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December 4, 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

On the court's own motion and in light of the court's per curiam opinion and orders issued on December 2, 2015, including the court's ruling that Attorney Francis Schmitz has no authority to act as the appointed special prosecutor with respect to the above-listed matters (except with respect to the limited tasks assigned to him in the December 2, 2015 per curiam opinion denying his motion for reconsideration);

IT IS ORDERED that if any or all of the district attorneys of Columbia, Dane, Dodge, Iowa, and Milwaukee Counties wish to request permission to intervene as a party for all purposes

in the above-referenced matters, such motion or motions for intervention shall be filed with the clerk of this court on or before December 18, 2015.

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

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). I do not join the majority's unsigned order imposing a 14-day deadline on any or all of the five district attorneys for filing a motion to intervene. Again the four justices do not explain what they will do with any motion to intervene.

¶2 The ink is not yet dry on the court's December 2, 2015 per curiam opinion denying the Special Prosecutor's motion for reconsideration of Justice Gableman's July 16, 2015 majority opinion.[1] As I predicted in my concurrence/dissent to the per curiam, expect the per curiam to be "modified and clarified" as the four justices take a piecemeal, shifting approach to the John Doe trilogy.[2] The per curiam has come unglued already.

¶3 The per curiam stated that "one or more of the district attorneys could seek to intervene in these actions, which would allow for the prosecution to be represented in future proceedings."[3] The per curiam set no deadline for such motions. Now, just two days later, the four justices issue the instant order. If such an order is necessary, then why was it not included in the per curiam? No explanation is given. The instant order is the embodiment of the four justices' piecemeal approach to the John Doe trilogy and the four justices' constantly changing direction. Thus, the four justices add to the mess they have created.

¶4 In addition to the instant order's piecemeal and shifting approach, the instant order is ambiguous, unfair, and in all likelihood is not binding on either the district attorneys or the court. Each of these points merits attention, but first, some background is necessary to put the instant order in context.

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[1] Throughout my writing, I will refer to Justice Gableman's July 16, 2015 majority opinion as such or as "the majority opinion." The full citation is State ex rel. Two Unnamed Petitioners v. Peterson, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165. I refer to the per curiam opinion denying the Special Prosecutor's motion for reconsideration issued December 2, 2015, as "the per curiam."

[2] See my concurrence/dissent to the per curiam, ¶52

[3] Per curiam, ¶19.

¶5 The December 2, 2015 per curiam departed from Justice Gableman's July 16, 2015 majority opinion and terminated the Special Prosecutor's authority to act as Special Prosecutor from December 2, 2015, forward. Thus, as of December 2, 2015, the four justices knowingly and intentionally left the prosecution and State totally unrepresented in future proceedings in the John Doe trilogy. Yet the four justices know that numerous matters are still unresolved in the John Doe trilogy. If what's past is prologue,[4] numerous additional issues will arise in this court in short order, requiring adversarial representation.[5]

¶6 The four justices joining the instant order previously denied a motion by Three Unnamed Petitioners to add the five district attorneys as parties.[6] The Three Unnamed Petitioners warned more than a year and a half ago that if the five district attorneys were not joined and the court concluded that the Special Prosecutor could not act in his official capacity, the prosecution would be left entirely unrepresented.[7] The four justices did not heed this warning.[8]

¶7 On the same date the per curiam was issued, December 2, 2015, the four justices joining the instant order also denied two motions for limited intervention filed by two investigators and a law enforcement officer. The proposed intervenors sought limited intervention to protect their interest in preserving documents and other materials acquired during the John Doe I and II investigations to the extent the materials are relevant to the proposed intervenors' interests in pending and future lawsuits. I dissented from the order denying the two motions for limited intervention.[9]

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[4] See William Shakespeare, The Tempest, Act II, Scene 1.

[5] Per curiam, ¶16.

[6] See Attachment C (Petitioners' Motion to Add Five Respondents) to my concurrence/dissent to the per curiam; see also my concurrence/dissent to the per curiam, ¶¶68-70.

[7] See Attachment C (Petitioners' Motion to Add Five Respondents) to my concurrence/dissent to the per curiam, at 4.

[8] See My concurrence/dissent to the per curiam, ¶¶111-114.

[9] See Attachment D (Order Denying Limited Intervention) to my concurrence/dissent to the per curiam and my dissent thereto.

