John Doe II proceedings and investigation. The court also indicated that given Attorney Schmitz's inability to continue acting as the special prosecutor, one or more of the district attorneys who petitioned for the commencement of the five John Doe proceedings could file a motion to intervene in the three John Doe II-related proceedings pending in this court.

On December 18, 2015, three district attorneys, Milwaukee County District Attorney John T. Chisholm, Dane County District Attorney Ismael R. Ozanne, and Iowa County District Attorney Larry E. Nelson (the Intervenor District Attorneys) filed a motion seeking to intervene as parties in all three actions pending in this court. Their motion indicated that they were seeking to intervene as district attorneys (not as private citizens). On January 12, 2016, this court granted the motion of the three district attorneys to intervene as parties in the three John Doe II-related proceedings in this court. Because the three district attorneys sought to intervene as district attorneys and this court granted their request, they became parties in their official capacities.

On January 25, 2016, the Intervenor District Attorneys filed a motion to amend the John Doe II secrecy orders to allow three specific attorneys (Brian A. Sutherland, Kasey J. Curtis, and M. Patrick Yingling) and an administrative assistant (Laura Espino) associated with the Reed Smith LLP law firm, as well as an unspecified specialist printing company, to have access to unredacted versions of documents contained in the John Doe II record, as well as unredacted briefs and other documents filed in this court. The motion stated that the Reed Smith law firm had already agreed to represent the Intervenor District Attorneys on a pro bono basis "for the limited purpose of preparing the petition for certiorari and any merits briefing that may follow

[2] We use the term "John Doe II" to refer to the John Doe proceedings and the accompanying investigation in five counties that were initially presided over by Reserve Judge Barbara A. Kluka until the fall of 2013 and then were presided over by Reserve Judge Gregory A. Peterson.

and presenting oral argument in the United States Supreme Court." The motion did not indicate that anyone other than the Intervenor District Attorneys had authorized this representation. The motion requested that the specified individuals and the printing company employees be granted authorization to view record documents covered by the John Doe II secrecy orders in order to prepare filings and make argument in the U.S. Supreme Court and also to file such documents in that Court, "provided that intervenors seek leave to file such documents under seal in that Court."

Responses objecting to the Intervenor District Attorneys' motion were filed by a number of the Unnamed Movants. Among other things, the responses questioned the authority of the Intervenor District Attorneys to file a petition for certiorari because they argue that only the Department of Justice (DOJ) may represent the State of Wisconsin on appeals under Wis. Stat. § 165.25(1). The responses also question the ability of the Intervenor District Attorneys to retain private counsel to represent them in that process.

A reply memorandum in support of the motion was filed by the Intervenor District Attorneys. They asserted that while Wis. Stat. § 165.25(1) does provide that the DOJ shall appear on behalf of the State in appeals, it does not preclude other parties from defending the constitutionality of state statutes. The Intervenor District Attorneys made clear that they intend to pursue a petition for certiorari in their official capacities, noting that they have an interest in defending the state laws as district attorneys because they commenced John Doe investigations on the basis of their understanding of those laws. They specifically drew a distinction between themselves and private citizens who seek to intervene to defend state statutes. They also alleged that their decision to retain the Reed Smith law firm is proper because the Reed Smith attorneys would only be briefing a legal question presented in the original action in the U.S. Supreme Court, because the involvement of the Reed Smith attorneys would end at the conclusion of the U.S. Supreme Court proceedings, and therefore because the Intervenor District Attorneys would not be delegating prosecutorial discretion (as they define it) to the Reed Smith attorneys.

Having reviewed the parties' filings, the court concludes that the current motion should be denied. In order to consider whether it would be appropriate to amend the existing secrecy orders to allow the Reed Smith attorneys and administrative assistant to view documents in the John Doe II record and in the appellate record in this court, we first must consider whether the alleged attorney-client relationship between the Intervenor District Attorneys and Reed Smith LLP is one that this court can recognize as valid. If the Intervenor District Attorneys lack the unilateral authority to retain the Reed Smith law firm to represent them, then there is no reason to amend the John Doe II secrecy orders to grant the Reed Smith attorneys and administrative assistant access to any documents or information covered by those secrecy orders.

