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March 27, 2015

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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 John Doe proceedings in this court, which are taking place in the context of an ongoing John Doe investigation, have presented the court with unprecedented issues, including questions regarding the secrecy of evidence gathered in the John Doe investigation and the confidentiality of the identity of individuals connected in some way with the investigation. The John Doe judge presiding over the investigation issued secrecy orders early on in those investigatory proceedings.[1]

[1] The John Doe judge issued five nearly identical secrecy orders—one for each of the five counties in which John Doe proceedings were initiated. To the extent that there were variations in the language used in some of

The secrecy order provides in pertinent part:

> IT IS HEREBY ORDERED that the John Doe proceeding, commenced by order of the court rendered this day and pending before me, shall be secret. All persons having access to these proceedings are hereby ordered not to disclose to anyone the court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as all other matters they may observe or hear in the John Doe proceeding. This order is made:
>
> 1) To prevent persons from collecting perjured testimony for any future trial.
>
> 2) To prevent those interested in thwarting the inquiry from tampering with prospective testimony or secreting evidence.
>
> 3) To render witnesses more free in their disclosures.
>
> 4) To prevent testimony which may be mistaken, untrue, insubstantial or irrelevant from becoming public.
>
> . . . .
>
> IT IS FURTHER ORDERED that secrecy shall be maintained during this John Doe proceeding as to court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as to all other matters observed or heard in the John Doe proceeding. See, generally, In re John Doe Proceeding, 2003 WI 30 at ¶62.[2]

In this court's December 16, 2014 order granting review in these proceedings, the court established procedures whereby documents or portions of documents that had been or would be

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the orders, the variations were minor and do not affect the substance of the orders. For ease of reference, therefore, we will treat those five orders as if they were a single secrecy order.

[2] The secrecy orders themselves were part of the record in the John Doe proceedings and therefore were maintained as confidential. Notwithstanding this fact, we are forced to include a portion of the text of one of the secrecy orders in this order so that we can decide the redaction objections raised by the parties and establish the proper secrecy rules that will apply to filings in this court.

filed under seal could be placed into the open court file and be made available to the public. Those procedures (one for briefs and one for other documents that were filed under seal) directed the parties, by certain deadlines, to file (1) either a statement that the previously sealed document could be placed into the open court file or (2) a proposed redacted version of the brief or other document that could be placed into the open court file (while the original, unredacted version of the brief or document would remain under seal). The purpose of these procedures was to strike a balance between the need to protect the secrecy of information covered by the secrecy order issued by the John Doe judge and the public interest in understanding what is transpiring in its judicial system, and particularly, in this court.

Recognizing that there might be disagreements among the parties as to what should or should not be redacted and what should or should not be placed into the open court file, the court's procedures provided an opportunity for other parties to object to certain proposed redactions or to the lack of certain redactions. If such an objection was made, the objection would be submitted to the court for a ruling, with the redacted versions at issue being maintained under seal until the court had issued an order disposing of the objection.

Consistent with these procedures, a number of objections have been filed to proposed redactions. This decision and order will address and resolve those objections.

On February 2, 2015, Unnamed Movant #2[3] filed an unredacted and a redacted version of its brief-in-chief, but its redacted version contained only a couple of redactions. The redacted version did not contain any redactions in the brief's statement of the case and statement of facts. The redacted version did not redact the name of Unnamed Movant #2 on the cover page.

On February 2, 2015, Unnamed Movant #3 filed an unredacted and a redacted version of its brief-in-chief. Its redacted version generally redacted mentions of its own name. The redacted version, however, failed to redact the identity of one of the other Unnamed Movants on page 2 of the brief.

On February 2, 2015, Unnamed Movants ##4 and 5 filed a joint unredacted brief-in-chief, but did not file a redacted version of that brief.[4] In the cover letter accompanying their brief,

[3] As we have done in prior orders in these proceedings, we use the term "Unnamed Movants" to refer collectively to the Three Unnamed Petitioners in Case Nos. 2013AP2504-2508-W, the Two Unnamed Petitioners in Case No. 2014AP296-OA, and the Unnamed Movants in Case Nos. 2014AP417-421-W. When referring to one of the Unnamed Movants individually, we utilize the number that has been attached to that individual or entity in Case Nos. 2014AP417-421-W.

[4] Unnamed Movants ##4 and 5 did file a redacted version of their appendix at the same time that they filed their brief-in-chief.

they indicated that they were not filing a redacted brief because their preference was to make their briefs (and presumably other filings) in these proceedings a matter of public record without redactions. The cover letter acknowledged, however, that portions of the brief would arguably be subject to the provisions of the secrecy orders issued by the John Doe judge. Subsequent to the filing of their brief-in-chief, one or more other Unnamed Movants expressed objections to Unnamed Movants ##4 and 5 regarding the lack of certain redactions in the brief-in-chief. Rather than file a redacted version of their brief that redacted the portions identified by the objecting parties, on February 24, 2015, Unnamed Movants ##4 and 5 filed a letter motion asking to file a "superseding" brief, which contained some changes in the text of the original brief-in-chief to replace the language the other Unnamed Movant(s) believed should be redacted.

On January 30, 2015, Unnamed Movant #6 filed both an unredacted and a redacted brief-in-chief. While the redacted version did redact the identities of individuals connected with the underlying John Doe investigation, it did not redact the portion of the brief that described the contents of the search warrants that were served on Unnamed Movant #6 and the items that were seized during the execution of the search warrant.