¶8 A third motion for limited intervention filed by Milwaukee County District Attorney John Chisholm and two assistant district attorneys on October 14, 2015, remains pending in these cases. This unaddressed motion for limited intervention filed by these prosecutors raises the same interests as the other three proposed intervenors, seeks the same relief, and received the same response by the Unnamed Movants. As I have written previously, are the four justices holding the Milwaukee County District Attorney's and assistant district attorneys' motion for limited intervention to try to induce the district attorney and assistant district attorneys to intervene "for all purposes?"[10]

¶9 Now that the four justices' deliberate and intentional actions have terminated the Special Prosecutor's appointment and authority, leaving the prosecution and State entirely unrepresented in future proceedings in the John Doe trilogy, the four justices are desperately trying to fill the gap in representation that they created. The four justices are seeking someone other than the Special Prosecutor to represent the prosecution's and the State's interests so that the court can conduct adversarial proceedings on numerous issues that are already before the court and those that are sure to come up in the future.

¶10 The four justices apparently could not let the per curiam dated December 2, 2015, stand without further modification. Accordingly, they issue the instant order, requiring the five district attorneys to file, within fourteen days, any motion to intervene "for all purposes." The instant order is misguided for several reasons.

¶11 First, the instant order states that if any of the five district attorneys wish to intervene "for all purposes," they must file a motion to intervene within 14 days. The instant order does not, however, define the phrase "for all purposes." This ambiguous phrase raises several questions.

¶12 Do the four justices plan to define the phrase "for all purposes" if they grant a motion to intervene? Or to define it after the district attorneys become intervening parties? Are the district attorneys being lured into becoming intervening parties without knowing the true nature and extent of their future involvement in the John Doe trilogy?

¶13 Does intervention "for all purposes" allow an intervening district attorney to relitigate prior decisions and actions by the Special Prosecutor?

¶14 For example, is a district attorney who intervenes "for all purposes" bound by all of the Special Prosecutor's prior decisions, arguments, and actions? Is the per curiam's decision, for example, that the Special Prosecutor forfeited the argument that the investigation should

[10] See my concurrence/dissent to the per curiam, ¶59.

continue with regard to coordinated express advocacy binding on an intervening district attorney, even though the district attorney was not a party at the time of the alleged forfeiture? Is holding a district attorney to an arguable forfeiture by the Special Prosecutor when the district attorney has had no say yet another instance of unfair treatment of the prosecution by the four justices?[11]

¶15 Or does intervention "for all purposes" simply mean picking up where the Special Prosecutor left off? The meaning of "for all purposes" is of immediate significance. The court may soon have to resolve the impact of the revised John Doe statutes on the instant cases.[12] Does intervention "for all purposes" allow an intervening district attorney, for example, to make new arguments regarding the impact of the revised John Doe statutes on the instant cases? Or is an intervening district attorney limited to the arguments made by the Special Prosecutor in his filings on the issue? The Special Prosecutor's filings were made while the Special Prosecutor's appointment and authority were intact. As a result, the Special Prosecutor's filings are properly before the court.[13]

¶16 The instant order raises more issues that will need to be resolved, again piecemeal, and again affording the four justices the opportunity to shift direction.

¶17 Second, the instant order may well give five busy district attorneys too little time to convene and discuss the instant order with each other and with the Special Prosecutor, weigh the relevant considerations, and prepare and file a motion to intervene. As I noted previously, even if one or more of the district attorneys were to intervene for limited purposes, the learning curve to assume responsibility for challenging past orders and opinions of this court and for representing the prosecution's and the State's interests in future legal proceedings would be steep.[14]

¶18 Moreover, intervention may impose significant expenses on a district attorney's office, an office funded by the State and county. The instant order does not appear to give the

[11] For additional examples of unfairness to the Special Prosecutor and other members of the prosecution, see my concurrence/dissent to the per curiam, ¶¶44, 110-125.

[12] See my concurrence/dissent to the per curiam, ¶¶46-52.

[13] See per curiam, ¶15 ("Our ruling herein, . . . means that the actions [the Special Prosecutor] has previously taken . . . were within his authority at that time.").

[14] See my concurrence/dissent to the per curiam, ¶113.

district attorneys sufficient time to determine what resources, funding, and staff are available to undertake intervention.

¶19 Why a 14-day deadline? Why not a January 4, 2016 deadline?

¶20 Third, in addition to giving the district attorneys too little time to file any motions to intervene, I wonder whether the 90-day clock for filing a petition for writ of certiorari to the United States Supreme Court is running from Wednesday, December 2, the date the per curiam was issued, and who is to file such a petition.[15] The December 2, 2015 per curiam declared that the four justices wanted to "avoid[] impeding in any way the ability of the prosecution team to seek certiorari review in the United State [sic] Supreme Court."[16] Nevertheless, both the per curiam and the instant order appear to raise the specter of unfairly undermining review of this court's rulings by the United States Supreme Court.[17]

¶21 Fourth, the deadline imposed in the instant order may not be binding on either the district attorneys or the court. In other words, if the district attorneys do not intervene before the court-imposed deadline, that alone may not render a later motion to intervene untimely. Under both Wisconsin and federal law, the timeliness of a motion to intervene is determined in the circumstances of each particular case at the time of the motion.[18] As a result, even when a court sets a deadline for filing a motion to intervene, the circumstances surrounding the motion to intervene and the underlying case determine whether intervention is timely, not a mechanical application of the deadline alone.

