FILED UNDER SEAL
STATE OF WISCONSIN
IN THE SUPREME COURT

Nos. 2013AP2504-2508-W, 2014AP296-OA, 2014AP417-421-W

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IN THE MATTER OF JOHN DOE PROCEEDING

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor,
Respondents.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

[Captions continue on following page.]

REDACTED RESPONSE OF UNNAMED MOVANT NO. 1 TO SPECIAL PROSECUTOR'S MOTION FOR RECUSAL

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CORRECTED
Revised redactions per 3-27-15 Order

No. 2014AP296-OA

STATE OF WISCONSIN ex. rel. TWO UNNAMED PETITIONERS,
Petitioner,

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THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and FRANCIS D. SCHMITZ, Special Prosecutor,
Respondents.

L.C.#s 2012JD23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

Nos. 2014AP417-421-W

STATE OF WISCONSIN ex. rel. FRANCIS D. SCHMITZ,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
Respondent,

and

EIGHT UNNAMED MOVANTS,
Interested Parties.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2013JD23

INTRODUCTION

After waiting an entire year while this matter remained pending before this Court—including two months after this Court's delineation of the issues for review, and on the heels of the unnamed movants' filings of their initial briefs—the Special Prosecutor has just now concluded that the time is ripe to file a motion to recuse two Justices and provide "helpful" guidance regarding two other Justices. The motion includes no information that could not have been presented to this Court at a much earlier date.

On the merits, the motion should be denied in its entirety. Recusal is unwarranted. The Special Prosecutor has both misstated the recusal standard and misconstrued the factual record.

Moreover, the Special Prosecutor's "redacted" filing must be further redacted. It includes a substantial amount of unredacted information that is not only clearly covered by the John Doe secrecy orders, but also was previously filed under seal by the Special Prosecutor himself.

In sum, the Special Prosecutor's motion for recusal should be denied on the merits, and his "redacted" filing should be further redacted in accordance with the attached Exhibit 1.

DISCUSSION

I. The Special Prosecutor's motion should be denied in its entirety because recusal is unwarranted.

The motion for recusal should be denied in its entirety because recusal is unwarranted. The Special Prosecutor has both misstated the recusal standard and misconstrued the factual record.

A. The Special Prosecutor misstates the recusal standard.

The Special Prosecutor has misstated the recusal standard because: (1) the State cannot assert a due process claim; (2) *Caperton* is wholly distinguishable; and (3) the motion is untimely.

1. The State cannot assert a due process claim.

Relying on the United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Special Prosecutor suggests that "there is no 'safe harbor' [from recusal] to be found within the provisions of SCR 60.04(7) and (8) . . . [because] Due Process considerations 'trump' any state statute that seeks to protect such conduct." (Motion at 7-9, 22.)

A state, however, is not a "person" entitled to due process protection. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (dismissing claims on basis that Due Process Clause "cannot,

by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . ."); *Connecticut Dep't of Soc. Servs. v. Leavitt*, 428 F.3d 138, 147 (2d Cir. 2005); *see also Curry v. McCanless*, 307 U.S. 357 (1939); *In re Herndon*, 188 B.R. 562 n.8 (E.D. Ky. 1995). Thus, while the Special Prosecutor, representing the interests of the State, may move for recusal under state statutes or judicial rules, he cannot invoke due process as grounds for such a motion.

2. *Caperton* is wholly distinguishable.

The Supreme Court in *Caperton* concluded that recusal is appropriate "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." 556 U.S. at 884 (emphasis added). The Court recognized that absolutely critical to its decision was the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case." *Id.* at 886. Specifically, the Court emphasized that "[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.*

The Court ultimately held that the donor's "significant and disproportionate influence" in conjunction with the "temporal relationship" between the election and the pending case could cause the judge to be unfair so as to require recusal. *Id.* at 886-87. "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* (emphasis added).

