STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP230-W

In The Matter Of The John Doe Petition:

STATE OF WISCONSIN ex rel. ADRIAN T. HIPP,

Petitioner-Respondent,

v.

THE HONORABLE MARSHALL B. MURRAY, PRESIDING,

Respondent-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I

BRIEF AND APPENDIX OF THE HONORABLE MARSHALL B. MURRAY

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ISSUES PRESENTED

(1) Does a John Doe judge have exclusive authority to subpoena witnesses for a John Doe proceeding?

The issue was raised by the response of the Honorable Marshall B. Murray to Adrian Hipp's petition for a supervisory writ. The court of appeals decided in the negative. The court of appeals decided that a clerk of court may issue subpoenas for a John Doe proceeding.

(2) Is a John Doe judge required to subpoena every witness that the John Doe petitioner requests and to examine every such witness at the John Doe proceeding?

The issue was raised by the Court of Appeals *sua sponte*. The court of appeals answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Honorable Marshall B. Murray believes that oral argument and publication of the court's opinion are warranted. The opinion will clarify the law and it will decide a case of substantial and continuing public interest. *See* Wis. Stat. § 809.23(1)(a). The court's opinion will have statewide impact, and it will resolve a question of law that is likely to recur. *See* Wis. Stat. § 809.62(1)(c).

STATEMENT OF THE CASE

A. Nature of the case and disposition in the court of appeals.

This is a review of a decision of the Court of Appeals, District I, dated July 17, 2007, *see In the Matter of the John Doe Petition: State of Wisconsin ex rel. Adrian T. Hipp v. The Honorable Marshall B. Murray, presiding*, 2007 WI App 202, __ Wis. 2d __, 738 N.W.2d 570 (Pet.-App. 101-112), that granted Adrian Hipp's petition for a supervisory writ. The Court of Appeals decided that a John Doe petitioner may compel the appearance of witnesses at a John Doe hearing by subpoenas not issued by the John Doe judge, but instead issued by a clerk of court. The Court of Appeals intimated that a John Doe judge must subpoena and must examine every witness that the John Doe petitioner requests.

B. Procedural history of the case and statement of facts.

On September 25, 2006, Hipp submitted a John Doe petition to the Milwaukee County Clerk of Circuit Court (R. 1). Hipp alleged that some time before March 1, 2001, a John Doe had taken his movable property from his residence, without his consent and with intent to deprive him permanently of possession of the property, contrary to Wis. Stat. § 943.20(1)(a) and (3)(c) (R. I: 2-6). He requested that the court examine him and any witnesses produced by him, and that the court subpoena and examine other witnesses at the request of an appointed special prosecutor (R. 1: 2). A witness list was appended to the John Doe petition, containing the names of six witnesses (four of Hipp's friends, the owner of the apartments where Hipp resided, and the John Doe) (R. 1: 16). The case was assigned to Judge Murray (R. 2).

On November 15, 2006, Hipp, a prisoner at Stanley Correctional Institution, was produced for a hearing in Milwaukee before Judge Murray.[1] At the end of the hearing, Judge Murray told Hipp that he would continue the hearing to December 13, 2006, and that it was Hipp's responsibility to produce his witnesses at the continued hearing (Tr. 7-10). Judge Murray told Hipp that he would question Hipp's witnesses "about what they know and about what information they have" (Tr. 7). Hipp asked Judge Murray what would happen if witnesses, other than his own witnesses, were not willing to appear at the continued hearing (Tr. 9). Judge Murray responded:

[1] On February 6, 2006, upon Hipp's uncontested motion to supplement the record, the Supreme Court ordered that the transcript of the November 15, 2006, hearing be filed with the Supreme Court. On February 18, 2006, the transcript was filed with the Supreme Court.

> THE COURT: Sir, I'm not the Judge in this case. I am just responding to the petition that you wrote. You have to bring in information to me. I'm just a police officer trying to do an investigation here.

(Tr. 9).

On November 20, 2006, Hipp submitted a proposed witness list to Judge Murray, informing Judge Murray "of his intent to call the following subpoenaed witness[es]" at the continued John Doe hearing (R. 3). The list included three of his friends, the owner and the manager of the apartments where Hipp resided, the John Doe, an assistant district attorney, and an investigator in the district attorney's office (R. 3).

On December 13, 2006, at the continued hearing, Hipp did not appear because the assistant district attorney present at the hearing, ADA Jon Reddin, neglected to produce him (R. 11). Judge Murray continued the hearing to January 8, 2007 (R. 11: 5). Two of Hipp's friends voluntarily appeared at the hearing and they informed Judge Murray that while they understood that Hipp had mailed subpoenas to them, they had not received the subpoenas (R. 11: 6). Judge Murray responded: "Well, if you receive them, remember that you're under subpoena until the next court date" (R. 11: 6). ADA Reddin told Judge Murray that while Hipp could request the appearance of the other assistant district attorney and the investigator listed on his witness list, he did not have the authority to subpoena them to appear at the continued hearing (R. 11: 6-7).

On January 4, 2007, Hipp submitted copies of subpoenas to Judge Murray that were issued by the Milwaukee County Clerk of Circuit Court on December 29, 2006, for one of Hipp's friends, for the owner of the apartments where Hipp resided, for the John Doe, for an assistant district attorney, and for the investigator (R. 5). Hipp also informed Judge Murray that his two friends who had appeared at the hearing on December 13, 2006, would be present at the hearing on January 8, 2007, "as you

placed them under subpoena when they were present at the aborted hearing of December 13, 2006" (R. 5). The subpoenas listed an attorney as a person who could be contacted with any questions about the subpoenas (R. 5).

On January 4, 2007, ADA Reddin, the assistant district attorney who had appeared at the two previous John Doe hearings, notified the attorney whose name appeared on the subpoenas, by letter, that under Wis. Stat. § 968.26, "no one, not even the judge, has subpoena power unless and until the judge finds that there is reason to believe that a crime has been committed within his jurisdiction" (R. 4). ADA Reddin continued:

> Because no such finding has been made, the subpoenas which were served today are invalid and without authority. I have advised the three individuals served that these subpoenas have no legal effect and that they are not required to appear. I have consulted with Judge Murray and he concurs with this advice. He did offer that you may appear Monday and make any statements to him that you wish.
>
> In the event Judge Murray makes a finding that there is reason to believe that a crime has been committed, and based upon that finding orders a John Doe proceeding, the judge, and only the judge, will have subpoena power.

(R. 4).

On January 8, 2007, the John Doe hearing was held before Judge Murray (R. 13). At the beginning of the hearing, Hipp informed Judge Murray that he had subpoenaed witnesses who were not present at the hearing (R. 13: 7). The following colloquy then occurred between Hipp, Judge Marshall, and ADA Reddin:

> **THE COURT:** You don't have subpoena power, sir.
>
> **MR. HIPP:** Well, the circuit court issued the subpoenas that . . . I sent you copies of.

THE COURT: The clerk of court doesn't have subpoena power.

Mr. Hipp: Understand your Honor. I have an ability to have witnesses on my behalf to be present on a John Doe.

THE COURT: You may ask witnesses to come. You don't have a right to subpoena them.

MR. HIPP: Your Honor, I need a moment. When we were here on the first occasion on the 15th of November, I had asked what I was to do if I needed to have people subpoenaed. And according to my understanding of Wisconsin Statutes 885.01 about who may issue subpoenas and what proceedings subsection 1 indicates that I do have an ability, Your Honor, indicating to me that the subpoena . . . may be signed and issued . . . [by] [a]ny judge or clerk of a court . . . .

It's based on that, your Honor, that I asked to the clerk of courts for the subpoena forms.

THE COURT: John Doe proceeding, neither the clerk, nor you, nor the DA have subpoena power.

MR. HIPP: Who has subpoena power, Your Honor?

THE COURT: If anybody has subpoena power, it's me.

MR. HIPP: I asked when we first came, if I could get subpoenas. Do you recall me asking for that, because I understood that . . . since I am the petitioner here, I'm in a situation that is not unusual. . . . I have a right to have people present that would be able to determine the probable cause that I'm looking to establish.

THE COURT: Well, okay., it's up to me to determine if there's probable cause or not.

Counselor?

> **ATTORNEY REDDIN:** The way the John Doe statute reads, Mr. Hipp has a right to produce witnesses voluntarily and to have them examined by himself or you in an effort to discover whether or not there's reason to believe that a crime has been committed.
>
> The only subpoena power that lies in a John Doe, is the Court. It states, the judge may and at the request of the district attorney shall, . . . issue subpoenas. We are not there yet. This court has not found that there is reason to believe a crime has been committed. There's a difference between producing witnesses and compelling witnesses.
>
> I became aware Thursday or Friday that a number of people including one of my assistants and one of the investigators had been supposedly subpoenaed. . . . I got copies of the subpoenas, and they clearly were without legal basis.
>
> There was an attorney listed on them, and I called them [sic] and [he] told me that the only reason that he let his name be put on the subpoena [was] because Mr. Hipp was incarcerated so . . . the witnesses being subpoenaed could call him and be told these were legal subpoenas.
>
> I explained to them [sic] they were not legal subpoenas. If he wanted to come and make a record, he could do that. He said he didn't want to do that. There is no subpoena power by anyone at this point, until the Court makes a finding that there is reason to believe a crime was committed, then you have subpoena power, not Mr. Hipp.