On February 24, 2015, an objection was filed by the special prosecutor, Francis D. Schmitz, to certain of the redactions contained within the briefs-in-chief filed by the Unnamed Movants. On February 25, 2015, this court ordered that any response to the special prosecutor's objection be filed by March 4, 2015. Responses were filed by Unnamed Movants ##1, 2, 3, 6, and 7.

On February 12, 2015, the special prosecutor, Francis D. Schmitz, filed an original, unredacted version and a redacted version of a motion for recusal of certain justices. On February 20, 2015, Unnamed Movant #1 filed a response to the recusal motion, which included an objection to the lack of redactions of certain portions of the recusal motion. Unnamed Movant #1 also attached a proposed redacted version of the special prosecutor's recusal motion, containing all of the redactions Unnamed Movant #1 believed necessary. On February 23, 2015, Unnamed Movants ##6 and 7 also filed an objection to the lack of redactions in the special prosecutor's proposed redacted version of his recusal motion.

On March 5, 2015, the special prosecutor filed both an unredacted and a redacted version of his brief-in-chief. The redacted version did not redact the identities of the Unnamed Movants or of other individuals who received subpoenas and search warrants issued by the John Doe judge or who were otherwise connected with the John Doe investigation in some way. While the redacted version of the brief did redact actual images of documents collected either in connection with the underlying John Doe investigation or with a previous John Doe investigation, the special prosecutor did not redact any of the many portions of the text that described (often in

great detail) the contents of such documents or the actions of individuals that were disclosed as a result of the underlying John Doe investigation or of a previous John Doe investigation.

The special prosecutor essentially takes the position that while the John Doe judge did issue a secrecy order that required most documents and identities connected with the John Doe investigation to be maintained as confidential, that secrecy order no longer governs whether documents and identities need to remain secret. He contends that the actions of one of the Unnamed Movants and a director of that organization have improperly disclosed a considerable amount of information regarding the John Doe investigation, in violation of the secrecy order, and therefore waived or forfeited confidentiality regarding the information that had been disclosed.[5]

The special prosecutor argues that since these documents and this information has been publicly disclosed by one of the Unnamed Movants, albeit in violation of the John Doe secrecy order, no real purpose would be served by maintaining as confidential any documents or information connected to the John Doe proceedings that has been previously disclosed. Thus, he contends that the identity of the Unnamed Movants, the identity of other individuals who have had some connection with the John Doe proceedings, the identity of individuals mentioned in documents that have been collected as part of the John Doe investigation, and other information about the nature of the John Doe investigation and the underlying actions that are being investigated should be fully disclosed to the public.

On the other hand, most, but not all, of the Unnamed Movants argue that all of the information covered by the John Doe secrecy order, including their identities and the identities of all individuals/entities connected with the John Doe investigation or mentioned in documents collected as part of the John Doe investigation, should be maintained as confidential pursuant to that secrecy order.

Having reviewed all of the parties' filings regarding the confidentiality of documents and the impact of the John Doe secrecy order on proceedings in this court and recognizing the strong interest of the public in observing what transpires in this court, we conclude that the secrecy order issued by the John Doe judge should be respected and that all documents and information covered by that secrecy order must remain sealed in this court.

Under the John Doe statute, Wis. Stat. § 968.26, the John Doe judge is authorized to determine whether the proceedings in the John Doe, including the testimony taken and the documents collected, should remain secret. See Wis. Stat. § 968.26(3) ("The examination may

[5] It should be noted, however, that the special prosecutor has acknowledged that certain documents and information obtained in connection with the John Doe investigation have not been publicly disclosed.

be adjourned and may be secret.") The statute further provides that once the decision has been made to keep a John Doe proceeding secret, all John Doe materials and testimony must remain secret, with only three exceptions where public use or disclosure is allowed: (1) use by the prosecution at a preliminary examination, (2) use by the prosecution at a criminal trial, and (3) required disclosure pursuant to the criminal discovery statute, Wis. Stat. § 971.23. See Wis. Stat. § 968.26(3) ("Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used."); see also, State v. O'Connor, 77 Wis. 2d 261, 279-80, 252 N.W.2d 671 (1977) ("The legislative history of sec. 968.26 indicates that the primary purpose of the provision specifically limiting inspection of the record is to prevent public access to John Doe records at any time, and to preclude criminal defendants from asserting a right to discovery of John Doe testimony except as provided in the statute.").

We have previously addressed the ramifications of a John Doe secrecy order in the context of a potential disclosure by a John Doe judge. See State ex rel. Niedziejko v. Coffey, 22 Wis. 2d 392, 126 N.W.2d 96 (1964). In that case, the John Doe judge had ordered that the proceedings be kept secret. When certain police officers who had been ordered to appear before him a second time refused to answer questions, the John Doe judge threatened to disclose their prior John Doe testimony to their police supervisors. We held that even the John Doe judge, once the decision to keep proceedings secret has been made, is bound by the secrecy order and is prohibited from revealing portions or summaries of material in the John Doe record. We expressly and clearly stated that once a secrecy order has been entered, the only occasions when John Doe documents or testimony may be disclosed are the three exceptions noted in the statute:

> The statute clearly contemplates that a secrecy order, if issued by the magistrate, shall be binding on him as well as the witnesses. We conclude that if the magistrate, in the proper exercise of his discretion, orders that a John Doe proceeding should be secret, it must remain so for all purposes (until closed), subject to the statutory exceptions for trials and preliminary examinations.