This matter is markedly distinguishable. The temporal relationship critical to *Caperton*'s analysis does not exist here. [redacted] There is no temporal connection between any campaign contributions, the elections, and the pendency of the current proceeding. Said another way, the spending the Special Prosecutor questions occurred long before the unnamed movants were aware of, were involved in, or had any "stake" in the outcome of these proceedings.

Finally, unlike the challenge to the $50 million judgment entered against the donor in *Caperton*, the questions here are purely legal and equally applicable to virtually all candidates for public offices

in the State of Wisconsin. For all these reasons, *Caperton* is inapposite.

3. The motion is untimely.

The Special Prosecutor argues that, under this Court's decision in *Storms v. Action Wisconsin Inc.*, 2008 WI 110 ¶ 30, 314 Wis. 2d 510, 754 N.W.2d 480, his motion is timely because it was filed "before a decision on the merits." (Motion at 5.) Although such a recusal motion certainly should be filed before a final decision is rendered, this Court should be very troubled, as it was in *Storms,* by the timing of the Special Prosecutor's motion.

The petition for review and petition for leave to commence an original action were both filed in February 2014, and the petitions to bypass were filed shortly thereafter. The Special Prosecutor undoubtedly was in possession of the factual information contained in his recusal motion at that time—that is, over a year ago. Yet the fact remains that he waited until he was able to review the unnamed movants' opening briefs to file a recusal motion.

In *Storms,* this Court explained:

> Motions such as this, having the potential to undermine the public's trust and confidence in the legitimacy of this court's decisions and the integrity and impartiality of this court as an

> institution, are very serious indeed, and, accordingly, must be raised in a timely fashion. While we are appreciative of the fact that requesting the disqualification of a judge by law is a very serious matter, in fairness to the parties and the court, if a party has information while a case is pending that goes to the issue of a judge's or justice's participation in the matter, that party has an obligation to promptly bring the matter to the individual judge's or justice's attention before a decision has been rendered.

2008 WI 110, ¶ 30 (emphasis added).

Here, however, nothing about the timing of the Special Prosecutor's motion was "prompt"—it neither complies with the spirit of *Storms* nor is it consistent with the Special Prosecutor's suggestion that he is simply trying to "assist members of the court." (Motion at 5.) Instead, the timing of the Special Prosecutor's motion suggests he read the parties' opening briefs and understood the uphill battle he is facing.

As this Court has recognized:

> Removal of a justice from participating in an individual case negatively impacts judicial independence. This is so because motions for disqualification are not made in regard to a justice that the movant believes will decide the pending case in the movant's favor. Rather, they are made to exert pressure on a justice the movant believes will not decide the case as the movant wants it to be decided, or in motions after decision in order to cancel a justice's participation from a decision under which the movant did not prevail.

State v. Henley, 2011 WI 67, ¶ 37, 338 Wis. 2d 610, 802 N.W.2d 175 (citations omitted). Again, the Special Prosecutor's delay in filing his recusal motion indicates that it was made after a review of the unnamed movants' briefs "to exert pressure on a justice the movant believes will not decide the case as the movant wants it to be decided."

B. The Special Prosecutor misconstrues the factual record.

The Special Prosecutor presents an incomplete (and, at times, inaccurate) factual record, selectively stringing together emails in an attempt to personalize his recusal motion to the Justices he targets. It is important, however, to remember the full procedural posture of the case, the broad issues under consideration, and the full impact of this Court's ruling.

First, no one has been charged with anything. This Court is not being called upon to consider adjudged guilt or innocence of individual parties. In fact, the unnamed movants are before the Court because the John Doe Judge repeatedly held that none of them engaged in any wrongdoing. Rather, the issues before the Court are more general considerations of the meaning, scope, and constitutionality of Chapter 11. But they are issues of great constitutional and public

importance in the State of Wisconsin, and issues that will most certainly recur unless and until this Court addresses them.