The Intervenor District Attorneys have offered no legal authority to support their ability to retain outside counsel to represent them in their official capacities as district attorneys who represent the State in proceedings of a criminal nature. While the proceedings here are not criminal actions in the usual sense of that term where there is a criminal complaint filed that alleges violations of the criminal law, the proceedings here result from John Doe proceedings, which are criminal in nature. Petitioning for the commencement of and participating in a John Doe proceeding is part of the prosecutorial function of district attorneys. District attorneys petition for the commencement of John Doe proceedings and participate in those proceedings on behalf of the State. In addition, the former special prosecutor asserted that he acted in the John Doe II proceedings and in the proceedings in this court as the special prosecutor for the State of Wisconsin. Thus, to the extent that he determined which legal arguments to make and which not to make, he was exercising a prosecutorial function on behalf of the State. Similarly, to the extent that the Intervenor District Attorneys intend to pursue review in the U.S. Supreme Court, the decisions on what to argue and what not to argue will likewise be part of the exercise of the prosecutorial function on behalf of the State. The Intervenor District Attorneys, however, indicate in their motion that they want to retain the Reed Smith attorneys for the purpose of having those attorneys prepare the petition for certiorari, prepare any briefs on the merits if review is granted, and finally to present oral argument on the merits. The Intervenor District Attorneys have presented no authority that a single state prosecutor (or three prosecutors) can confer those parts of the prosecutorial function on behalf of the State onto private outside attorneys. See, e.g., 27 C.J.S. District and Prosecuting Attorneys § 27 (2015) (in absence of statutory authority, prosecuting attorneys are generally not authorized to delegate official powers and duties to others, including private counsel). The Intervenor District Attorneys have further not established that they, as public officials who represent the State in criminal investigations and proceedings, can retain outside private counsel. Indeed, they have not shown why they need assistance.

The portion of the motion that seeks the amendment of the John Doe II secrecy orders to allow employees of a specialist printing company to view certain documents covered by those secrecy orders must also be denied at this time. The Intervenor District Attorneys have not identified which specialist printing company they intend to use, nor do they indicate that they will obtain an agreement from a specific printing company and the employees involved in the preparation and printing of any petition for certiorari that they will maintain the confidentiality of any documents or information covered by the John Doe II secrecy orders.[3]

[3] The court is mindful that there are unique requirements for filing a petition for certiorari in the United States Supreme Court and that petitioners often employ printing companies who specialize in formatting and printing such petitions. If a subsequent motion to amend the secrecy orders by the Intervenor District Attorneys would identify a specific printing company and provide assurance that the company and its relevant employees will maintain the secrecy of

Finally, we grant the portion of the motion that seeks the amendment of the John Doe II secrecy orders to allow the Intervenor District Attorneys to file unredacted versions of documents from the John Doe II records and from the appellate record in this court in the U.S. Supreme Court, provided that the Intervenor District Attorneys seek leave to file such documents under seal in that Court. We note that this part of the motion does not pertain to all documents or information obtained in the course of the John Doe II investigation, but is limited to those documents that are contained in the records of the John Doe II proceedings and of this court.

IT IS ORDERED that the motion to amend the John Doe II secrecy orders to grant access to unredacted portions of the John Doe II records and this court's records to Attorney Brian A. Sutherland, Attorney Kasey J. Curtis, Attorney M. Patrick Yingling, and Ms. Laura Espino of Reed Smith LLP is denied.

IT IS FURTHER ORDERED that the motion to amend the John Doe II secrecy orders to grant access to unredacted portions of the John Doe II records and this court's records to an unspecified specialist printing company and its employees is denied.

IT IS FURTHER ORDERED that the motion to amend the John Doe II secrecy orders to allow Intervenors, District Attorney John T. Chisholm, District Attorney Ismael R. Ozanne, and District Attorney Larry E. Nelson to file unredacted versions of documents contained in the John Doe II records and this court's records in the United States Supreme Court, provided that the Intervenors seek leave to file such documents under seal in that Court, is granted.

ANN WALSH BRADLEY AND REBECCA G. BRADLEY, J.J., did not participate.