22 Wis. 2d at 398.

We have also previously determined that the fact that a John Doe proceeding becomes the subject of review in an appellate court (regardless of the type of legal vehicle used to obtain such review, such as a supervisory writ) does not eliminate the secrecy of documents and other information that are covered by a secrecy order issued by a John Doe judge. In re John Doe Proceeding Commenced by Affidavit Dated July 25, 2001, 2003 WI 30, ¶67, 260 Wis. 2d 653, 660 N.W.2d 260 ("It is critical that when a John Doe judge issues a secrecy order pursuant to Wis. Stat. § 968.26, the judge must be assured that secrecy will be preserved when and if the

matter reaches an appellate court. Seeking review in the court of appeals must not become a vehicle to undermine the secrecy or integrity of a John Doe proceeding."). The appellate court may seal such information in filings made in the appellate court, and the failure to do so would compromise the John Doe investigation. Id., ¶68. Thus, we directed any party seeking review of a John Doe judge's decision to file with its appellate petition a motion seeking leave to file under seal any portions of the petition or record that fall within the scope of an existing secrecy order. Id., ¶71. While the appellate court is to review the sealed documents to determine if they should be unsealed, we have expressly stated that if the documents "fall within the scope of a permissible secrecy order, they shall remain sealed." Id., ¶73. The procedure we have utilized in these matters to date, including the procedure outlined in this order, has tracked the procedure we previously adopted for such situations.

Thus, contrary to the special prosecutor's argument, the fact that one individual or entity may have disclosed certain documents and information subject to a John Doe secrecy order does not mean that the secrecy order becomes a nullity and the entirety of the John Doe proceeding or an appellate review of the John Doe proceeding is opened to public view. While such a disclosure of John Doe material may well constitute a violation of the secrecy order and may subject the individual/entity making the disclosure to sanctions, it does not change the duty of the John Doe judge and the participants in the John Doe investigation to continue to honor their obligation to obey the secrecy order.

Consequently, we see no reason why the rules we have established for a John Doe judge and participants in a John Doe proceeding should not apply in this instance, when that proceeding has become the subject of appeal, writ proceeding or original action in this court. The John Doe investigation that is the subject of the several proceedings this court is reviewing remains an open investigation. While that may complicate how this court normally conducts its appellate review functions, the convenience of this court and the parties/counsel appearing before it does not provide a sufficient basis on which to ignore the statutory commands to maintain secrecy or the rules we have already established for maintaining the secrecy of John Doe materials.

Our conclusion that the secrecy of an ongoing John Doe investigation must be maintained does not mean that this court has no concern for the interest of the public in knowing what is transpiring in the highest court of this state. We have taken and continue to take measures to provide the public with redacted copies of the filings in this court so that the public can understand the issues this court is being asked to decide and the arguments of the parties on those issues. As this order demonstrates, these are not simple issues with easy answers nor are there simple procedures that can accomplish these goals. We asked the parties to submit redacted versions of their briefs and other filings in the hope that we could get those redacted documents into the public domain as quickly as practicable. The parties, however, have taken different

approaches to what should be redacted, which has delayed the release of redacted briefs/documents and required us to issue this order. It also will require the parties to redo the redacted versions of their briefs and other filings to conform to this order. That will require some additional time, but it will still result in the public being able to see the legal arguments being made by the parties.

Accordingly, we will deny the special prosecutor's objection to the redactions in the Unnamed Movants' briefs-in-chief and grant the objections filed by Unnamed Movants ##1, 6 and 7 to the special prosecutor's recusal motion. Our ruling, however, is not limited to just those filings. Rather, we direct all of the parties to redact all information that is subject to the secrecy orders issued by the John Doe judge. This is a broad universe of documents and information, including the John Doe court dockets and activity records, court filings, process issued by the John Doe judge, information concerning the questions asked and answers given during a John Doe hearing, transcripts of any proceedings before the John Doe judge, all exhibits and other papers produced during the John Doe proceedings, and all other matters observed or heard in the John Doe proceedings. See State ex rel. Individual Subpoenaed to Appear at Waukesha County v. Davis, 2005 WI 70, ¶21, 281 Wis. 2d 431, 697 N.W.2d 803 (approving similar language). Further, it is not sufficient merely to redact the image of a document, but then to leave unredacted a textual discussion of the contents of that document. The secrecy order requires redaction of the contents as well as the image of the document. We also agree that the secrecy order extends to the identity of the individuals and entities to whom subpoenas or search warrants are issued or who are questioned by the John Doe judge, the prosecutor, or individuals working at their direction.

This will mean that the parties will need to review the redacted versions of their briefs and other filings to ensure that they comply with the directions we are providing in this order. If any previously submitted redacted version of any brief or other filing does not comply with the secrecy order and this order, the party responsible for that brief or filing must file a new redacted version consistent with the secrecy order and this order. If a previously filed redacted version meets the requirements we have established, the party must submit a statement to that effect and indicate that it will not be submitting a revised redacted version. We will again utilize an objection period to identify and resolve any disputes that arise from this second round of redactions, but the time periods to comply with this order and to file any objection will be substantially compressed.