(R. 13: 7-10).

Judge Murray then heard the testimony of Hipp and three of his friends (R. 13: 12-470. At the conclusion of the hearing, Judge Murray ruled that Hipp had failed to present sufficient evidence for Judge Murray to find probable cause that a crime had been committed by the John Doe or by anyone else as it related to his property (R. 13: 49-52).

On January 26, 2007, Hipp filed a petition for a supervisory writ with the Court of Appeals, to compel Judge Murray to provide him a proper John Doe hearing under Wis. Stat. § 968.26. Hipp sought a supervisory writ to determine the validity of the subpoenas issued by the clerk of circuit court. If the subpoenas were valid, he requested that the John Doe proceeding be reopened to take the testimony of the subpoenaed witnesses who did not testify. He further requested that a different judge and a different assistant district attorney be assigned.

On January 30, 2007, the Court of Appeals ordered Judge Murray to respond to Hipp's petition for a supervisory writ. *See In the Matter of John Doe Proceeding*, 2003 WI 30, ¶¶ 2, 38, 41, 260 Wis. 2d 653, 661, 678, 680, 660 N.W.2d 260 (the actions of a John Doe judge are subject to review pursuant to a petition for a supervisory writ in the court of appeals). On January 7, 2007, Judge Murray filed his response (R. 8).

On July 17, 2007, the Court of Appeals, District I, issued its decision, granted the writ, and remanded the case for further proceedings. The Court of Appeals concluded that Judge Murray "erred by not permitting Hipp to subpoena witnesses Hipp wanted to call at the *John Doe* hearing" (Court of Appeals Decision, pp. 1-2) (Pet.-App. 101-102). The court directed that, on remand, Hipp "be permitted, as explained in this opinion, to have subpoenas issued for those persons whom he wants to testify at the *John Doe* hearing" (Court of Appeals Decision, p. 12) (Pet.-App. 112).

The court stated that the issue was "whether the *John Doe* statute, WIS. STAT. § 968.26, permits a person filing a *John Doe* petition to compel the attendance of witnesses at the hearing by **subpoenas not issued by the *John Doe*** judge" (Court of Appeals Decision, p. 7) (Pet.-App. 107) (bold added). In answering affirmatively, the court reasoned (1) that the John Doe judge must "examine the complainant under oath **and any witnesses produced by him or her**," *see* Wis. Stat. 968.26 (bold added),

(2) that the way a complainant can "produce" witnesses is via Wis. Stat. § 885.01(1), which, *inter alia,* authorizes a clerk of court to subpoena witnesses to appear in any proceeding to be examined by a magistrate or other person authorized to take testimony, and (3) that "nothing in WIS. STAT. § 968.26 . . . removes *John Doe* matters from § 885.01(1)'s universal application" (Court of Appeals Decision, pp. 7-9) (Pet.-App. 107-109). Finally, the court incorrectly stated that "Judge Murray contends, in response to Hipp's petition for a writ of mandamus, that Hipp can only present the witnesses who he can persuade to attend" (Court of Appeals Decision, p. 10) (Pet.-App. 110). To the contrary, Judge Murray contended that Hipp could request that witnesses be subpoenaed to testify but that only the John Doe judge (and not the clerk of court) could issue the subpoenas.

On August 16, 2007, Judge Murray petitioned for review of the decision of the Court of Appeals by the Wisconsin Supreme Court. On November 5, 2007, the Supreme Court granted review.

STATUTES INVOLVED

Wis. Stat. § 885.01(1) and (2) provide:

> The subpoena need not be sealed, and may be signed and issued as follows:
>
> (1) By any judge or clerk of a court . . ., within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses . . . in any action, matter or proceeding pending or to be examined into before any court, magistrate . . . or other person authorized to take testimony in this state.
>
> (2) By the attorney general or any district attorney or person acting in his or her stead, to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate . . . .

Wis. Stat. § 968.26 provides in pertinent part:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and **any witnesses produced by him or her and may**, and at the request of the district attorney shall, **subpoena and examine other witnesses** to ascertain whether a crime has been committed and by whom committed. **The extent to which the judge may proceed in the examination is within the judge's discretion**. . . . . If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. . . .

(Bold added.)

PRELIMINARY CONSIDERATIONS

A. This case reflects how John Doe procedures are not well understood.

A John Doe judge must conduct a John Doe hearing if the John Doe judge first determines that the John Doe petition meets the threshold test of alleging objective, factual assertions sufficient to support a reasonable belief that a crime has been committed. *See State ex rel. Reimann v. Circuit Court for Dane Cty.*, 214 Wis. 2d 605, 618, 623, 571 N.W.2d 385 (1997). In this case, although Judge Murray never formally determined that Hipp's John Doe petition met the threshold test, he implicitly determined that it met the threshold test when he proceeded with a hearing on the John Doe petition. Thus, ADA Reddin's position that the purpose of the John Doe hearing is to determine whether there is reason to believe that a crime had been committed (as opposed to determining whether there is probable cause that a crime has been committed), and that no one has subpoena power

until the "reason to believe" standard is satisfied **at hearing**, clearly is erroneous.

To the contrary, once the John Doe judge initially determines that the John Doe petition sufficiently alleges objective, factual assertions sufficient to support a reasonable belief that a crime has been committed, a John Doe judge may subpoena witnesses to appear at the John Doe hearing, either at the request of the John Doe petitioner or at the request of the district attorney. In this case, when Hipp reasonably inquired of Judge Murray at the November 15, 2006, hearing, what would happen if witnesses were not willing to appear voluntarily at the continued hearing on December 13, 2006, Judge Murray should have responded that he alone had authority to subpoena witnesses, that Hipp should identify which witnesses he wished to subpoena, and that Judge Murray would decide whether he would subpoena some or all of the witnesses identified by Hipp. On November 20, 2006, when Hipp filed a proposed witness list, Judge Murray had a second opportunity to inform Hipp that he alone had subpoena authority and that he would issue subpoenas for some or all of the witnesses identified by Hipp. Regrettably, Judge Murray did not provide information to Hipp on either occasion. In fact, at the December 13, 2006 hearing where Hipp was not produced, Judge Murray specifically informed two of Hipp's friends that if they received subpoenas from Hipp, they were under subpoena for the continued hearing on January 8, 2007.

Given this situation, and given the language of Wis. Stat. § 885.01(1), it was not unreasonable for Hipp to seek subpoenas from the Milwaukee County Clerk of Circuit Court. In view of the issuance of those subpoenas, even if ADA Reddin believed that the subpoenas were not valid because a John Doe judge has exclusive authority to issue subpoenas in a John Doe proceeding, he should not have advised the subpoenaed witnesses not to appear at the John Doe hearing. Instead, he should have filed a motion with Judge Murray requesting that Judge Murray quash the subpoenas. Judge Murray then could have

quashed the subpoenas issued by the clerk of circuit court, and decided, as the presiding John Doe judge, whether to issue subpoenas for some or all of the witnesses on his own.[2]

Although this case would not be before this court if Judge Murray had issued subpoenas for the witnesses identified by Hipp in the first instance, because the decision of the Court of Appeals incorrectly holds that John Doe judges do not have exclusive authority to issues subpoenas for John Doe hearing, and because the Court of Appeals intimates that John Doe judges must subpoena and examine every witness identified by a John Doe petitioner, Judge Murray has brought this case to the Supreme Court for its review.

B. The Supreme Court should decide the issues presented for review even though this case is moot.

The primary purpose of a John Doe hearing is to determine if it is probable that a crime has been committed and who committed it. *See* Wis. Stat. § 968.26. If it appears probable, a written complaint may be prepared and a warrant issued for the arrest of the accused. *See id.* On the other hand, Wis. Stat. § 939.74(1) provides that a prosecution for a felony must be commenced, *i.e.*, a warrant must be issued, within six years after the commission of the felony.

In this case, Hipp alleges in his John Doe petition that the alleged crime was committed sometime before

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[2] Indeed, the essential difference between construing Wis. Stat. §§ 885.01(1) and 968.26 as giving exclusive authority to the John Doe judge to issue subpoenas or as giving clerks of court concurrent authority to issue subpoenas for John Doe hearings is that witnesses will not be required to appear and move to quash subpoenas issued by a clerk of court which the presiding John Doe judge would not have issued in the first place, and the John Doe judge will not be required to rule on such motions.