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[15] See U.S. S. Ct. R. 13.3.

[16] Per curiam, ¶29.

[17] See my concurrence/dissent to the per curiam, ¶¶128-130 (noting what a mess the court has wrought by terminating the Special Prosecutor's appointment and authority).

[18] See NAACP v. New York, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances."); State ex rel. Bilder v. Delevan Twp., 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983) ("The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly.").

Because Wis. Stat. § 803.09 is based on Rule 24 of the Federal Rules of Civil Procedure, I may look to federal cases involving Rule 24 as well as state cases for guidance in interpreting the Wisconsin intervention statute. See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶37, 307 Wis. 2d 1, 745 N.W.2d 1.

¶22 For these reasons, I would not issue the instant order. The per curiam told the district attorneys that they could intervene and imposed no deadline. Now, just two days later, the four justices revise the per curiam. Enough already! I would leave it to the five district attorneys to determine whether to intervene and on what basis they may wish to file a motion for intervention.

¶23 In closing, I also write to object to the deadline imposed by the four justices on my separate writing. Let me explain what the four justices did in this instance.

¶24 Over the lunch hour on the afternoon of Wednesday, December 2, a day when the court was meeting in closed conference, the four justices circulated the instant order. The four justices advised me by email on December 2, the very date the per curiam denying the Special Prosecutor's motion for reconsideration was publicly released, that there is a need to set a deadline immediately for any or all of the district attorneys to file intervention motions. Why the immediacy? Why wasn't this deadline placed in the per curiam? No explanation was given.

¶25 The four justices decided to issue the instant order without giving me any opportunity to provide input on the order, even though they had no way of knowing what my position would be. Moreover, the four justices decided (also without any input from me) that the instant order would be issued by the close of business Friday, December 4, and that any separate writing I might wish to prepare would need to be finalized by 4:00 P.M. on Friday, December 4, so it could be filed by the close of business on Friday.

¶26 The four justices' emails explained that given the brevity of the instant order and the need for a prompt order to issue, two days should be more than enough time for me to prepare any separate writing in response. If I did not comply with this ultimatum, the emails explained that the instant order would issue with the notation "Separate writing to follow."

¶27 This is a complete departure from past practice. No existing rule authorizes such a practice.

¶28 Although the email states that "two days should be more than enough time [for me] to prepare any separate writings," the email glosses over the court's scheduled meetings on December 2, 3, and 4 (meetings that are not related to the John Doe trilogy). The court was in closed conference all day on Wednesday, December 2 and for half of the day Thursday, December 3 (although a full day conference was scheduled). An open rules conference is scheduled for Friday, December 4 from 9:30 A.M. to 3:45 P.M. A memorial service for Justice N. Patrick Crooks has been scheduled for 4 P.M. on Friday, December 4.

¶29 I am troubled that four members of the court, without consultation with all participating justices, threaten to issue an order with the notation "Separate writing to follow." Is this an attempt to stifle dissent by trying to deliberately bury a separate writing? After all, who is interested in a separate writing issued even one day after an order or opinion is issued? Furthermore, separate writings are not (as the four justices apparently believe) merely a nuisance that might delay the release of their decision.

¶30 Separate writings serve many purposes. Among other things, a separate writing may express a different viewpoint than that held by the majority or articulate flaws in the majority's conclusions or analysis. Issuing an order or decision with a notation that a separate writing is to follow deprives not only the majority of an opportunity to rethink a position and revise and respond to a separate writing, but also deprives the parties and the public of a more thorough, well-reasoned majority decision. Furthermore, the parties and public are deprived of the opportunity to evaluate the majority decision in light of the separate writing.

¶31 The court's practice in the instant order is disrespectful of minority views and contrary to the way a collegial court should act. Chief Judge Diane Wood of the federal Seventh Circuit Court of Appeals got it right in her article entitled When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court, 100 Cal. L. Rev. 1445, 1451-57 (2012). Chief Judge Wood elaborated on the purposes of separate writings. The purposes include correcting factual or legal errors in a majority decision, exposing flaws in reasoning or principle, preventing the majority from sweeping facts or law under the rug, and shaping the development of the law in the future.

¶32 Do the four justices really want to adopt a procedure that allows opinions to be released without time to study a forthcoming separate writing? Will such a procedure backfire by encouraging justices to release separate writings after the majority opinion so that the majority opinion cannot be revised to respond?

¶33 For the reasons set forth, I dissent and write separately.

Diane M. Fremgen
Clerk of Supreme Court

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