IT IS ORDERED that the objection of the special prosecutor to the redacted versions of the briefs-in-chief filed by the Unnamed Movants is denied; and

IT IS FURTHER ORDERED that the objection of Unnamed Movants ##1, 6, and 7 to the redacted version of the special prosecutor's recusal motion is granted; and

IT IS FURTHER ORDERED that the motion of Unnamed Movants ##4 and 5 to file a superseding brief is denied, and Unnamed Movants ##4 and 5 shall file a redacted version of their brief-in-chief that complies with the provisions of this order and the secrecy orders issued by the John Doe judge in the underlying John Doe proceedings; and

IT IS FURTHER ORDERED that for all briefs and other filings in this court that are filed under seal or maintained under seal, the parties must file a redacted version that redacts all information subject to the secrecy orders issued by the John Doe judge in the underlying John Doe proceedings; and

IT IS FURTHER ORDERED that, on or before April 6, 2015, each party that has previously filed a redacted version of a brief or other document that has been maintained under seal until the date of this order shall for each such brief or document either file a written statement that the previously filed redacted version complies with the secrecy orders issued by the John Doe judge in the underlying John Doe proceedings and may be placed into the open court file or file a revised redacted version of the document in which all matters covered by the secrecy orders issued by the John Doe judge in the underlying John Doe proceedings or that are otherwise confidential shall be redacted. (This requirement does not apply to documents filed in the court of appeals in Case Nos. 2013AP2504-2508-W.) Each party shall serve on all other parties a copy of the statement that the previously filed redacted version may be placed into the open court file or two copies of the revised redacted version. All other parties shall have 10 calendar days after the filing of the statement or the revised redacted versions to file a written objection to the statement or the revised redacted version, which objects to either insufficient redaction or excessive redaction. Each such written objection must specify which words, sentences or paragraphs the objector either wants to be redacted or unredacted, and must provide reasons for each such objection. If no objections are received within the 10-day period, the clerk of this court will place either the original document or the previously filed redacted version (in the case of a statement) or a copy of the revised redacted version of the previously filed document into the public court file on the seventh calendar day following the expiration of the 10-day objection period. If an objection is received, the original document and the revised redacted versions shall remain under seal until such time as the court rules on the objection and issues a written order directing the clerk of this court to place the original or a revised redacted version of the brief or previously filed document into the public court file; and

IT IS FURTHER ORDERED that for any redacted version of a document for which a revised redacted version is filed, the clerk of this court shall maintain the first redacted version under seal pending further order of this court.

IT IS FURTHR ORDERED that for all future briefs and other documents that are filed in this proceeding, the filing party shall comply with the provisions of the December 16, 2014 order regarding the filing of a statement that the brief or other document may be placed into the open court file or the filing of a redacted version of the brief or other document, which shall be subject to the 20-day objection procedure set forth in that order. The extent of the redactions shall comply with the provisions of this order.

ANN WALSH BRADLEY, J., did not participate.

¶1 SHIRLEY S. ABRAHAMSON, C.J. *(dissenting).* In September of 2012 and August 2013, a John Doe judge signed multiple, substantially similar secrecy orders with regard to a single multi-county John Doe investigation.[1] Over one and a half years later, the public still has not been given access to the parties' filings or briefs or to the records in the three John Doe cases before it arising from that investigation. Rather, this court has accepted under seal virtually all the John Doe material requested to be filed under seal. In other words, if a party has requested that a document be filed under seal, the court has automatically complied with the request.

¶2 The court's treatment of the John Doe material runs directly counter to the public's longstanding and firmly established right to access judicial records.[2]

¶3 The unnamed movants and the special prosecutor take varying positions on whether the John Doe judge's expansive secrecy order applies to this court in the instant cases. The special prosecutor favors fuller public disclosure than the John Doe secrecy order or this court's order on redaction allow.[3] The majority of the unnamed movants, in contrast, favor this court's full observance of the John Doe secrecy order.[4]

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[1] We refer to these secrecy orders collectively as "the John Doe judge's secrecy order" or "the John Doe secrecy order."

[2] See, for example, State v. Cummings, 199 Wis. 2d 721, 738, 546 N.W.2d 406 (1996), in which this court stated that "at least two sets of rights [] are involved when court documents are kept from public scrutiny: (1) those rights guaranteed under the First Amendment and (2) the common law right of public access." See also Nixon v. Warner Communications, Inc., 435 U.S 589, 597-98 (1978) (stating that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents").

[3] The court's redaction order summarizes the prosecutor's position as follows:

> The special prosecutor essentially takes the position that while the John Doe Judge did issue a secrecy order . . . that secrecy order no longer governs whether documents and identities need to remain secret. He contends that the actions of one of the Unnamed Movants and a director of that organization have improperly disclosed a considerable amount of information regarding the John Doe investigation, in violation of the secrecy order, and therefore waived or forfeited confidentiality . . . .

¶4 The court's order on redaction sides with the unnamed movants and mandates continued observance of the entirety of the John Doe secrecy order. The order directs the parties to review the redacted briefs they have filed in this court to ensure that "all information that is subject to the secrecy order issued by the John Doe Judge" has been redacted.

¶5 Apparently, the parties' redacted briefs will eventually be open to the public. Perhaps not soon. The parties on both sides of the "v." are still arguing about specific redactions. Still, the question remains whether the extensive redactions ordered by the court—or any redactions at all—are justified at this stage in the litigation.

¶6 Like the court's order canceling oral argument in the instant cases,[5] the court's redaction order is long on stating the parties' positions but short on explaining the court's rationale. The court's redaction order regurgitates the history and content of the parties' filings regarding redaction. It then asserts that "the secrecy order issued by the John Doe judge should be respected and [] all documents and information covered by the secrecy order must remain sealed in this court."

¶7 I agree that the John Doe secrecy order should be respected. However, respect does not mean the secrecy order must be fully embraced.

¶8 The court's redaction order examines the John Doe statute, Wis. Stat. § 968.26 (2011-12),[6] and three prior John Doe cases—none of which is directly on point, as the John Doe cases before the court are sui generis, the first and only ones of their kind in the annals of our John Doe jurisprudence. The redaction order then weakly concludes: "Consequently, we see no reason why the rules we have established for a John Doe judge and participants in a John Doe

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[4] The court's redaction order explains that most, but not all, of the unnamed movants urge that all of the information covered by the John Doe secrecy order, including the identities of the unnamed movants and the identities of all individuals/entities connected with the John Doe investigation or mentioned in documents collected as part of the John Doe investigation, should remain confidential.