¶1 SHIRLEY S. ABRAHAMSON, J. *(concurring in part, dissenting in part).* I concur in the order granting the three district attorneys' motion to amend the secrecy orders to permit them to file unredacted versions of documents contained in the John Doe II records and this court's records under seal in the United States Supreme Court. I dissent, however, from the order denying the motion to amend the secrecy orders to permit access to the John Doe II records by three pro bono attorneys, a paralegal, and a printing company for the purpose of assisting the district attorneys in filing a petition for certiorari in the United States Supreme Court.

¶2 Despite the four justices' assurances just two months ago that the district attorneys could seek to intervene in these actions and that the four justices would "avoid impeding in any way the ability of the prosecution team to seek certiorari review in the United States Supreme

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documents covered by the John Doe secrecy orders, this court would give prompt review to such a motion.

Court," the four justices adopt yet another inconsistent position, impeding the ability of the district attorneys to obtain "assistance," as they request, from experienced pro bono counsel for the specialized task of petitioning for certiorari in the United States Supreme Court.[4]

¶3 I write separately to make four points:

1. Although the instant order (unlike many previous orders and decisions that offered no analysis[5]) provides analysis of the four justices' reasoning. The four justices' analysis is misguided and unpersuasive. Instead, the analysis contained in the instant order is an outcome in search of a theory.

   Contrary to the four justices' conclusion, the district attorneys have offered legal authorities do support their position. They do have the authority to retain pro bono counsel to assist in the preparation of a petition for certiorari in the United States Supreme Court. Neither the instant order nor the Unnamed Movants cite any authority barring the district attorneys from obtaining pro bono representation to assist in the preparation of a petition for certiorari in the United States Supreme Court. Given that the district attorneys have the authority to retain pro bono counsel, those counsel should be granted access to the record to the same extent and under the same restrictions as the district attorneys.

   Moreover, this issue only arose because of the four justices' insistence on excessive secrecy in the John Doe trilogy. Much of the record in the John Doe trilogy has been

[4] Numerous articles have identified the relatively recent rise of a specialized Supreme Court bar. See, e.g., Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 Geo. L.J. 1487 (2008).

A recent study of the 93,000 petitions for certiorari filed between 2001 and the start of the 2015 United States Supreme Court term found that although the United States Supreme Court grants less than 1% of the petitions for certiorari, a small number of experienced Supreme Court practitioners have 15% to 29% of their petitions granted. See Adam Feldman & Alexander Kappner, Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015, USC Center for Law & Social Science, Legal Studies Research Paper Series No. 16-5, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715631.

[5] See, e.g., Attachments D and E to my concurrence/dissent to the December 2, 2015 per curiam (court orders denying motions for limited intervention and remand to the John Doe judge without analysis or explanation).

maintained under seal without any review by this court and without any instruction or order from this court. Any need to maintain the secrecy of portions of any filings should have been addressed promptly by the participating justices and material redacted for the public if necessary. If the four justices had followed this process, the district attorneys' pro bono attorneys (as well as the public) could have had access to the record and the basis for this court's decisions.

2. Despite the four justices' earlier statement that they wanted to "avoid[] impeding in any way the ability of the prosecution team to seek certiorari review in the United States Supreme Court," the four justices are now impeding the district attorneys' efforts to obtain assistance in filing a petition for writ of certiorari. In so doing, the four justices demonstrate their continued hostility toward the State and the "prosecution team" that are supporting the constitutionality of the Wisconsin campaign finance laws regulating coordination.

3. In the instant order, the four justices once again address the multiple issues facing the court in piecemeal fashion. As a result, the instant order will beget further generations of motions and orders, leaving room for further inconsistencies and changes of course.

4. The instant order appears to consider several filings opposing the motion to amend the secrecy orders submitted by the Unnamed Movants after a court-ordered deadline. The Unnamed Movants submitted these filings without filing a motion to extend time as required by Wis. Stat. § (Rule) 806.07. Because the Unnamed Movants have not shown excusable neglect, I would not consider the late filings.

¶4 For the reasons set forth, I concur in part, dissent in part, and write separately.

I

¶5 The four justices deny the district attorneys' motion to amend the John Doe secrecy orders to allow the record filed in this court to be shared with three pro bono attorneys and a paralegal from a private law firm, Reed Smith LLP, and an unnamed printing company for the purpose of preparing a petition for writ of certiorari and/or merits briefing in the United States Supreme Court.

