

UNDER SEAL  
STATE OF WISCONSIN  
COURT OF APPEALS  
Districts I and/or IV

No. 2013-AP-2506-W  
*2504 W*  
*2505 W*  
*2507 W*  
*2508 W*

IN THE MATTER OF JOHN DOE PROCEEDING

STATE OF WISCONSIN EX REL.  
THREE UNNAMED PETITIONERS,

*Petitioners,*

*v.*

HON. BARBARA A. KLUKA,  
John Doe judge, or her successor,

*Respondent.*

FILED

NOV 14 2013

CLERK OF COURT OF APPEALS  
OF WISCONSIN

MOTION TO STAY INVESTIGATION

COME NOW the Unnamed Petitioners identified in the accompanying Petition for Supervisory Writs of Mandamus and Prohibition, and move that this Court enter an order staying all action by the John Doe judge, the special prosecutor, and any and all

agents of the investigation pending resolution of the Petition. In further support of their Motion, the Unnamed Petitioners (the "Petitioners") state as follows:

1. On or about Thursday, November 14, 2013, the Petitioners filed in this Court a Petition for Supervisory Writs of Mandamus and Prohibition (the "Petition"). *See* WIS. STAT. (Rule) 809.51. The Petition is accompanied by the following: (1) one Affidavit and its constituent six exhibits; and (2) a Supporting Memorandum (the "Memorandum"). *Id.*
2. The Petition seeks this Court's supervision over the acts of judicial officers, including at least one reserve judge, and also over least one special prosecutor. This group of court officers purport to be running a five-county John Doe investigative proceeding. *See* WIS. STAT. § 968.26. Among the ancillary relief requested by the Petition is a stay of all action by the John Doe judge, special prosecutor, and agents of the John Doe investigation. For the reasons discussed below, a stay is

necessary to preserve the *status quo*. If Petitioners are correct, then the role of the special prosecutor in this John Doe proceeding has been improper from the start. If Petitioners are correct, his appointment is void *ab initio*. Further, if Petitioners are correct, the John Doe judge has had no lawful authority at least from the time that this John Doe probe expanded to five counties. The acts at issue in the Petition that have related to the Petitioners occurred after that expansion to five counties. So again if the Petitioners are correct, no order that the John Doe judge has issued since that time is valid. Under those circumstances, no further action should be taken by the John Doe judge, the special prosecutor, or agents of the John Doe investigation at least until this Court rules on the merits of the Petition.

3. As of the date of the filing of the Petition, confidential records and documents of at least one Petitioner are in the hands of the special prosecutor, his agents, and perhaps others. These

records were seized pursuant to at least one search warrant signed by the John Doe judge.

4. The seizure of the records and their impending review is the subject of at least one motion that a Petitioner mailed to a Post Office box designated in process that the Petitioner had received. Mailing to the post office box was the only apparent means for initiating adjudication over the constitutional or substantive rights of the witnesses or other parties in interest. The delivery of the motion occurred on or about October 18, 2013.
5. The Petitioner who delivered the motion believes that the special prosecutor, who may control the post office box, received the motion, and that the John Doe judge later received it. However, Petitioner does not know whether the motion is maintained in any type of official filing system or whether it will be taken up or considered by any tribunal. No judicial officer or clerk has acknowledged receipt of the motion, set a

time for the special prosecutor to file a response, set a hearing on the motion, or otherwise indicated that the motion will trigger any adjudication.

6. Nonetheless, the seized documents remain in the possession of unknown individuals that at least include the special prosecutor. They remain open to perusal, subject only to verbal statements of the special prosecutor about whether he has allowed review to proceed.
7. Additionally, on information and belief, multiple subpoenas have been issued to witnesses, including at least one Petitioner. The subpoenas were signed by the John Doe judge and required that any objection relating to the subpoenas be addressed by mailing to the post office box. Upon pain of contempt, they restrained any other communication relating to the subpoenas—even communications relating that the subpoenas existed. The return date on at least one subpoena was October 29, 2013.