March 1, 2001. Although Hipp filed his John Doe petition on September 25, 2006, within six years of the commission of the alleged crime, more than six years have now elapsed. Thus, a determination of whether there is probable cause to believe that a crime has been committed, in the John Doe hearing required on remand by the Court of Appeals, can have no practical legal effect. This is because the six-year statute of limitations would bar the issuance of a warrant for the arrest of the accused.

A case is "moot" when it seeks a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon an existing controversy. *See State ex rel. La Crosse Tribune v. Circuit Ct.*, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983). Hipp's case is moot because the determination of whether there is probable cause to believe that a crime has been committed can have no practical legal effect.

Ordinarily, the Supreme Court will not consider a question the answer to which cannot have any practical effect upon an existing controversy. *See id.* It generally is not in the interest of judicial economy to continue to litigate issues that will not affect real parties to an existing controversy. *See id.* On the other hand, it is not in the "interest of judicial economy or in the interest of the law-declaring function of this court if matters of serious public concern which are likely to cause judicial disputes in the future are not resolved when a factual basis on which a judicial declaration may be made to guide future conduct is presently before the court." *See id.* at 228-29. Thus, despite the general rule of dismissal when cases are moot, the Supreme Court will retain a case for determination although the determination can have no practical effect on the immediate parties where the issues are of great public importance, where the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts, and where the issue is likely to arise again and should be resolved by the Supreme Court to avoid uncertainty. *See id.* at 229. Judge

Murray respectfully submits that these exceptions are present in this case and that the Supreme Court should decide the issues presented.[3]

ARGUMENT

I. A JOHN DOE JUDGE HAS EXCLUSIVE AUTHORITY TO SUBPOENA WITNESSES FOR A JOHN DOE PROCEEDING.

John Doe proceedings are governed by Wis. Stat. § 968.26. The John Doe proceeding is an institution sanctioned by long and continuous usage in Wisconsin since 1839. *See In Matter of John Doe Proceeding*, 2003 WI 30, ¶ 21, 260 Wis. 2d 653, 668, 660 N.W.2d 260; *see State v. Washington*, 83 Wis. 2d 808, 819, 266 N.W.2d 597 (1978); *State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-59, 362, 441 N.W.2d 696 (1989). The statute has remained substantially unchanged for over one hundred and fifty years, *see State v. Unnamed Defendant*, 150 Wis. 2d at 363, although it was revised by ch. 631, Laws of 1949, to specifically add the provision that the John Doe judge "may, and at the request of the district attorney shall, subpoena and examine other witnesses," **and** the provision that "[t]he extent to which the magistrate may proceed in such examination is within his [or her] discretion."

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[3] Although Judge Murray believes that the Supreme Court should decide the issues presented, Judge Murray does not believe that the John Doe proceeding initiated by Hipp's John Doe petition should continue on remand. This is because the determination of whether there is probable cause to believe that a crime has been committed can have no practical legal since no warrant could issue given the six-year statute of limitation for felonies. Insofar as the Court of Appeals remanded the case to Judge Murray for further proceedings, the Supreme Court should reverse and direct Judge Murray to dismiss the John Doe proceeding because it is moot.

A John Doe proceeding is intended as an independent, investigatory tool (1) to ascertain whether a crime has been committed and, if so, by whom committed, and (2) to protect innocent citizens from frivolous and groundless prosecutions. *See In the Matter of John Doe Proceeding,* 2003 WI 30, ¶ 22, 260 Wis. 2d at 669; *State ex rel. Reimann v. Circuit Court or Dane Cty.*, 214 Wis. 2d at 621. By invoking the formal John Doe proceeding, law enforcement officers are able to obtain the benefit of powers not otherwise available to them, including the power to subpoena witnesses and to take testimony under oath. *See Washington*, 83 Wis. 2d at 822-23. The judge's subpoena power is important to the prosecution and the judge has broad discretion in conducting the proceeding. *See Washington*, 83 Wis. 2d at 823.

In *Washington*, the court commented:

> . . . The John Doe judge is a judicial officer who serves an essentially judicial function. The judge considers the testimony presented. It is the responsibility of the John Doe judge to utilize his or her training in constitutional and criminal law and in courtroom procedure **in determining the need to subpoena witnesses** requested by the district attorney, and in presiding at the examination of witnesses, and in determining probable cause. It is the judge's responsibility to ensure procedural fairness. [Citation omitted.]
>
> The John Doe judge should act with a view toward issuing a complaint or determining that no crime has occurred. To the extent that the judge exceeds this limitation, there is an abuse of discretion. [Citation omitted]. If the facts show that the judge has extended the proceeding in duration or scope beyond the reasonable intendment of the statute **or has otherwise improperly conducted the proceeding** and intends to persist, he or she can be restrained by writ of prohibition for abuse of discretion. [Citation omitted]. . . .
>
> . . .

> **The latitude afforded the John Doe judge under the statute is designed to ensure that the proceeding is conducted in an orderly and expeditious manner.** . . .

See Washington, 83 Wis. 2d at 823-24 (footnote omitted; bold added).

In *In Matter of John Doe Proceeding*, the court observed:

> . . . It is well settled that a John Doe judge has broad discretion to determine the nature and extent of John Doe proceedings. [Citation omitted.] The judge also has final responsibility for the proper conduct of John Doe proceedings. [Citation omitted]. . . .
>
> . . .
>
> A John Doe judge is also entitled to exercise the authority inherent in his or her judicial office. [Citation omitted]. As such, a John Doe judge has authority to issue subpoenas, examine witnesses, adjourn the proceedings, take possession of subpoenaed records, adjudicate probable cause, and issue and seal warrants. [Citation omitted]. . . .

See In Matter of John Doe Proceeding, 2003 WI 30, ¶¶ 52-54, 260 Wis. 2d at 684. *See also In re Wisconsin Family Counseling Services, Inc. v. State*, 95 Wis.2d 670, 675, 291 N.W.2d 631 (1980) (a John Doe judge has inherent power to issue subpoenas).

Finally, in *State v. O'Connor*, 77 Wis. 2d 261, 284, 252 N.W.2d 671 (1977), the court stated:

> . . . The final responsibility for the proper conduct of [a John Doe proceeding] rests with the presiding judge, whose obligation it is to ensure that the considerable powers at his or her disposal are at all times exercised with due regard for those rights of the witnesses, the public, and those whose activities may be subject to investigation. . . .

Wisconsin Statute § 968.26 provides that the presiding judge in a John Doe proceeding "shall examine the complainant under oath and any witnesses **produced** by him or her" (bold added). In addition, the statute provides that the judge "**may**, and at the request of the district attorney **shall**, subpoena and examine other witnesses" (bold added). The general rule is that when used in a statute, the word "may" is construed as permissive or allowing discretion and the word "shall" is construed to be mandatory, unless another construction is necessary to carry out the clear intent of the legislature, and that when the words "may" and "shall" are used in the same section of a statute, the court can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings. *See State ex rel. Reimann*, 214 Wis. 2d at 614-15; *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 447-48, 531 N.W.2d 606 (Ct. App. 1995). It is clear, therefore, that while Wis. Stat. § 968.26 requires the presiding judge in a John Doe proceeding to issue subpoenas requested by the district attorney, the judge has discretion whether to subpoena any other witnesses, including those that the John Doe petitioner wishes to **produce** by subpoena. This reading is consistent with the statutory directive that the "[t]he extent to which the judge may proceed in the examination is within the judge's discretion." *See* Wis. Stat. § 968.26.

It is true that Wis. Stat. § 885.01(1) generally authorizes a clerk of court to issue subpoenas for proceedings like John Doe proceedings. By comparison, Wis. Stat. § 885.01(2) generally authorizes district attorneys to issue subpoenas for proceedings like John Doe proceedings. Historically, however, district attorneys do not attempt to issue subpoenas for witnesses for John Doe proceedings and instead request, pursuant to Wis. Stat. § 968.26, that the John Doe judge issue subpoenas for witnesses. To the contrary, the reasoning of the Court of Appeals, District 1, would seem to permit district attorneys to exercise their general statutory authorization (like that of clerks of court) to subpoena witnesses to

appear at John Doe proceedings, and would render the language in Wis. Stat. § 968.26 (requiring John Doe judge to issues subpoenas at a district attorney's request) a nullity.

The general rule is where two statutes deal with the same subject matter, the more specific statute prevails over the general statute, particularly in the case of conflict between the two statutes. *See State v. Taylor*, 170 Wis. 2d 524, 529, 489 N.W.2d 664 (Ct. App. 1992); *Maxey v. Racine Redevelopment Authority*, 120 Wis. 2d 13, 22, 353 N.W.2d 812 (Ct. App. 1984). Thus, while Wis. Stat. § 885.01(1) generally authorizes a clerk of court to issue a subpoena, Wis. Stat. § 968.26 specifically and exclusively confers the authority to issue a subpoena upon the presiding judge in a John Doe proceeding. If a clerk could validly issue subpoenas in a John Doe proceeding under Wis. Stat. § 885.01(1), that authority would usurp the presiding judge's authority and discretion to decide whether any subpoenas should be issued in the proceeding.