[5] The court's order on redaction is one of three orders issued today in the John Doe cases that the court has consolidated for purposes of briefing and oral argument in this court. These three orders present interrelated and overlapping issues. I discuss the other two—an order denying a motion to intervene filed by Journal Sentinel, Inc. and an order canceling oral argument in the John Doe cases—in my dissents to those orders. For a full picture of the important public interests at stake in the three orders the court issues today, my dissents in all three orders should be read together.

[6] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

proceeding should not apply in this instance, when that proceeding has become the subject of appeal, writ proceeding or original action in this court."

¶9 There are many reasons why rules established for a John Doe judge or for the participants in a John Doe proceeding should not apply to this court. Unlike a John Doe judge, the supreme court is a court. The John Doe judge exercises judicial and quasi-executive powers;[7] it ultimately decides whether there is probable cause to believe a crime has been committed.[8] The supreme court has much broader powers; it decides procedural and substantive issues presented.

¶10 I do not dispute that this court may need to order redaction of the parties' briefs. Redaction may provide the best available means of balancing the public's right to access judicial documents against the interests of the parties and the court in keeping certain information confidential.

¶11 But in ordering redaction, the court must exercise discretion "in light of the relevant facts and circumstances."[9] Because redaction withdraws elements of the parties' briefs and the appellate record from public view, it "requires rigorous justification."[10]

¶12 The only justification the court's redaction order provides for the extensive redaction it requires is the John Doe secrecy order. By automatically adopting the John Doe secrecy order wholesale, this court overlooks the legal principle that it should continue to impose secrecy only if secrecy is warranted. This court should not blindly adopt a secrecy order issued by a John Doe judge in John Doe proceedings more than a year and a half ago.

¶13 Because this court has failed to consider carefully whether continued concealment of all information subject to the John Doe secrecy order is justified, and because the record falls far

[7] State v. Washington, 83 Wis. 2d 808, 828, 266 N.W.2d 597 (1978).

[8] In re John Doe Proceeding, 2003 WI 30, ¶22, 260 Wis. 2d 653, 660 N.W.2d 260.

[9] The United States Supreme Court has stated that "the right to inspect and copy judicial records is not absolute." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). Courts have "supervisory power over [court] records and files, and access [to court records] has been denied where court files might have become a vehicle for improper purposes." Nixon, 435 U.S. at 598. While the Nixon Court declined to enumerate "all the factors to be weighed" in determining whether public access to particular information is appropriate, the Court made clear that courts must exercise discretion "in light of the relevant facts and circumstances" when deciding whether the interest in access or the interest in secrecy should prevail.

[10] Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992) (explaining that withdrawal of an element of judicial proceedings from public view "requires rigorous justification").

short of demonstrating that full observance of the secrecy order remains appropriate, I dissent from the court's redaction order.

¶14 There are several reasons the court should not enforce the John Doe judge's sweeping secrecy order at this stage of the litigation.

¶15 First, the public has a constitutional, statutory, and common-law right to access judicial proceedings and judicial records. This right is negated by the court's broad redaction order.

¶16 Second, Wis. Stat. § 968.26 and the case law do not support the proposition that this court must comply with the John Doe secrecy order. The three John Doe cases are sui generis; they are not governed by prior case law.

¶17 Third, this court has the inherent power to determine the level of secrecy necessary to decide the John Doe cases before it. Indeed, the court's redaction order admits to violating the John Doe secrecy order by revealing a confidential portion of the secrecy order. Why does the court breach the John Doe secrecy order? According to the redaction order, the court is "forced" to do so "so that we can decide the redaction objections raised by the parties and establish the proper secrecy rules that will apply to filings in this court."[11] That is precisely my point. Thus, this court must decide the level of secrecy that applies based on the public's rights and this court's needs to decide the John Doe cases before it.

¶18 Fourth, the justifications for secrecy in John Doe proceedings no longer support secrecy at this stage in the instant litigation. The cat may be out of the bag.

¶19 Thus, I conclude that this court's sweeping redaction order, which simply adopts the John Doe secrecy order, impermissibly violates the public's constitutional, statutory, and common-law right to access judicial proceedings and records.

[11] Footnote 2 of the court's redaction order explains its violation of the John Doe secrecy order as follows:

> The secrecy orders themselves were part of the record in the John Doe proceedings and therefore were maintained as confidential. Notwithstanding this fact, we are forced to include a portion of the text of one of the secrecy orders in this order so that we can decide the redaction objections raised by the parties and establish the proper secrecy rules that will apply to filings in this court.

I

¶20 I begin by examining the public's right of access to court records. This right is negated by the court's broad redaction order.

¶21 I discuss the public's right to open judicial proceedings under the federal and state constitutions, under state statutes,[12] and under the common law more fully in my dissent to another order issued by the court today denying a newspaper's motion to intervene.

¶22 Here, it suffices to cite Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992), in which Judge Easterbrook explains how he decides motions to seal records. Judge Easterbrook describes the presumption of public access to judicial proceedings and the purposes that presumption serves, making clear that the presumption of public access is fundamental to our system of government[13] and can be overcome only by the weightiest interests.[14] Judge Easterbrook writes:

> Judicial proceedings in the United States are open to the public—in criminal cases by constitutional command, and in civil cases by force of tradition. What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.[15]

¶23 Applying these principles to the instant cases, I conclude that to support a redaction order that "withdraws an element of the judicial process from public view," the court must provide truly compelling reasons.[16]

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[12] In addition to the John Doe statute (Wis. Stat. § 968.26), the court has explained that Wisconsin's public records law (Wis. Stat. § 19.35) applies to the court of appeals' sealing records filed in a case seeking review of a John Doe judge's actions. In re John Doe Proceeding, 2003 WI 30, ¶66, 260 Wis. 2d 653, 660 N.W.2d 260.