¶6 The four justices' order concludes that even though the instant cases "are not criminal actions in the usual sense of the term," the proceedings at issue here stem from John

Doe proceedings, "which are criminal in nature."[6] As a result, the four justices conclude that by allowing the Reed Smith attorneys to participate in briefing and argument in the United States Supreme Court, the district attorneys would be "confer[ring] . . . parts of the prosecutorial function on behalf of the State onto private outside attorneys.[7]

¶7 The four justices observe that the district attorneys have not "established that they, as public officials who represent the State in criminal investigations and proceedings, can retain outside private counsel."[8] More importantly, the four justices have not established that the district attorneys are barred from retaining pro bono outside counsel to assist in the specialized task of preparing a petition for certiorari.

¶8 The analysis presented by the four justices is simply an outcome in search of a theory. It is unpersuasive for several reasons.

¶9 First, the district attorneys are obviously seeking review in the United States Supreme Court of only one of the John Doe trilogy's three constituent cases to the United States Supreme Court: namely the original action, State ex rel. Two Unnamed Petitioners v. Peterson, No. 2014AP296-OA. The original action was brought by Two Unnamed Petitioners seeking a declaratory judgment that regulation of coordinated issue advocacy is invalid.

¶10 Although the issues raised in the original action addressed the Special Prosecutor's legal theory in the underlying John Doe II investigation, the original action was brought by private citizens on publici juris grounds. The private citizens sought a declaratory judgment determining the constitutionality of Wisconsin's campaign finance laws, a matter of concern to all persons in Wisconsin.[9] The original action is not in a criminal case. The original action asked the court to resolve purely legal questions.

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[6] Order at 4.

[7] Order at 4.

[8] Order at 4.

[9] The private citizen-petitioners in the original action stated the first issue as "[w]hether the plain language and statutory history of Chapter 11, viewed in light of this Court's and the U.S. Supreme Court's precedents, dictate that the statutory definition of 'contributions' made 'for political purposes' in Wis. Stat. Ch. 11 is limited to expenditures for express advocacy, lest it run afoul of the U.S. and Wisconsin Constitutions." In the view of the private citizen-petitioners in the original action, "every Wisconsin citizen who wishes to engage in issue advocacy with the aim of influencing an election is at risk today. To provide clarity in this important and now

¶11 The four justices' focus on the "criminal . . . nature" of John Doe proceedings is misplaced.[10] Even if some part of John Doe proceedings are criminal in nature (even though no criminal charges have ever been filed in the John Doe trilogy), the original action at issue here is not a criminal case, and the district attorneys as intervening parties do not serve as prosecutors in the original action. Instead, the district attorneys are respondents in the original action, replacing the Special Prosecutor, who was named as a respondent by the private citizens who brought the original action. Involving pro bono counsel to assist the respondents in an appeal of this court's resolution of a purely legal question in the original action would not "confer . . . parts of the prosecutorial function . . . onto private outside attorneys."[11]

¶12 Second, and related, no statute, rule, or case law prohibits the district attorneys from obtaining the assistance of pro bono counsel. The Unnamed Movants cite three statutes, Wis. Stat. § 165.25(1), Wis. Stat. § 978.05(5), and Wis. Stat. § 14.11(2), to support their position.[12] The order does not rely on these three statutes because they do not support the four justices' position.

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confused area of law, this court's intervention is urgently needed publici juris." See February 7, 2014 petition for leave to commence an original action seeking declaratory judgment and other relief, No. 2014AP296-OA, at 2-3 (citation omitted).

[10] See Order at 4.

[11] See Order at 4.

This non-criminal original action differs from cases cited by the Unnamed Movants involving the delegation of prosecutorial functions to private attorneys in the trial of criminal cases. See, e.g., State v. Peterson, 195 Wis. 351, 218 N.W. 367, 368 (1928) (discussing the problems with delegating prosecution of criminals before and during trial to private attorneys paid by private parties); Biemel v. State, 71 Wis. 444, 37 N.W. 244, 245 (1888) (stating that attorneys employed and paid by private parties "should not be permitted . . . to assist in the trial of such criminal cases") (emphasis added); see also State v. Noble, 2002 WI 64, ¶¶44-46, 253 Wis. 2d 206, 646 N.W.2d 38 (Abrahamson, C.J., dissenting) (discussing Biemel and other cases involving the improper delegation of a district attorney's duties in the trial of criminal cases to private attorneys). Here, the private attorneys are not involved in the trial or prosecution of a criminal case.