In summary, Judge Murray respectfully submits that a John Doe judge has exclusive statutory authority under Wis. Stat. § 968.26, to subpoena witnesses for a John Doe proceeding, and that Judge Murray properly refused to enforce the subpoenas issued by the clerk of circuit court in Hipp's case.

II. A JOHN DOE JUDGE IS NOT REQUIRED TO SUBPOENA EVERY WITNESS THAT THE JOHN DOE PETITIONER REQUESTS OR TO EXAMINE EVERY SUCH WITNESS AT THE JOHN DOE PROCEEDING.

In *State ex rel. Long and another v. Keyes*, 75 Wis. 288, 293, 44 N.W. 13 (1889), the court held a John Doe petitioner may "produce" witnesses for a John Doe

proceeding either by having the witnesses come voluntarily **or** by having the witnesses subpoenaed. Judge Murray does not dispute that a John Doe petitioner may "produce" witnesses at a John Doe proceeding by requesting that the witnesses be subpoenaed. Under Wis. Stat. § 968.26, however, Judge Murray respectfully submits that the John Doe petitioner's request must be exclusively to the John Doe judge and not to a clerk of court.

Judge Murray further submits, however, that the John Doe judge has discretion whether to permit a John Doe petitioner to subpoena whatever witnesses the John Doe petitioner wishes, and whether to permit those witnesses to testify at the John Doe proceeding. Although it might not otherwise be necessary in this case to reach beyond the issue of whether a John Doe judge has exclusive authority (as opposed to a clerk of court) to issue subpoenas for a John Doe proceeding in the first instance, the decision of the court of appeals is recommended for publication and intimates that a John Doe judge must subpoena and examine each and every witness that a John Doe petitioner requests. Judge Murray respectfully submits that such result is not consistent with good public policy and is not required by Wis. Stat. § 968.26.

Although it is true that Wis. Stat. § 968.26 requires a John Doe judge to examine the John Doe petitioner "under oath and any witnesses produced by him or her," provided that the John Doe petitioner has made the required threshold showing of an objective reasonable belief that a crime has been committed, *see State ex rel. Reimann*, 214 Wis. 2d at 617, 621-623, Judge Murray respectfully submits that a John Doe judge does not have to subpoena every witness that the John Dope petitioner wishes to produce or to examine every such witness at the John Doe proceeding. This is true for at least two reasons. First, a John Doe judge has both statutory and inherent authority "in determining the need to subpoena witnesses," *see Washington*, 83 Wis. 2d at 823; *In re Wis.*

Family Counseling Services, Inc., 95 Wis. 2d at 675, and has broad discretion to determine the extent of the examination of witnesses, *see In Matter of John Doe Proceeding*, 2003 WI 30, ¶¶ 52-54, 260 Wis. 2d at 684; *State v. O'Connor*, 77 Wis. 2d 261 at 284.

Second, if a John Doe judge were required to subpoena and to examine every witness requested by the John Doe petitioner, the judge's ability to efficiently and fairly conduct the John Doe proceeding would be jeopardized. If the judge believed that the subpoena for a particular witness was improper (*e.g.*, because the witness would enjoy immunity from testifying, or could not have been a proper fact witness, or could not qualify as an expert witness, etc.), is the judge nonetheless required to honor the John Doe petitioner's request for a subpoena on the one hand and later quash the subpoena on the other hand? Alternatively, if the number of witnesses for which subpoenas were requested was excessive (*e.g.*, a prisoner requesting subpoenas for the entire cell block and the entire correctional staff at a prison), and the testimony obviously would be repetitive and cumulative, must the John Doe judge still subpoena and examine every witness? This mischief would be compounded if the John Doe petitioner could simply request and obtain subpoenas from a clerk of court without the John Doe judge having any ability to screen and to limit the issuance of subpoenas in advance. At some point, common sense must guide the interpretation of the John Doe statute when a contrary interpretation would be a "waste of time." *Cf. State ex rel. Williams v. Fielder*, 2005 WI App 91, ¶ 2, 282 Wis. 2d 486, 488, 698 N.W.2d 294.

The general problem and the recognition of the judge's authority to limit cumulative or irrelevant testimony was aptly described by the Court of Appeals in a case not involving a John Doe petition, *see Wisconsin Dep't of Corr. v. Saenz*, 2007 WI App 25, ¶ 30, 299 Wis. 2d 486, 512-13, 728 N.W.2d 765, as follows:

> . . . We also conclude that Saenz's opportunity to present testimony and evidence . . . would not be meaningful unless he is allowed to compel the testimony of witnesses, including WCI staff and, perhaps, other inmates. We recognize, of course that **granting an inmate the unlimited opportunity to subpoena DOC staff and other inmates to testify at the hearing may invite mischief or result in the unnecessary expenditure of resources**. Accordingly, the circuit court should allow Saenz to identify any witnesses he wishes to call and require him to describe their expected testimony. **The court may disallow Saenz the opportunity to compel the testimony of any witness** to whom the Department objects, **if, in the exercise of its discretion, the court determines that the testimony of the witness would be irrelevant to the issues being litigated, [or] cumulative of other evidence** . . . .

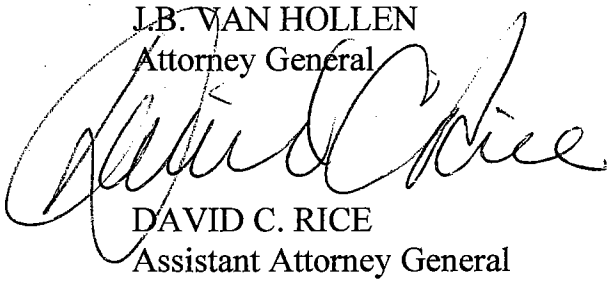
(Bold added; footnote omitted].

In summary, Judge Murray respectfully submits that a John Doe judge is not required to subpoena every witness that the John Doe petitioner requests and to examine every such witness at the John Doe proceeding.

CONCLUSION

Judge Murray respectfully requests that the Supreme Court reverse the decision of the Court of Appeals, and decide (1) that a John Doe judge has exclusive authority to subpoena witnesses for a John Doe proceeding, and (2) that a John Doe judge is not required to subpoena every witness that the John Doe petitioner requests and to examine every such witness at the John Doe proceeding. In addition, Judge Murray requests that the court reverse the mandate of the Court of Appeals directing further proceedings on remand, and instead direct Judge Murray to dismiss the John Doe proceeding because it is moot.

J.B. VAN HOLLEN
Attorney General



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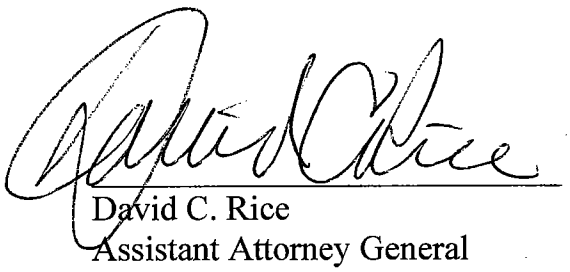
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,383 words.

Dated this 3rd day of March, 2008.



David C. Rice
Assistant Attorney General

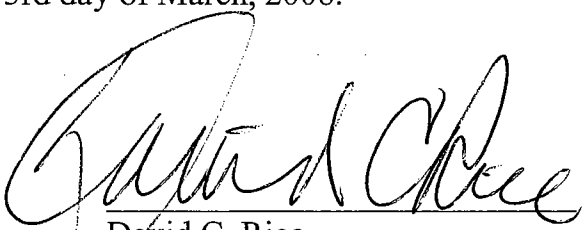
APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of March, 2008.



David C. Rice
Assistant Attorney General

APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP230-W Cir. Ct. No. 2006JD000007

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE MATTER OF THE JOHN DOE PETITION:

STATE OF WISCONSIN EX REL. ADRIAN T. HIPP,

PETITIONER,

V.

THE HONORABLE MARSHALL B. MURRAY, PRESIDING,

RESPONDENT.

MANDAMUS to the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Writ granted and cause remanded.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Adrian T. Hipp seeks a writ of mandamus directing the Honorable Marshall B. Murray to give him a proper *John Doe* hearing under WIS. STAT. § 968.26. He claims that Judge Murray erred by not permitting Hipp to subpoena witnesses Hipp wanted to call at the *John Doe* hearing. We agree. Accordingly, we grant the writ.

I.

¶2 Hipp is incarcerated, and was during the time material to this mandamus proceeding. In October of 2006, Hipp sought a *John Doe* hearing under WIS. STAT. § 968.26, alleging that Leslie M. Coleman took valuable property from his apartment without his consent shortly after he was arrested. He contended that she was guilty of theft under WIS. STAT. § 943.20(1)(a). The chief judge of the circuit court for Milwaukee County assigned the *John Doe* hearing to Judge Murray.