And because every current Supreme Court Justice was elected using a campaign committee authorized under Chapter 11, every Justice's consideration of this case necessarily touches on their prior political activity.[1] Arguably, accepting the Special Prosecutor's argument would necessarily call into question each and every Justice, and thus result in invocation of the Rule of Necessity. *See State v. Houser*, 122 Wis. 534, 100 N.W. 964 (1904); *see also United States v. Will*, 449 U.S. 200, 212 (1980) (explaining it is precisely considerations of this kind—where all of the Justices and perhaps even all of the Court of Appeals judges could arguably be disqualified based on the Special Prosecutor's theory, and thereby prevent a decision on the merits—that give rise to the Rule of Necessity).

On a related note, this Court's decisions regarding Chapter 11 will apply across the political spectrum in all future elections. (*See*

[1] One is not hard-pressed to note the close involvement of related parties in prior elections of Supreme Court Justices not subject to the pending motion.

Opening Brief of Unnamed Movant No. 1, at 51-53 (summarizing similar conduct of others involved in recall elections)). That is, the interests before the Court are not unique to one political party.

Finally, the factual record must be corrected regarding one individual in particular. Specifically, the Special Prosecutor attempts to portray [redacted] as a critical link between one of the unnamed movants and individual Justices. As [redacted] affidavit, attached as Exhibit 2, makes clear, however, [redacted] (Motion at 14.)

II. Further redactions must be made to the Special Prosecutor's "redacted" filing.

Merits aside, further redactions must be made to the Special Prosecutor's "redacted" filing. In his motion, the Special Prosecutor seeks to provide unredacted information to the public that is not only clearly covered by the John Doe secrecy orders, but also was previously filed under seal by the Special Prosecutor himself.

First, the Special Prosecutor explicitly names all of the unnamed movants, failing to respect their rights to anonymity in a John Doe proceeding. (Motion at 3-4.) In all previous filings, the Special Prosecutor had kept this information under seal.

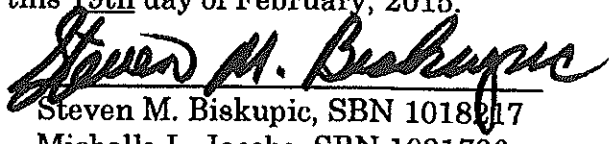
Second, although redacting the actual text, the Special Prosecutor sets forth all of the relevant details (sender, recipients, date, and content) of emails evidencing the conduct in question, all of which appear to have been obtained via the John Doe proceeding, and thus should remain under seal. (Motion at 10-11, 17-18.) The Special Prosecutor references his February 14, 2014, affidavit and related filings in Case No. 14AP417 as the source of these emails and other unredacted factual information. (Motion at footnotes 1-2, 8-9, 14, 16, 35.) Those filings, however, remain under seal in the Court of Appeals.

In short, this material should have been redacted. The Special Prosecutor's previous filings demonstrate his awareness that unredacted information in his motion for recusal is subject to the John Doe secrecy orders. As a result, regardless of this Court's decision on the merits, the information highlighted in the attached Exhibit 1 must be redacted.

CONCLUSION

For all of these reasons, Unnamed Movant No. 1 respectfully requests that: (1) the Special Prosecutor's motion for recusal be denied on the merits; and (2) the Special Prosecutor's "redacted" filing be further redacted in accordance with the attached Exhibit 1.

Respectfully submitted this 19th day of February, 2015.



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UNNAMED MOVANT NO. 1'S PROPOSED REDACTIONS HAVE BEEN OMITTED AS MOOT DUE TO COURT'S MARCH 27, 2015 ORDER REQUIRING SPECIAL PROSECUTOR TO FURTHER REDACT HIS FILINGS

Exhibit 1

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[Captions continue on following page.]