[13] See also Wis. Stat. § 19.31 ("In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government . . . .").

[14] See also State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis. 2d 220, 241, 340 N.W.2d 460 (1983) (holding that the public should not be "denied the right of access to the court for other than the most weighty and overwhelming reasons").

[15] Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992).

[16] Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992).

¶24 The order issued today provides just one reason for requiring far-reaching redactions in documents filed in this court: The John Doe secrecy order is binding on this court and, for this reason alone, the parties must redact all information subject to that secrecy order.

¶25 To determine whether this explanation constitutes the "rigorous justification" required to support redaction, I turn first to the statutes and case law governing secrecy in John Doe cases.

II

¶26 The question is whether Wis. Stat. § 968.26 and related case law compel this court to comply with the John Doe secrecy order. I conclude they do not.

¶27 The rules governing John Doe proceedings are set forth at Wis. Stat. § 968.26. Wisconsin Stat. § 968.26(3) authorizes a John Doe judge to issue secrecy orders binding on those involved in a John Doe proceeding. The statute lists three circumstances under which the record of the John Doe proceeding and the testimony taken shall be open to inspection. It cannot be assumed, however, that all aspects of John Doe proceedings are encapsulated within the four corners of the statute. Courts have "filled in" the statute and recognized other instances when the record of a John Doe proceeding or the testimony taken at a John Doe proceeding shall be open.[17]

¶28 The statutory language of Wis. Stat. § 968.26(3) is as follows:

> The extent to which the judge may proceed in an examination under sub. (1) or (2) is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses, or argue before the judge. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.[18]

[17] For example, in State v. Rindfleisch, unpublished disp. No. 2013AP362-CR, at 4 (Wis. Ct. App.), the court of appeals stated that it has "supervisory authority to unseal documents in our record . . . regardless of whether a prior circuit court order or trial judge order sealed the documents," and the court of appeals exercised this authority in the case before it to unseal records that were subject to a John Doe secrecy order.

[18] Wis. Stat. § 968.26(3).

¶29 Furthermore, Wis. Stat. § 968.26 alone cannot justify sealing documents in this court. This court must make its own decision. In United States v. Moussaoui, unpublished disp., 65 Fed. App'x 881, 887 (4th Cir. 2003), a federal court of appeals concluded that the federal Classified Information Procedure Act could not on its own justify closing oral argument or sealing documents. The Moussaoui court declared that a court must independently conduct a constitutional inquiry to determine whether and to what extent judicial proceedings should be closed. The court may not simply assume that the legislature has struck the correct constitutional balance in the statute.

¶30 Beyond its discussion of the John Doe statute, the court's redaction order also refers briefly to three cases involving John Doe proceedings: State v. O'Connor, 77 Wis. 2d 261, 279-80, 252 N.W.2d 671 (1977); State ex rel. Niedziejko v. Coffey, 22 Wis. 2d 392, 398, 126 N.W.2d 96 (1964); and In re John Doe Proceeding, 2003 WI 30, ¶¶67-68, 71, 260 Wis. 2d 653, 660 N.W.2d 260.

¶31 The cases are largely unhelpful. This court's prior John Doe cases examined questions of John Doe procedure but did not delve into the ultimate merits of the investigation. In the instant cases, the court is reviewing both procedural matters and substantive legal questions related to the subject matter of the John Doe investigation. The three cases now before the court, as I stated previously, are sui generis.

¶32 With that in mind, I review the cases cited by the court's redaction order.

¶33 This court quotes the O'Connor reference to legislative history that supposedly demonstrates that the John Doe statute is intended to "prevent public access to John Doe records at any time, and to preclude criminal defendants from asserting a right to discovery of John Doe testimony except as provided in the statute."

¶34 The legislative history referred to by O'Connor and by this court's redaction order discusses limits upon the rights of the public and of criminal defendants to demand disclosure of documents protected by a John Doe secrecy order. It does not address, explicitly or implicitly, the right of an appellate court to order disclosure of documents when the appellate court determines such disclosure is warranted at the appellate level.

¶35 Furthermore, O'Connor makes clear that secrecy in John Doe proceedings "is not maintained for its own sake."[19] Rather, "[t]he policy underlying secrecy is directed to promoting

[19] State v. O'Connor, 77 Wis. 2d 261, 283, 252 N.W.2d 671 (1977).

[the] effectiveness of the investigation . . . ."[20] It follows from O'Connor that when secrecy does not promote the effectiveness of the investigation, it should not be imposed.

¶36 In sum, the court's reliance on O'Connor is misplaced.

¶37 The reliance on Niedziejko in the court's redaction order is similarly unpersuasive.

¶38 In Niedziejko, the court considered a John Doe judge's attempt to coerce a witness to testify by threatening disclosure of incriminating information contained in a secret John Doe record. The court concluded that the John Doe judge's conduct constituted an erroneous exercise of discretion. The Niedziejko court explained: "The [John Doe] statute clearly contemplates that a secrecy order, if issued by the magistrate, shall be binding on him as well as the witnesses."[21]

¶39 If the court interprets this language from Niedziejko as mandating the continued secrecy of a John Doe proceeding in an appellate court, then the court is taking the language out of context.