¶3 A hearing on Hipp's *John Doe* petition was scheduled for December 13, 2006, and by a document whose file-stamp indicates that it was received by Judge Murray's clerk on November 28, 2006, Hipp indicated that he would be calling eight witnesses at the hearing, including Coleman, and friends of his whose affidavits were attached to the petition, Kathryn Schicker and David Mercado.

¶4 On December 13, 2006, Schicker and Mercado were in court. The only other person appearing was John Reddin, a deputy district attorney for Milwaukee County. Reddin told Judge Murray that he "had neglected to produce Mr. Hipp" from Hipp's place of incarceration. The transcript reveals that Judge Murray and Reddin conferred *ex parte* (that is, without Hipp being either present or a party to the conversation) about the merits of Hipp's petition and Hipp's ability to compel witnesses to testify at the hearing:

> THE COURT [addressing Reddin]: [Do you] want to place on the record our conversation this morning?
>
> ....
>
> MR. REDDING [*sic*]: Uhm, I also received a phone call from the person whom he believes stole his property. She is, in fact, the executor of the estate of the victim of the theft for which Mr. Hipp is serving his -- his time.
>
> The allegations in those cases were that he -- he ran up about $40,000 in charges. I have reviewed the documents of the charge cards, and most of that money was taken in cash; so there's no way to trace what it was used for.
>
> She believes that it was used to buy various things, some of which are the property that is in dispute here.

Judge Murray then noticed two persons in the courtroom. They were Schicker and Mercado. Judge Murray told them what was going on.

> THE COURT: Good afternoon. What we're talking about here is a case that Mr. Hipp has brought to the attention of the court. I'm doing an investigation. And so far what I've learned is that there are allegations that things that he left at an apartment once he was arrested have been removed from the apartment by someone. He's alleging that the things were stolen.
>
> I've also learned that Mr. Hipp has -- he's serving a sentence for taking money from a person, and I'm not sure but I guess we'll find out if he used that money to purchase the items that he's saying that were allegedly taken; and if that's true, then I don't think he has an argument. Something was stolen from him under -- if this were a repo kind of situation, he would have lost it anyway 'cause the items were obtained wrongfully and by use of money that he had no right to.[1]

[1] *But see* ***Edwards v. State***, 49 Wis. 2d 105, 113, 181 N.W.2d 383, 388 (1970) ("Theft in sec. 943.20 is defined as the intentionally taking and carrying away movable property of another without his consent and with intent to deprive the owner permanently of possession of such property. Unless the accused can trace his ownership to specific coins and bills in the possession of the debtor, the debtor is the owner of the money in his pocket and it is theft to take it from his (continued)

(Footnote added.) Judge Murray told Schicker and Mercado that the matter would have to be adjourned until January 8, 2007, and that they should not talk to Coleman. Judge Murray also asked them whether they were "given a subpoena by Mr. Hipp."

> MS. SCHICKER: He said he sent them in the mail, but we never did get them.
>
> THE COURT: Well, if you receive them, remember that you're under subpoena until the next court date. Okay?
>
> MS. SCHICKER: (Nods head.)
>
> ....
>
> THE COURT [addressing Reddin]: Mr. Hipp sent a proposed witness list, and he included Attorney David Feiss [an assistant district attorney for Milwaukee County] and investigator [for the Milwaukee County district attorney's office] Bonnie [*sic*—should be "Bonny"] Parsons. I don't know if you received that.
>
> MR. REDDING [*sic*]: I did not.
>
> THE COURT: Okay.
>
> MR. REDDING [*sic*]: I don't know if he subpoenaed -- and I don't -- I mean, the way the statute is, he does not have subpoena power. At that time he doesn't have subpoena power. In any event --
>
> THE COURT: Right, but he put them down as witnesses.
>
> MR. REDDING [*sic*]: He can certainly ask witnesses to come --
>
> THE COURT: Right.
>
> MR. REDDING [*sic*]: -- and be examined.

---

possession with intention to permanently deprive him of its possession regardless of what other motive or intention the accused has.").

THE COURT: Okay.

MR. REDDING [*sic*]: But he has no --

THE COURT: That's right.

MR. REDDING [*sic*]: -- authority to require them.

THE COURT: Thank you.

MR. REDDING [*sic*]: Thank you.

¶5 On December 29, 2006, the Milwaukee County clerk of circuit court issued subpoenas for five witnesses whom Hipp wanted to appear at the January 8, 2007, hearing: Nancy Pearson, identified by Judge Murray's response to Hipp's petition for a writ of mandamus as "the owner of the apartment where Hipp resided" before he was arrested; Jeffrey Polinske, a friend of Hipp's; Feiss; Parsons; and Coleman. Hipp's Wausau lawyer was named on the subpoenas as the person to contact if anyone served had "any questions about this subpoena." The subpoenas were served on Parsons, Coleman, and Feiss on January 4, 2007.

¶6 Hipp was produced for the January 8, 2007, hearing. Three of his witnesses, Schicker, Mercado, and Polinske also appeared. Reddin again represented the State and told Judge Murray:

> The way the John Doe statute 968.26 reads, Mr. Hipp has a right to produce witnesses voluntarily and to have them examined by himself or you in an effort to discover whether or not there's reason to believe that a crime has been committed.
>
> The only subpoena power that lies in a John Doe, is the Court. It states, the judge may and at the request of the district attorney shall, subpoena--issue subpoenas. We are not there yet. This Court has not found that there is a reason to believe a crime has been committed. There's a difference between producing witnesses and compelling witnesses.
>
> I became aware Thursday or Friday that a number of people including one of my assistants and one of the

> investigators, had been supposedly been subpoenaed. I looked. I got copies of the subpoenas, and they clearly were without legal basis.
>
> There was an attorney listed on them, and I called them [*sic*] and told me [*sic*] that the only reason he let his name be put on the subpoena, because Mr. Hipp was incarcerated so if [*sic*] the witnesses being subpoenaed could call him and be told these were legal subpoenas.
>
> I explained to them [*sic*], they were not legal subpoenas. If he wanted to come and make a record, he could do that. He said he didn't want to do that. There is no subpoena power by anyone at this point, until the Court makes a finding that there is reason to believe a crime was committed, then you have subpoena power, not Mr. Hipp.

¶7 Judge Murray advised Hipp that at a "John Doe proceeding, neither the clerk, nor you, nor the DA have [*sic*] subpoena power." Judge Murray's response to Hipp's petition for a writ of mandamus concedes that "Reddin told the persons who had been subpoenaed by the clerk (at the request of Hipp) that they did not have to obey the subpoena and that they did not have to appear before Judge Murray."

¶8 At this stage of the proceedings the only issue ripe for review is whether persons filing a *John Doe* petition may compel witnesses to appear on their behalf. We agree with Hipp that they may.

II.

¶9 The parties agree that we review Judge Murray's actions in connection with Hipp's *John Doe* petition *via* mandamus. *See* ***State of Wisconsin ex rel. Unnamed Person No. 1 v. State***, 2003 WI 30, ¶¶41, 48, 260 Wis. 2d 653, 680, 682–683, 660 N.W.2d 260, 273, 275; *see also* ***id.***, ¶23, 260 Wis. 2d at 670, 660 N.W.2d at 268 ("[I]t is well settled that a John Doe judge's actions are not directly appealable to the court of appeals because an order issued by a John Doe judge is not an order of a 'circuit court' or a 'court of record.'"). As we have seen,

the issue here is whether the *John Doe* statute, WIS. STAT. § 968.26, permits a person filing a *John Doe* petition to compel the appearance of witnesses at the hearing by subpoenas not issued by the *John Doe* judge. As noted, we conclude that it does.

¶10 The first place to start is, of course, with the statute. WISCONSIN STAT. § 968.26 provides, as material:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination is within the judge's discretion. ... If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused.[2]

---

[2] WISCONSIN STAT. § 968.26 reads in full:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination 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. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to

(continued)

(Footnote added.) Unless there is an ambiguity or constitutional infirmity, we apply statutes as they are written. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 123–124. Our review of Judge Murray's interpretation and application of § 968.26 is *de novo*. *See* ***State ex rel. Reimann v. Circuit Court***, 214 Wis. 2d 605, 613, 571 N.W.2d 385, 387 (1997). If there is a threshold showing that the complainant has shown in his or her *John Doe* petition, beyond mere conclusory assertions, that he or she has reason to believe that a crime was committed, *see* ***id.***, 214 Wis. 2d at 618–619, 571 N.W.2d at 389–390, the *John Doe* judge "shall":

- "examine the complainant under oath," and
- "examine ... any witnesses produced by" the complainant.

