

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

No. 2013-AP-~~2506~~-W

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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

SUGGESTION OF CERTIFICATION
TO SUPREME COURT

Concerning

John Doe Investigative Proceeding in Five Counties,
Hon. Barbara A. Kluka, Presiding
Columbia County No. 13-JD-011; Dane County No. 13-JD-009
Dodge County No. 13-JD-006; Iowa County No. 13-JD-001;
Milwaukee County No. 12-JD-023

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Three Unnamed Petitioners, by respective counsel, now suggest to this Court that their Petition for Supervisory Writs of Mandamus and Prohibition may be appropriate for certification to the Wisconsin Supreme Court, pursuant to WIS. STAT. §§ 809.61, 809.62(1r), and Supreme Court IOP II.B.2.

1. The Petition meets criteria for supreme court review later. A decision by the supreme court will help develop and clarify the law, in part because the question presented here is a novel one. WIS. STAT. § 809.62(1r)(c)2.

The John Doe proceeding at issue here follows, and flows from, an earlier John Doe investigation in Milwaukee County that ran more than two years and was much noted publicly. The new John Doe proceeding here involves at least a loose consolidation or amalgam of five counties, each of which have assigned a John Doe case number. But one John Doe judge and one special prosecutor appear to be in charge of proceedings in all five counties.

Petitioners know of no earlier, analogous situation. This case presents questions of whether an unelected reserve judge may preside over a John Doe inquiry in an *ad hoc* amalgam of five counties (even assuming that a reserve judge properly may preside over a John Doe investigation in one county). The Unnamed Petitioners have found no statute or earlier case that addresses any similar procedure.

This five-county John Doe investigation also involves one special prosecutor, who apparently is acting in all five counties. The relevant statute, WIS. STAT. § 978.045(1r), suggests that there is no lawful basis for appointment of an unelected special prosecutor in even one county here, let alone in five. Again, petitioners find no helpful earlier cases from which this Court might draw direct guidance.

The reserve judge acting as the five-county John Doe magistrate and the special prosecutor also are operating the investigation out of a post office box, seemingly to the exclusion of five Clerks of Court. A secrecy order requires challenges to a subpoena to be mailed to the post office box, rather than filed with a Clerk of Court (or five Clerks of

Court). The secrecy order, if read literally, threatens contempt punishment against a person-in-interest or lawyer if a challenge to a subpoena were filed with a Clerk of Court, rather than mailed to the post office box. Once again, this procedure appears unprecedented, for all that petitioners' research reveals.

2. Because the *ad hoc* combination of five counties into one joint John Doe proceeding appears to create something akin to a "supercircuit" that is outside the contemplation of the Wisconsin Statutes, and that raises real questions of public accountability through the political process of the (unelected) reserve judge and (unelected) special prosecutor in those five counties, a real and significant question of state law arises here. This procedure appears also to circumvent the constitutional and statutory roles of both Clerks of Court and District Attorneys in this state. See WIS. CONST. Art. VII, § 12(1) (Clerks of Court), and Art. VI, § 4 (District Attorneys). At least arguably, too, it effects a structural change in the statutory scheme of circuit courts in

this state. For these reasons, the case may meet the criterion for review set out in WIS. STAT. § 809.62(1r)(a), as well.

3. As a practical matter, the five-county assemblage described above complicates accountability by appellate review within the judicial branch as well. The five counties at issue here spread across two of this Court's appellate districts, District I and District IV. It is not even clear, then, which District of this Court should consider this Petition in the first instance. That complication would be resolved by certification, because obviously the supreme court has undivided appellate jurisdiction over all counties within the state's borders.

4. Because this is a John Doe investigation, with no criminal charges filed, there arguably is a clear need to hasten the ultimate appellate decision. Supreme Court IOP II.B.2. Certification to the supreme court may accomplish that goal.

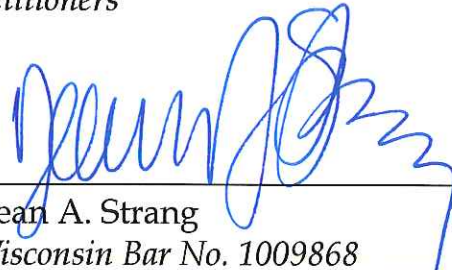
5. Finally, given the novelty of the legal questions here and the high public interest in the earlier John Doe proceeding, the supreme court might choose ultimately to consider this case regardless of how

the Court of Appeals might decide the issues. Supreme Court IOP
II.B.2. That also is a consideration in certification.

WHEREFORE, Unnamed Petitioners respectfully suggest to this
Court that it consider certification to the Wisconsin Supreme Court.

Respectfully submitted,

THREE UNNAMED PETITIONERS,
Petitioners



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