¶40 Again, the Niedziejko court considered whether a John Doe judge erroneously exercised his discretion by threatening to disclose information protected by a John Doe secrecy order for the purpose of coercing a witness to testify. The Niedziejko court did not address whether an appellate court has discretion to disclose information protected by a John Doe secrecy order for a legitimate purpose.

¶41 Finally, the court's redaction order cites In re John Doe Proceeding.

¶42 One of the issues presented in In re John Doe Proceeding was whether the court of appeals had authority to seal John Doe records within the court of appeals when a petition for a supervisory writ was filed in the court of appeals. The supreme court acknowledged that "Wisconsin statutes and case law do not specifically address this issue."[22]

¶43 In In re John Doe Proceeding, the supreme court admonished that "[s]eeking review in the court of appeals must not become a vehicle to undermine the secrecy or integrity of a John Doe proceeding."[23] I agree.

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[20] State v. O'Connor, 77 Wis. 2d 261, 281, 252 N.W.2d 671 (1977).

[21] State ex rel. Niedziejko v. Coffey, 22 Wis. 2d 392, 398, 126 N.W.2d 96 (1964).

[22] In re John Doe Proceeding, 2003 WI 30, ¶64, 260 Wis. 2d 653, 660 N.W.2d 260.

[23] In re John Doe Proceeding, 2003 WI 30, ¶¶67, 71, 260 Wis. 2d 653, 660 N.W.2d 260.

¶44 The supreme court went on to say, however, that the court of appeals "may seal parts of a [John Doe] record."[24] The supreme court used the word "may"; it did not say the court of appeals "shall" seal the record. The supreme court carefully counseled that secrecy "is not maintained for its own sake" but rather "is directed to promoting the effectiveness of the investigation."[25]

¶45 In re John Doe Proceeding is not easy to read or to understand. On the one hand, it gives the court of appeals discretion to seal records. On the other hand, it seems to state that if an in camera inspection of the records by the court of appeals shows that the records are encompassed by a "permissible secrecy order," then the documents must remain sealed.

¶46 The better reading of In re John Doe Proceeding, in my view, permits this court to consider the extent to which the John Doe secrecy order at issue in the instant cases is still a permissible secrecy order. To decide this question, this court must determine whether the secrecy order at issue remains, at this stage of the litigation, reasonably tailored to further the purposes that secrecy in John Doe proceedings are designed to serve. If it is not, then the order should be enforced only partially, or not at all.

III

¶47 My interpretation of the statutes and case law is supported by the doctrine of inherent powers.

¶48 In addition to powers expressly granted to courts under the state and federal constitutions, courts have inherent, implied, and incidental powers that enable them to accomplish their constitutionally and legislatively mandated functions.[26] "A grant of jurisdiction by its very nature includes those powers necessary to fulfill the jurisdictional mandate."[27]

¶49 "A court is understood to retain inherent powers when those powers are needed to 'maintain [the courts'] dignity, transact their business, and accomplish the purposes of their

[24] In re John Doe Proceeding, 2003 WI 30, ¶¶68, 71, 260 Wis. 2d 653, 660 N.W.2d 260 (emphasis added).

[25] In re John Doe Proceeding, 2003 WI 30, ¶¶61, 71, 260 Wis. 2d 653, 660 N.W.2d 260.

[26] State ex rel. Friedrich v. Circuit Court, 192 Wis. 2d 1, 16-17, 531 N.W.2d 32 (1995).

[27] State v. Cummings, 199 Wis. 2d 721, 736, 546 N.W.2d 406 (1996) (recognizing that the John Doe judge has inherent powers).

existence."[28] In Wisconsin, courts have been recognized as possessing inherent authority to manage their internal operations,[29] to regulate the bench and bar,[30] and to ensure that the courts themselves function "efficiently and effectively to provide the fair administration of justice."[31]

¶50 A court has the inherent power "to preserve and protect the exercise of its judicial function . . . [by] limit[ing] public access to judicial records when the administration of justice requires it."[32] In other words, courts have the inherent power to exclude the public from judicial proceedings in the interests of justice.

¶51 Surely a necessary corollary of a court's inherent power to exclude the public from its proceedings is a court's inherent power to give the public access to its proceedings, even in the face of a John Doe secrecy order. Depending on the circumstances, either exclusion or access may be necessary "to preserve and protect the exercise of [a court's] judicial function."[33] Without the inherent power to determine whether exclusion or access is appropriate in a given case, an appellate court would be unable to balance the interest in confidentiality against the interest in openness and thus could protect neither interest. An appellate court would be unable, in other words, to do its job.

¶52 In sum, although the court's redaction order apparently determines that the John Doe secrecy order governs the instant cases, I conclude that this court should reassess the extent to which the extensive secrecy ordered by the John Doe judge is needed at this stage in the litigation. In my opinion, the court should enforce the secrecy order only to the extent secrecy remains warranted.

¶53 Because the propriety of this court's enforcing the John Doe judge's secrecy order turns on whether the justifications for secrecy still apply, I examine those justifications now.

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[28] State v. Henley, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350.

[29] City of Sun Prairie v. Davis, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999).

[30] City of Sun Prairie v. Davis, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999).

[31] City of Sun Prairie v. Davis, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999).

[32] State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983).

[33] State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983).

IV

¶54 The oft-stated and accepted rationale for secrecy in John Doe proceedings does not support maintaining the secrecy of the John Doe cases in this court.