Sec. 968.26. Additionally, the *John Doe* judge "may ... subpoena and examine other witnesses," and, if so requested by the "district attorney[,] shall, subpoena and examine other witnesses"—all "to ascertain whether a crime has been committed and by whom committed." ***Ibid.***

¶11 The *John Doe* judge, of course, has the usual discretion in conducting the hearing. ***Ibid.*** ("The extent to which the judge may proceed in the examination is within the judge's discretion."); *see also* WIS. STAT. RULE 906.11(1) ("The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."). It is a truism that a

---

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. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

John Doe judge cannot comply with the statute's mandate to "examine ... any witnesses produced by" the complainant unless the complainant has a way to "produce" those witnesses. As Hipp argues, the way is *via* WIS. STAT. § 885.01(1).

¶12 WISCONSIN STAT. § 885.01(1) is the universal mechanism to compel the attendance of witnesses and the production of evidence. It permits subpoenas to be issued "[b]y any ... clerk of a court ... to require the attendance of witnesses and their production of lawful instruments of evidence *in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.*"[3] (Emphasis and footnote added.) "Any" means *any*, and, contrary to Judge Murray's argument in his response to Hipp's petition for a writ of mandamus, there is nothing in WIS. STAT. § 968.26 that removes *John Doe* matters from § 885.01(1)'s universal application.

¶13 The parties do not dispute that WIS. STAT. § 968.26 can be used to override a prosecutor's decision to not prosecute. *See* ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 360, 441 N.W.2d 696, 699 (1989) ("[T]he John Doe

[3] WISCONSIN STAT. § 885.01(1) reads in full:

> The subpoena need not be sealed, and may be signed and issued as follows:
>
> (1) By any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

statute itself requires no participation by the district attorney."); ***id.***, 150 Wis. 2d at 367, 441 N.W.2d at 702 (Section 968.26 "make[s] it possible for persons to trigger the prosecutorial powers of the state *in any kind of criminal action* where 'probable cause' can be established.") (Heffernan, C.J., concurring) (emphasis by Chief Justice Heffernan); ***id.***, 150 Wis. 2d at 372, 441 N.W.2d at 704 ("Crime victims should have recourse to the judicial branch when the executive branch fails to respond.") (Day, J., concurring); *see also* ***Reimann***, 214 Wis. 2d at 621, 571 N.W.2d at 390 ("[A] John Doe proceeding is intended as an investigatory tool used to ascertain whether a crime has been committed and if so, by whom."). Thus, we recently recognized:

> For some complainants, the John Doe procedures available under WIS. STAT. § 968.26 provide their only entrance to the state courts. Although we believe that circuit court judges must perform some gate-keeping functions under WIS. STAT. § 968.26, we do not here intend to close the doors of the courtroom to those persons who may have reason to believe a crime has been committed.

State ex rel. Williams v. Fiedler, 2005 WI App 91, ¶25, 282 Wis. 2d 486, 499–500, 698 N.W.2d 294, 300. The *John Doe* judge also "must recognize that many John Doe petitions are filed *pro se* by complainants not trained in the complexities of criminal law and procedure." ***Id.***, 2005 WI App 91, ¶25, 282 Wis. 2d at 500, 698 N.W.2d at 300. To say, as Judge Murray contends in response to Hipp's petition for a writ of mandamus, that Hipp can only present the witnesses whom he can persuade to attend, when, as in this case, the local prosecutor has told those witnesses that they need not attend (even if subpoenaed!) is, in essence, to either close the *John Doe* door to all but prosecutors, or enshrine prosecutors as *John*

Doe gatekeepers.[4] That is not the law. Further, contrary to what Reddin told Judge Murray, a finding under § 968.26 that there is reason to believe that a crime has been committed is *not* a prerequisite to the issuance of subpoenas as long as, as we have already seen, the petition for the *John Doe* hearing is not merely "conclusory." *See* ***Reimann***, 214 Wis. 2d at 618–619, 571 N.W.2d at 389–390.

III.

¶14 Judge Murray's response to Hipp's petition for a writ of mandamus does not dispute that Hipp's *John Doe* petition meets the legitimate "reason to believe" threshold recognized by ***Reimann***. Accordingly, Hipp is entitled to his *John Doe* hearing and have the clerk of courts issue subpoenas to those whom he wishes to have testify at the hearing. We express no opinion as to what remedy those subpoenaed might have except to note that WIS. STAT. § 968.26 permits witnesses to "have counsel present at the examination."

¶15 Hipp also seeks an order removing Judge Murray as his *John Doe* judge, and Reddin from further participation. We have no doubt but that Judge Murray will on remand fulfill his responsibilities as an impartial magistrate. *See*

[4] We are disturbed by Reddin's presumption to give, and Judge Murray's acquiescence to receive, Reddin's *ex parte* advice about the scope of Hipp's ability to have issued subpoenas for the production of his witnesses at the *John Doe* hearing, and we remind the bench and the bar of SCR 60.04(1)(g) ("A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding" other than in carefully delineated circumstances.), and SCR 20:3.5 ("A lawyer shall not: ... **(b)** communicate ex parte with [a judge] except as permitted by law or for scheduling purposes if permitted by the court."). *See also* ***State v. Washington***, 83 Wis. 2d 808, 824–825, 266 N.W.2d 597, 605 (1978). The Rules of Professional Conduct were amended, effective July 1, 2007, by S. CT. ORDER 04-07, 2007 WI 4. Supreme Court Rule 20:3.5(b) is unchanged. The new Rules of Professional Conduct may be accessed at: http://www.legis.state.wi.us/rsb/scr/5200.pdf.

State v. Washington, 83 Wis. 2d 808, 824, 266 N.W.2d 597, 605 (1978).[5] We express no opinion whether Hipp may, on remand, seek relief under either WIS. STAT. §§ 801.58(7) or 971.20(7), the substitution-of-judge statutes in civil and criminal cases, as that issue has not been presented or briefed. We also decline to interfere with the authority of the Milwaukee County district attorney to assign his deputies and assistants as he sees fit. *See* WIS. STAT. § 978.03(1) & (3).

¶16 We grant Hipp's petition for writ of mandamus and direct that on remand he be permitted, as explained in this opinion, to have subpoenas issued for those persons whom he wants to testify at the *John Doe* hearing.

By the Court.—Writ granted and cause remanded for further proceedings consistent with this opinion.

Publication in the official reports is recommended.

---

[5] On February 9, 2007, Hipp sought an order from us directing the production of transcripts for: November 13, 2006, when, apparently, the December 13, 2006, hearing-date was set; "December 15, 2006" [*sic*—should be December 13]; and January 8, 2007. Hipp included a letter from his then Wausau lawyer representing that although the lawyer "made several calls to receive the transcript that you requested" he was unsuccessful: "According to the reporter, the judge has instructed her to **not** complete any transcript, thus none will be available. I asked the reporter why, and no reason was provided. The reporter told me she was sorry, and if there is any problem, to take it up with the judge." (Bolding in original.) The lawyer then told Hipp that he could no longer represent him. The transcripts of the December 13, 2006, and January 8, 2007, hearings are in the Record. The other is not.

Judge Murray's response to Hipp's petition for a writ of mandamus does not contend that Judge Murray invoked that part of WIS. STAT. § 968.26 that permits the *John Doe* judge to make the proceedings secret. *See* ***id.*** ("The examination ... may be secret."). Accordingly, we trust that Judge Murray will not interfere with Hipp's efforts to get transcripts of the proceedings.

STATE OF WISCONSIN
SUPREME COURT

In the Matter of the John Doe Petition:

STATE OF WISCONSIN ex rel.,
ADRIAN T. HIPP,
Petitioner-~~Respondent,~~

v.

Appeal No.2007AP0230-W

THE HONORABLE MARSHALL B. MURRAY, PRESIDING,
Respondent-Petitioner.

ADRIAN T. HIPP'S RESPONSE BRIEF AND APPENDIX

Review of a District I Court of Appeals Decision Dated July 17, 2007

On Appeal from a Decision by Honorable Marshall B. Murray of the Milwaukee County Circuit Court, Case No. 2006JD7

Colleen D. Ball
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414-453-9198

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STATEMENT OF THE ISSUES

1. Whether the judge at a John Doe proceeding under § 968.26 has the exclusive authority to subpoena witnesses?

Judge Murray answered "yes." The court of appeals reversed his decision.

2. Whether the following issue, presented in Judge Murray's initial brief, was preserved for supreme court review:

Is a John Doe judge required to subpoena every witness that the complainant requests and to examine every such witness at the John Doe proceeding?

This issue was neither presented to nor decided by Judge Murray or the court of appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The supreme court has already scheduled oral argument in this case. The court's decision should be published pursuant to § 809.23 because it will contribute to the legal literature concerning John Doe proceedings.

STATEMENT OF CASE

On September 25, 2006, Mr. Hipp filed a John Doe petition with the Milwaukee County Circuit Court. (R.1:2).[1] The petition alleged in detail the identity of the perpetrator and the circumstances of a crime committed against him. (R.1:3-6). On October 16, 2006, Chief Judge

[1] "R.1:2" refers to page 2 of document no. 1 in the circuit court record. "App.__" refers to a page in Judge Murray's appendix, and "R-App.__" refers to a page in the appendix attached to this response brief.