[12] The Unnamed Movants also cite Wis. Stat. § 978.045, which allows for the appointment of a special prosecutor under certain circumstances. The statute is inapplicable

¶13 I examine each of the three statutes relied upon by the Unnamed Movants.

¶14 The first statute relied upon by the Unnamed Movants, **Wis. Stat. § 165.25(1)**, provides that the Department of Justice shall "appear for the state and prosecute or defend all actions or proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested as a party . . . ."

¶15 The Department of Justice (and the attorney general) has appeared in the John Doe trilogy on behalf of the Chief Judges and John Doe Judge Peterson, not the prosecutors. But here, the Department of Justice (and the attorney general) have expressly declined to take part in the John Doe II investigation in response to a request for assistance by Milwaukee County District Attorney John Chisholm. Then-Attorney General J.B. Van Hollen stated in a March 31, 2013 letter to District Attorney Chisholm declining to assist in the investigation, "I am concerned about potential conflicts of interest" and "the perception that my office can not [sic] act impartially . . . ."[13]

¶16 More recently, Unnamed Movants have written to the attorney general asking him to "exercise [his] authority" under Wis. Stat. § 165.25(1). These letters have been filed in this court and are pending here. Late today, the district attorneys moved to strike these letters.

¶17 Although the attorney general and Department of Justice ordinarily represent the State's interests on appeal in state courts, private counsel or other government lawyers have represented the State in defending a statute. For instance, in Appling v. Walker, 2014 WI 96, ¶4 n.6, 358 Wis. 2d 132, 853 N.W.2d 888, ten individuals and an advocacy group were permitted to intervene to defend the constitutionality of the domestic partnership statute because "the Attorney General . . . declined to defend the . . . law and . . . the appointed counsel for the

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because the district attorneys do not seek to grant prosecutorial or investigative authority to the pro bono attorneys.

[13] See May 31, 2013 letter from Attorney General J.B. Van Hollen to Milwaukee County District Attorney John Chisholm, at 1-2.

The Attorney General also declined to represent the Government Accountability Board and Milwaukee County District Attorney John Chisholm in a federal case, Citizens for Responsible Government Advocates v. Barland, No. 14-C-1222 (E.D. Wis.), concerning the constitutionality of Wisconsin's campaign finance laws. See Citizens for Responsible Gov't Advocates, Inc. v. Barland, No. 14-C-1222, 2014 WL 5148437, at *1 (E.D. Wis. Oct. 14, 2014).

[governor and other state officials] likewise declined to defend the law. Accordingly, the task of defending the law fell solely to the intervening-defendants-respondents . . . ."[14]

¶18 Likewise, the United States Supreme Court has permitted intervenors represented by private attorneys to defend a federal statute. For example, in United States v. Windsor, 133 S. Ct. 2675, 2683-84 (2013), the United States Attorney General and Department of Justice declined to defend the federal Defense of Marriage Act. A group of members of the House of Representatives was permitted to defend the statute on appeal.[15]

¶19 The second statute relied upon by the Unnamed Movants, **Wisconsin Stat. § 978.05(5)**, states that a district attorney shall "[u]pon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from a county within his or her prosecutorial unit to the court of appeals or supreme court," is inapplicable here. As explained above, the district attorneys do not seek pro bono assistance in bringing a criminal appeal—they seek assistance in obtaining review in the United States Supreme Court of a decision of this court in an original civil action, which involves purely legal issues regarding campaign finance. The original action, as I have explained above, is not a criminal prosecution.

¶20 The third statute relied upon by the Unnamed Movants, **Wis. Stat. § 14.11(2)(a)**, states that "[t]he governor, if in the governor's opinion the public interest requires such action, may employ special counsel" under the following circumstances:

1. To assist the attorney general in any action or proceeding;

2. To act instead of the attorney general in any action or proceeding, if the attorney general is in any way interested adversely to the state;

3. To defend any action instituted by the attorney general against any officer of the state;

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[14] Appling v. Doyle, 2013 WI App 3, ¶3 n.2, 345 Wis. 2d 762, 826 N.W.2d 666 (Ct. App. 2012). Similarly, in Lake Beulah Management District v. State of Wisconsin Department of Natural Resources, 2010 WI App 85, ¶38 n.16, 327 Wis. 2d 222, 787 N.W.2d 926, aff'd in part, rev'd in part on other grounds, 335 Wis. 2d 47 (2011), counsel for the Department of Natural Resources defended the DNR on appeal because the Department of Justice refused to defend the DNR's actions on appeal.