¶55 This court has repeatedly set forth the following reasons as justifying secrecy in a John Doe proceeding:

1. Keeping knowledge from an unarrested defendant that could encourage escape;
2. Preventing the defendant from collecting perjured testimony for trial;
3. Preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence;
4. Rendering witnesses more free in their disclosures; and
5. Preventing testimony that may be mistaken or untrue or irrelevant from becoming public.[34]

¶56 It is obvious that none of these reasons for secrecy applies to the three John Doe cases currently before this court.

¶57 It is also obvious from these justifications that secrecy is imposed to further the efforts of the prosecution. Indeed, the court has repeatedly recognized that secrecy is justified only insofar as it "promot[es] the effectiveness of the investigation."[35]

¶58 As the court's redaction order acknowledges, the special prosecutor in the instant cases now favors less, not more, secrecy.

¶59 Under these circumstances, the court's decision to require extensive redaction of the parties' briefs cannot withstand scrutiny.

¶60 A John Doe judge may amend its secrecy order as "subsequent developments require."[36] If a John Doe judge may amend the secrecy order if "subsequent developments [so] require," then surely this court may for purposes of its decision-making "amend" the John Doe secrecy order as well.

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[34] In re John Doe Proceeding, 2003 WI 30, ¶60, 260 Wis. 2d 653, 660 N.W.2d 260; State v. O'Connor, 77 Wis. 2d 261, 279, 252 N.W.2d 671 (1977).

[35] In re John Doe Proceeding, 2003 WI 30, ¶61, 260 Wis. 2d 653, 660 N.W.2d 260; State v. O'Connor, 77 Wis. 2d 261, 283, 252 N.W.2d 671 (1977).

[36] State v, O'Connor, 77 Wis. 2d 261, 286, 252 N.W.2d 671 (1977).

¶61 Developments subsequent to the issuance of the John Doe secrecy order at issue in the instant cases weigh in favor of amending that secrecy order. The John Doe secrecy order at issue has allegedly failed to achieve its objective of secrecy.

¶62 The special prosecutor claims that much of the information the secrecy order intended to conceal has been divulged through media leaks, through extensive media coverage of the underlying John Doe investigation and the instant litigation, and within unsealed filings in federal court in related litigation. The special prosecutor argues compellingly that because information subject to the John Doe judge's secrecy order has already been publicly released, public discussion of that information is appropriate.[37]

¶63 Indeed, on March 19, 2015, the special prosecutor filed a letter directed to this court regarding an "Apparent Violation of Supreme Court Order and John Doe Secrecy Order." (The unsealed part of the letter explains that it pertains to an "apparent violation of Supreme Court order and John Doe secrecy order.")

¶64 Records should be unsealed when they can be.[38] Once the overriding interest initially necessitating closure has passed, the restriction must be lifted.[39]

¶65 In the instant cases, continued adherence to the John Doe secrecy order will not serve the objectives of secrecy when secrecy has not in fact been preserved. When the objectives of secrecy are not furthered by continued observance of a secrecy order, disclosure is appropriate.[40]

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[37] In the parties' joint report on oral argument, the special prosecutor takes the position that oral argument should be held and that the courtroom should be open to the public. The special prosecutor's explanation of his position on oral argument applies with equal force to the issue of whether redaction is warranted:

> [B]ecause of the widespread public disclosure of the facts of this investigation over the last year by at least one Movant in national periodicals, on the Internet, and in a federal lawsuit . . . the secrecy of these proceedings has been undermined, intentionally and in disregard of Judge Peterson's orders. Indeed, most—if not all—of the facts of consequence have already been released publicly. This fundamentally affects the need to continue non-public proceedings before the Supreme Court of the State of Wisconsin.

[38] Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide at 22 (Federal Judicial Center 2010).

[39] United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994); Phoenix Newspapers, Inc. v. U.S. District Court, 156 F.3d 940, 948 (9th Cir. 1998).

[40] Robert Timothy Reagan, Fed'l Jud. Ctr., Sealing Court Records and Proceedings: A Pocket Guide 22 (2010).

"We simply do not have the power, even were we of the mind to use it if we had, to make what has become public private again . . . . The genie is out of the bottle . . . . We have not the means to put the genie back."[41]

¶66 It would be anomalous for this court to adhere to a sweeping John Doe secrecy order without any analysis when—as in the instant cases—observance of the order runs counter to the public's right of access to judicial proceedings, observance of the order is not required by statute or case law, the prosecutor whom the order was designed to serve does not seek its enforcement, and confidentiality has already been breached.

¶67 I conclude that enforcement of the sweeping John Doe secrecy order is neither necessary nor appropriate at this stage in the litigation. Because the court's order merely echoes the broad terms of the underlying secrecy order without providing "rigorous justification" for the extensive redaction it requires, I cannot join it. This court must independently determine the need for secrecy for each document.

* * * *

¶68 A few short years ago, I wrote that "[i]f Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government."[42]

¶69 The trio of orders the court issues today collectively and without full explanation deny the public its right of access to judicial proceedings in three cases of immense public interest and importance. The public will no doubt wonder, as do I, what has become of this court's commitment to transparency.

¶70 For the reasons set forth, I dissent.

Diane M. Fremgen
Clerk of Supreme Court

[41] Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004)(citing cases in support of this proposition and also a case upholding an injunction against media dissemination of material released by accident). See also Estate of Martin Luther King, Jr. v. CBS, Inc., 184 F, Supp. 2d 1353, 1363-64 (N.D. Ga. 2002).

[42] Schill v. Wisconsin Rapids School Dis., 2010 WI 86, ¶1, 327 Wis. 2d 572, 786 N.W.2d 177.

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