Kitty Brennan "reviewed the petition and found cause to assign the matter for review." (R.2). She ordered Judge Marshall B. Murray to "hold the proceedings" and forwarded Mr. Hipp's petition to him "for resolution." (R.2). Judge Murray proceeded to hold three separate hearings on the matter, and ultimately dismissed the petition because, in his words: "There is reason to believe that a crime hasn't been committed and by whom." (R-App.52).

Mr. Hipp filed a petition for writ of mandamus asking the court of appeals to restore the John Doe proceeding and to allow the subpoenaed witnesses to testify. The court of appeals granted the writ. (App.101). Judge Murray filed a petition for review. The supreme court granted it and appointed the undersigned counsel to represent Mr. Hipp.

STATEMENT OF FACTS

Judge Murray's recitation of the procedural history and facts of this case overlooks some significant details, and therefore, Mr. Hipp offers his own version of what happened.

The John Doe Petition

Mr. Hipp's John Doe petition identified Leslie M. Coleman as the person who knowingly committed theft of moveable property against him. The petition alleges that Mr. Hipp was arrested on January 16, 2001, and placed in the custody of the Milwaukee County Justice Facility. (R.1:4). He asked several friends to retrieve his personal property valued at over $15,000 from his apartment, which he shared with Robert Richter. (R.1:4). Richter told one of these friends, Kathryn

Schicker, that Leslie Coleman had removed Mr. Hipp's property from the apartment. (R.1:4). On Mr. Hipp's behalf, another friend, David Mercado, contacted Ms. Coleman and asked her to return the property in question. She refused, declaring that Mr. Hipp would never get his property back, and behaved belligerently toward Mr. Mercado. (R.1:5).

According to the petition, Mr. Hipp's friends also contacted the manager of his apartment complex. She indicated that Mr. Hipp would have to sign a letter of authorization before she would release his property to his friends. Mr. Hipp provided the letter. The manager let Mr. Hipp's friends into the apartment, and they discovered that, but for some paperwork and clothing, Mr. Hipp's property was gone. (R.1:5-6). The petition states that Mr. Hipp never gave Leslie Coleman permission to take, remove, hold, manage or control his personal property. (R.1:6). Mr. Hipp attached to his John Doe petition: (1) affidavits from Kathryn Schicker and David Mercado; (2) an inventory of the property stolen and the value of that property; and (3) a list of witnesses and their last known addresses. (R.1:7-16).

November 15, 2006 Hearing

Judge Murray conducted his first hearing in this matter on November 15, 2006. At this point, Mr. Hipp was a resident of the Stanley Correctional Institution. Without any notice to Mr. Hipp that a hearing was to occur that day, the state produced him in court. (R-

App.64).[2] Upon realizing the lack of notice, Judge Murray said that "he should probably reschedule the hearing." (R-App.64-65). But before doing that, he allowed the district attorney to place alleged "evidence" on the record. The district attorney asserted that: (1) Mr. Hipp had been convicted of credit card fraud against Robert Richter, his former roommate, and was ordered to make restitution; (2) Richter had died; (3) "Lisa [sic] Coleman was Richter's guardian and personal representative of his estate; and (4) Mr. Hipp's restitution would accrue to the estate. (R.App.65-66). The district attorney, who had not called any witnesses to testify, said: "It appears to me ***without knowing the facts*** . . . that there may be some self-help going on here of holding property." (R.App.66)(emphasis supplied).

Mr. Hipp responded that he had no knowledge that Coleman had anything to do with Richter's estate. He explained that he had been imprisoned out of state for the last three years, which made it very hard for him to get information about his property and Coleman's crime. "I tried piece by piece to get it. It's taken me this long," he said. (R.App-67). Mr. Hipp reminded the judge that the two affidavits attached to his petition indicated that Coleman had admitted taking the property in question. (R.App.68).

Judge Murray then promised to hold a hearing on December 13th and told Hipp: "It will be ***your*** job to get your witnesses here for that

[2] The November 15, 2006 transcript was not included in the record for this appeal, although Mr. Hipp repeatedly asked to have it prepared. The transcript was prepared and filed only after the Wisconsin Supreme Court granted Mr. Hipp's motion to supplement the record on February 6, 2008.

date, and we'll take it from there." (R-App.70)(emphasis supplied). Hipp asked how he was to produce witnesses that were not willing to come, and Judge Murray replied

> Sir, I'm not the Judge in this case. I am just responding to the petition that you wrote. ***You*** have to bring information ***to me***. I'm just a police officer trying to do an investigation here.

(R.App.71)(emphasis supplied). The CCAP minute order for this hearing indicates: "Based on hearing held, ***court orders complaint [sic] to subpoena witnesses*** for next court date." (R-App.74)(emphasis supplied).[3]

On November 28, 2006, Mr. Hipp filed "Complainant's Proposed Witness List," which informed the court that he was proceeding pro se and intended to call 8 witnesses, including Leslie Coleman, at the December 13, 2006 hearing. (R.3).

December 13, 2006 Hearing

At the beginning of the December 13th hearing, the district attorney informed Judge Murray that he had forgotten to produce Mr. Hipp. Nevertheless, the two proceeded to discuss the substance of the case in Mr. Hipp's absence. The district attorney informed the judge that Leslie Coleman called him and apparently said that she was the executor of Richter's estate and that Mr. Hipp was serving time for theft from Richter. (R.App.57). The district attorney said that money charged

[3] This minute order was not included in the record for this appeal. It does, however, appear on CCAP. An appellate court may take judicial notice of CCAP records. *Watton v. Hegerty*, 2007 WI App 267, ¶26 n.17, __Wis. 2d __, 744 N.W.2d 619.

against Richter's credit card was taken in cash "so there is no way to trace what it was used for." (R.App.57).

At this point Judge Murray noted two people, Kathryn Schicker and David Mercado, in the courtroom. Upon learning their identities he told them:

> I'm not sure but I guess we'll find out if [Hipp] used that money to purchase the items that he's saying that were allegedly taken; and if that's true, then I don't think he has an argument . . . if this were a repo kind of situation, he would have lost it anyway 'cause the items were obtained wrongfully and by use of money that he had no right to."

(R.App.58-59).[4]

Judge Murray rescheduled the hearing for January 8th and asked Schicker and Mercado not to contact Leslie Coleman. (R.App.59-60). Then this exchange occurred:

> The Clerk: ***They remain under subpoena?***
>
> The Court: ***Yes.*** Were you given ***a subpoena*** by Mr. Hipp?
>
> Ms. Schicker: He said he sent them in the mail but we never did get them.
>
> The Court: Well, if you receive them, ***remember that you're under subpoena*** until the next court date. Okay?
> . . .
>
> The Court: Mr. Hipp sent a proposed witness list, and he included Attorney David Feiss and Investigator Bonnie Parsons. I don't know if you received that.

[4] The court of appeals decision points out that Judge Murray's understanding of the law on this point is incorrect. (App.103, ¶4 n 1).

Mr. Reddin: I did not.

(R-App.60).

ADA Reddin then informed Judge Murray that "the way the statute is, [Hipp] does not have subpoena power." (R.App.60).[5] According to Reddin, Hipp could "ask witnesses to come," but he had no authority to require them. (R.App.60-61). Judge Murray responded: "That's right," even though he himself had just ordered that Mr. Hipp's witnesses "remained under subpoena." (R.App.61).

The District Attorney's Obstruction of Hipp's Subpoenas

At Mr. Hipp's request, the Milwaukee County Circuit Court Clerk issued subpoenas to 5 witnesses to appear for the January 8th hearing. (R.6). The witnesses were: (1) Nancy Pearson (apartment manager), (2) Jeff Polinske (friend); (3) ADA Feiss (has information about Hipp's property and Coleman's conduct), (4) DA Investigator Bonnie Parsons (same), and (5) Leslie Coleman (the target). (R.5-6). The subpoenas listed attorney Jon Schuster as the person to contact with questions.

On January 4th, 2007, ADA Reddin wrote Mr. Schuster a letter, which states in part:

> I have been contacted by three individuals who have been served with subpoenas to appear at a John Doe proceeding in front of the Honorable Marshall B. Murray . . . next Monday, January 8, 2007 . . .

[5] The court of appeals was alarmed by "Reddin's presumption to give, and Judge Murray's acquiescence to receive, Reddin's ex parte advice" about Hipp's ability to subpoena witnesses. (App.111, ¶13 n. 4).

> The hearing Monday is the ***"reason to believe" hearing***[6] mandated by 968.26. Under the provisions of that statute no one, not even the judge, has subpoena power unless and until the judge finds that there is reason to believe that a crime has been committed within his jurisdiction. Because no such finding has been made, ***the subpoenas which were served today are invalid and without authority.***
>
> ***I have advised the three individuals served that these subpoenas have no legal effect and that they are not required to appear. I have consulted with Judge Murray and he concurs with this advice. He did offer that you may appear Monday and make any statements to him that you wish.***
>
> In the event Judge Murray makes a finding that there is reason to believe that a crime has been committed, and based on that finding orders a John Doe Proceeding, the judge, and only the judge, will have subpoena power.