[15] Windsor, 133 S. Ct. at 2684, 2689.

4. To institute and prosecute an action or proceeding which the attorney general, by reason of the attorney general's opinion as to the validity of any law, or for any other reason, deems it the duty of the attorney general to defend rather than prosecute.[16]

¶21 Wisconsin Stat. § 14.11(2), however, addresses the governor's authority to appoint special counsel, not the district attorneys' authority. The statute contains no requirement that a district attorney (or anyone else) to request the governor appoint counsel. Moreover, it appears from media discussion of the John Doe trilogy that the governor may have conflicts of interest. Is the governor really interested in appointing counsel to sustain the constitutionality of Wisconsin's campaign finance laws at issue in the instant cases?

¶22 In short, the four justices ask what allows the district attorneys to obtain pro bono legal representation in a civil case. However, the real question is what in the statutes, rules, or case law prevents the district attorneys from obtaining pro bono assistance in seeking certiorari in the United States Supreme Court. The answer is none.

¶23 Finally, I note that the need to amend the secrecy orders to permit the district attorneys to obtain pro bono assistance only arose because of the four justices' insistence on excessive secrecy in the John Doe trilogy. Much of the record in the John Doe trilogy has been maintained under seal without any review by this court and without any instruction or order from this court. Any need to maintain the secrecy of portions of any filings should have been addressed promptly by the participating justices and material redacted for the public if necessary. If the four justices had followed this process, the district attorneys' pro bono attorneys (as well as the public) could have had access to the record and the basis for this court's decisions.

[16] This last ground for the appointment of special counsel was at issue in Citizens for Responsible Government Advocates v. Barland, No. 14-C-1222 (E.D. Wis.), where the Attorney General declined to represent the Government Accountability Board and Milwaukee County District Attorney John Chisholm because he disagreed with the defendants' legal theory. See Barland, 2014 WL 5148437, at *1. The Governor delegated his authority to appoint counsel to his chief legal counsel, who eventually did appoint counsel pursuant to Wis. Stat. § 14.11(2), even though this statute does not authorize the governor to delegate his or her gubernatorial authority to appoint special counsel.

II

¶24 By preventing the district attorneys from obtaining pro bono legal representation in appealing the original action to the United States Supreme Court, the four justices are "interfer[ing] with the ability of the prosecution team to seek Supreme Court review."[17]

¶25 First, as I have explained previously, it appears that the four justices have treated the district attorneys, Special Prosecutor, and other members of the prosecution team unfairly. Among other things, the four justices have: (1) terminated the Special Prosecutor's appointment and authority, thus leaving the prosecution and State's interests totally unrepresented from December 2, 2015 forward; (2) denigrated the conduct of the Special Prosecutor, prosecutors, and law enforcement officers, including their conduct in the execution of search warrants even though there is no evidence or factual findings in the record to support this criticism; and (3) repeatedly denied limited intervention to the prosecutors, law enforcement officers, and investigators who wished to advocate for the preservation of materials they assert reveal the truth about the investigation, thus hindering their defenses.

¶26 Now the four justices go further, effectively preventing the district attorneys from obtaining pro bono assistance in preparing a petition for certiorari to challenge the four justices' rulings. The four justices generously allow the district attorneys to go to the United States Supreme Court, then place a roadblock in their path to the United States Supreme Court.

¶27 Does this order reflect the Unnamed Movants' and the four justices' anxiety that allowing the district attorneys to obtain pro bono assistance from appellate counsel will increase the chances of review in the United States Supreme Court of a recusal challenge under Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) and the constitutionality of Wisconsin's campaign finance statutes?

III

¶28 In biblical genealogy, Adam and Eve begat sons and daughters, who begat their own sons and daughters, who begat their own sons and daughters, who begat the generations that followed.[18]

[17] Per curiam, ¶16.

[18] Genesis 5:4-32.