8. The October 29, 2013, subpoena, and upon Petitioners' belief, other subpoenas as well, are subject to motions to quash. Those motions were timely delivered to the post office box. A Petitioner who delivered one motion believes that the special prosecutor received the motion and that a John Doe judge may also have received it. However, this Petitioner does not know whether the motion is maintained in any type of official filing system or whether it will be taken up or considered by any judge or court. No judicial officer or clerk has acknowledged receipt of the motion, set a time for the special prosecutor to file a response, set a hearing on the motion, or otherwise indicated that the motion will trigger any adjudication.
9. Nonetheless, the return date on the subpoenas has passed and there is no indication from any judge, clerk, or court as to whether the old subpoenas will be enforced or new subpoenas will issue.

10. In short, serial issues relating to the substantive and constitutional rights of John Doe witnesses or other parties in interest have been timely raised in various motions and are awaiting judicial action. Indeed, the motions are awaiting formal acknowledgment that they have been received and will lead to some judicial or administrative action. Some proper Wisconsin tribunal should decide the underlying substantive and constitutional issues raised by these pending motions. Due process and basic procedural fairness would seem to demand a full and fair argument, on the record, by some body acting as a court and not merely as an investigating judge. See *In re John Doe Proceeding*, 2003 WI 30, 260 Wis. 2d 653, 683-84, 660 N.W.2d 260, 275 (“While the John Doe judge may impose limits on counsel's right of advocacy, this provision should not be interpreted to preclude the John Doe judge from entertaining argument when necessary to ensure procedural fairness. This is consistent with the practice of many John Doe

tribunals”). “To the extent that circumstances arising in the John Doe investigation require the adjudication of adversarial motions or orders affecting substantive rights or targets or witnesses—compulsion orders, contempt, privilege claims, and immunity grants—the John Doe statute contemplates, and case law has consistently required, that the John Doe judge convene and act as a court.” *Id.*, 260 Wis. 2d at 698, 660 N.W.2d at 282 (collecting cases) (Sykes, J., dissenting).

11. At the same time, the instant Petition raises questions of procedure and jurisdiction that are legally and logically antecedent to the substantive constitutional questions that Petitioners suggest should, at least in the first instance, be resolved by a properly-convened court below. Petitioners respectfully suggest that the procedural and jurisdictional matters raised in this Petition should first be resolved.

12. For these reasons, Petitioners request that this Court act to preserve the status quo during its review. This will protect



Petitioners from any additional constitutional or other injury that may occur due to further action by the John Doe judge, special prosecutor, or investigative agents. This may include, but is not limited to, the perusal of already-seized documents or the enforcement of subpoenas.

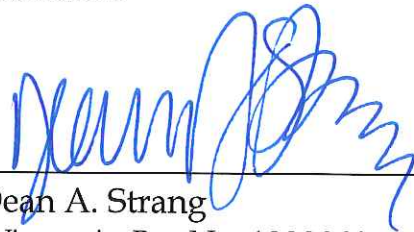
13. Petitioners recognize the concern that a stay may unduly delay the investigation. However, balanced against Petitioners' concrete experience with ongoing violations of their constitutional and substantive rights, an abstract concern about delay cannot prevail absent a showing of unique circumstances. Petitioners are aware of no such concern in this matter, and in fact, believe that the special prosecutor has made electronic copies of a massive amount of information seized from one or more witnesses or targets. The date range for documents sought by the subpoena also suggests that expiration of a statutory limitation period is not imminent.

14. In conclusion, a stay of the John Doe investigation is appropriate while this Court considers the antecedent procedural and jurisdictional issues that go to the very formation and existence of the John Doe.

WHEREFORE, Petitioners respectfully request that this Court enter an Order staying all action by the John Doe judge, the special prosecutor, and any and all agents of the investigation pending resolution of the Petition.

Respectfully submitted,

THREE UNNAMED PETITIONERS,  
*Petitioners*



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