AFFIDAVIT OF [redacted] REGARDING ALLEGATIONS IN RECUSAL MOTION

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Exhibit 2

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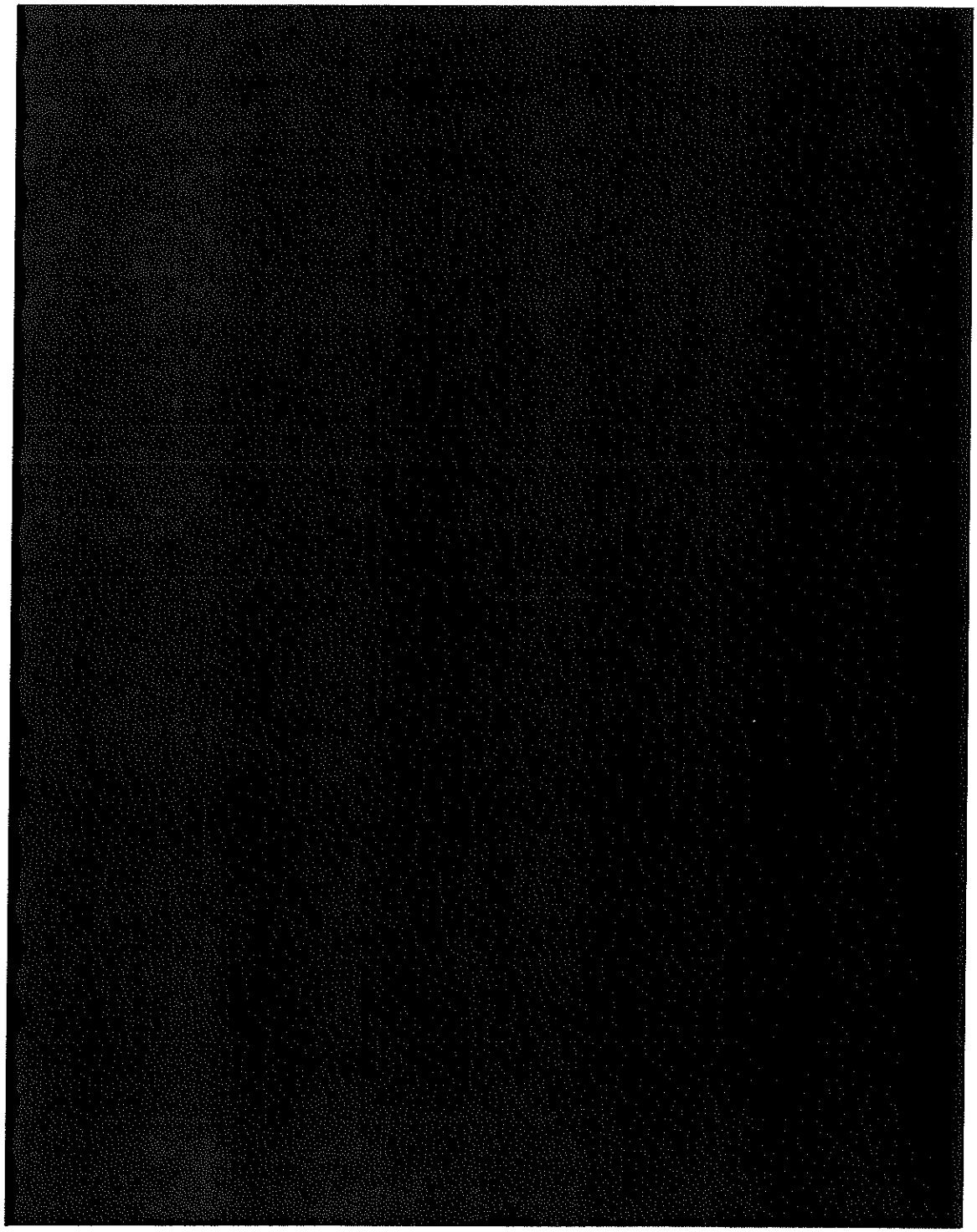
AFFIDAVIT OF [redacted]

I, [redacted] being duly sworn under oath, state as follows:



[redacted]

[redacted]

Subscribed and sworn to before me
this 17 day of February, 2015.

[redacted]