¶29 Just as each generation begat another generation, so too have the four justices' piecemeal orders and decisions in the John Doe trilogy begat motions, which begat further orders, which begat still further motions, and further orders. A fair description is that the John Doe trilogy is composed of this court's serial decisions and orders.

¶30 Although the four justices' orders (and the ensuing motions) are not yet "as numerous as the stars in the sky and as countless as the sands on the seashore,"[19] the John Doe trilogy's family tree continues to grow. If past is prologue, the instant order will beget generations of further motions and further orders, each to be resolved in piecemeal fashion, leaving room for further inconsistencies, twists, and turns.

¶31 As the instant motion and order demonstrate, the four justices' piecemeal approach has led to unintended consequences. Rather than carefully considering the consequences of their actions, the four justices are making their decisions in the dark.

¶32 The instant order will beget future motions.

¶33 First, in addition to denying the district attorneys' request to allow their pro bono counsel to access the record in these cases, the four justices also state that "[t]he portion of the [district attorneys'] motion that seeks the amendment of the John Doe II secrecy orders to allow employees of a specialist printing company to view certain documents covered by those secrecy orders must also be denied at this time."[20]

¶34 Petitions for certiorari are subject to stringent printing, formatting, and binding requirements. See Sup. Ct. R. 33-34. Such petitions cannot easily be prepared using ordinary word processing software or other commonly-available tools. As a result, several companies, including one named by the district attorneys, specialize in preparing petitions for certiorari.

¶35 The four justices are apparently concerned that "[t]he Intervenor District Attorneys have not identified which specialist printing company they intend to use, nor do they indicate that they will obtain an agreement from a specific printing company and the employees involved in the preparation and printing of any petition for certiorari that they will maintain the confidentiality of any documents or information covered by the John Doe II secrecy orders."

¶36 Evidently the four justices would like the district attorneys to first make these printing arrangements before granting the amendment to the secrecy order. But rather than grant

[19] Genesis 22:17.

[20] Order at 4 (emphasis added).

the motion on the condition that the district attorneys obtain an agreement with such a printing company regarding confidentiality, the four justices deny the motion.

¶37 As a result, the district attorneys, in addition to preparing a petition for certiorari in less than four weeks without the help of experienced appellate counsel, must file yet another motion with this court seeking leave to send the petition and accompanying documents to a printing company. [21]

¶38 "Briefs in the Pentagon Papers case and the hydrogen bomb plans case were [made] available to the press," and the United States Supreme Court "denied a motion to close part of the oral argument in the Pentagon Papers case."[22] If such proceedings can be conducted in the open, then surely we can trust that the district attorneys to send sealed documents to a printing company for preparation without having to file another motion asking our permission.

¶39 Second, counsel for Unnamed Movants have sent letters to the attorney general asking the attorney general for his position regarding the authority of the district attorneys to represent the State's and prosecution's interests in this court and in the United States Supreme Court. (Late today, the district attorneys moved to strike these letters.) Will this question (and the attorney general's views) beget further motions and orders?

IV

¶40 In keeping with the court's piecemeal approach, the instant order appears to accept the submission of several late filings by the Unnamed Movants.

¶41 The court imposed a deadline for filing responses to the district attorneys' motion to amend the secrecy orders in an effort to expedite consideration of the instant motion. Several Unnamed Movants submitted responses late, without filing a motion to extend time. See Wis. Stat. § (Rule) 806.07.

¶42 Wisconsin Stat. § (Rule) 806.07 permits a court "[o]n motion and upon such terms as are just" to relieve a party from an order based upon, among other things, "[m]istake, inadvertence, surprise, or excusable neglect . . . ." Because the Unnamed Movants have made no effort to show "[m]istake, inadvertence, surprise, or excusable neglect" as required by Wis. Stat. § (Rule) 806.07, I would reject these late filings.

[21] See Order at 5, n.4.
[22] Krynicki v. Falk, 983 F.2d 74, 76 (7th Cir. 1992).

¶43 Nonetheless, in keeping with the four justices' piecemeal approach, and leaving issues on the table without decision, this issue of disobedience to the court order is ignored at this time.

¶44 For the reasons set forth, I concur in part, dissent in part, and write separately.

Diane M. Fremgen
Clerk of Supreme Court

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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