(R.4)(emphasis supplied).

January 8, 2007 Hearing

Judge Murray began the January 8th hearing by putting Mr. Hipp on the defensive—questioning him about the crime for which he was convicted and whether he had used the proceeds of it to purchase the property that Leslie Coleman stole. (R.App.3-6). Mr. Hipp said "no." (R.App.6).

Then Mr. Hipp noticed that three of his witnesses were in court but the other subpoenaed witnesses were not. He asked for an explanation.

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[6] There is no such thing, as Judge Murray now concedes. A judge determines "reason to believe" from the face of the petition. *See* Section A of Judge Murray's "Preliminary Considerations" and Mr. Hipp's response.

The Court: You don't have subpoena power, sir.

Mr. Hipp: Well, the circuit court issued the subpoenas that I have, that I sent copies of.

The Court: The clerk of court doesn't have subpoena power.

Mr. Hipp: Understand your honor. I have an ability to have witnesses on my behalf to be present on a John Doe.

The Court: You can ask witnesses to come. You don't have the right to subpoena them.

Mr. Hipp: Your honor, I need a moment. When we were here on the first occasion on the 15th of November, I had asked what to do if I needed to have people subpoenaed. And according to my understanding of Wisconsin Statutes 885.01 about who may issue subpoenas and what proceedings subsection 1 indicates that I do have an ability, Your Honor, indicating that the subpoena need not be sealed and may be signed and issued as follows: Any judge or clerk of a court . . . to require the attendance of the witnesses . . . in any action, matter, or proceeding . . . It's based on that, Your Honor, that I asked the clerk of courts for the subpoena form.

The Court: John Doe proceeding, neither the clerk, nor you, nor the DA have subpoena power.

(R.App.7-8). The judge added: "If anybody has subpoena power, it's me." (R.App.9).

At this point ADA Reddin jumped in and argued that in a John Doe proceeding only the judge has the power to issue subpoenas, and the judge could do that only after making a "reason to believe" finding.

(R.App.9-10). Reddin admitted that he had called Hipp's witnesses and told them the subpoenas were not legal. (R.App.10).

Mr. Hipp expressed his concern that from the very first meeting the state had been making unsubstantiated claims that were causing Judge Murray to lean the state's way. (R.App.11). The judge ordered Hipp to start calling the witnesses that did appear in court, adding: "I'm a police officer. Give me your information. I read your petition. Call your witnesses." (R.App.11).

Three witnesses testified under oath: Kathy Schicker, David Mercado, and Jeff Polinske. Mr. Hipp also gave a statement under oath. Together they established the following facts. Mr. Hipp and Richter had moved into the apartment at the same time, and both of their names were on the lease. (R.App.35-36, 39). After he was arrested, Hipp called Schicker and Mercado to collect his personal property from his apartment. (R.App.12-13, 24). The property included a bedroom set, computer desk, computer components, CDs, movies, clothing, file cabinets and papers. (R.App.44). Schicker called Richter (by then living in a nursing home), who told them to make arrangements to get the keys and collect the property through Leslie Coleman. (R.App.13-14, 16). Schicker also called Nancy Pearson, the apartment manager, who said that she would require a letter from Mr. Hipp authorizing the removal of his property from the apartment. (R.App.17-18). Mercado actually spoke with Coleman, and she responded rudely and said that Hipp was not going to get his property back. (R.App.22-24).

Hipp's friend, Jeff Polisnke, established that prior to living with Richter in the apartment, Hipp had owned his own home and it was furnished. (R.App.27-28). Hipp sent Polinske a letter authorizing him to pick up his property from the apartment. (R.App.29). Polinske contacted the property manager, who let him into the apartment, and discovered only a box of papers and clothing. (R.App.30). The manger told Polinske that she had no idea where the rest of the furnishings were. (R.App.32).

Based on this testimony, Judge Murray dismissed the John Doe petition. Excerpts of his reasoning follow:

> There's been nothing provided to me that the property . . . you have listed, just because you could have had it doesn't mean that you had it.
>
> I don't have any receipts presented to me. I have no pictures. I have nothing to show that what you listed here are $17,000 worth of property . . . I don't have any evidence. I have your allegation . . .

(R.App.49-50)

> [Y]ou asked [some friends] to go and get property of the apartment that you jointly shared with Mr. Richter . . . and you didn't give them a list of property. You gave them a verbal list. Nothing in writing to go on . . . No arrangements for them to get the keys to go into the apartment . . . You didn't take the proper action to protect your property. You didn't do as much as you could have done . . .

(R-App.50).

> You have not given me evidence. I'm denying your petition for probable cause. I don't find there is probable cause a crime is committed by Miss Coleman or anyone else.

(R.App.52).

At this point, ADA Reddin jumped in again and corrected the judge:

> Attorney Reddin: I believe the finding you need to make, there is not reason to believe a crime has been committed rather than probable cause.
>
> The Court: I'm sorry. There is reason to believe that a crime hasn't been committed and by whom.

(R.App.52).

The Court of Appeals' Decision.

Mr. Hipp filed a petition for writ of mandamus, and the court of appeals granted it based on the plain language of § 928.26. The statute provides that if the judge finds reason to believe that a crime has been committed, then the John Doe judge "shall" examine the complainant under oath and any witnesses produced by the complainant. (App.108, ¶10). The court held:

> It is a truism that a John Doe judge cannot comply with the statute's mandate to "examine . . . any witnesses produced by" the complainant unless the complainant has a way to "produce" those witnesses. As Hipp argues, the way is via Wis. Stat. § 885.01(1).

(App.108-109, ¶11).

The court of appeals reasoned that § 968.26 permits a person to initiate a John Doe proceeding without the prosecutor's participation.

"[M]any John Doe petitions are filed by pro se complainants not trained in the complexities of criminal law and procedure." (App.110, ¶13)(citing *State ex rel. Williams v. Fiedler*, 2005 WI App 91, ¶25, 282 Wis. 2d 486, 500, 698 N.W.2d 294. If "Hipp can only present witnesses whom he can persuade to attend, when, as in this case, the local prosecutor has told those witnesses they need not attend (even if subpoenaed!) is, in essence, to either close the John Doe door to all but prosecutors, or enshrine prosecutors as John Doe gatekeepers. That is not the law." (App.110-111).[7]

The court of appeals held that Judge Murray did not dispute that Hipp's John Doe met the "reason to believe" threshold recognized in *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 618-619, 571 N.W.2d 385 (1997).

> Accordingly, Hipp is entitled to his John Doe hearing and have the clerk of courts issue subpoenas to those whom he wishes to have testify at the hearing. We express no opinion as to what remedy those subpoenaed might have except to note that Wis. Stat. § 968.26 permits witnesses to "have counsel present at the examination."

(App.111, ¶14).

[7] Judge Murray contends that the court of appeals misunderstood his argument on this point, but the January 8, 2007 transcript suggests otherwise. Judge Murray told Mr. Hipp: "You can ask witnesses to come. You don't have the right to subpoena them." (R-App.8).

RESPONSE TO PRELIMINARY CONSIDERATIONS

A. Judge Murray Now Concedes that He Applied the Wrong Legal Standard to Deny Mr. Hipp's John Doe Petition.

Contrary to Judge Murray's assertions, the general procedures for a § 968.26 John Doe proceeding are clear. (Initial Br. 10) When a person files a John Doe petition, a judge "must first determine ***from the face of the petition*** whether the complainant has shown that he or she has reason to believe that a crime has been committed. If the judge finds that the complainant has made such a showing, the judge ***has no choice*** but to examine the complainant under oath." *Reimann*, 214 Wis. 2d at 624-625 (emphasis supplied); *see also Judicial Bench Book*, Vol. 1 at CR-48-11 (Judicial Ed. Office, Wis. Sup. Ct. 2007). If the complaint fails to establish reason to believe, the judge may deny the petition without conducting an examination. *Reimann*, 214 Wis. 2d at 625.

After the subpoena and examination of witnesses, the John Doe judge determines whether there is probable cause. *Id.* at 624. In making that determination, the judge does not weigh evidence, delve into the credibility of witnesses, or choose between conflicting facts and inferences. *State v. Schober*, 167 Wis. 2d 371, 481 N.W.2d 689 (Ct. App. 1992). "The duty of a John Doe judge is to issue a complaint once probable cause is shown." *Id.* (citing *State v. Washington*, 83 Wis. 2d 808, 824, 266 N.W.2d 597 (1978)). Furthermore, the judge must ensure the procedural fairness of the proceeding. *Judicial Bench Book* at CR-48-11 (citing *State v. O'Connor*, 77 Wis. 2d 261, 284, 252 N.W.2d 671

(1977). He must conduct himself as a "neutral and detached magistrate in determining probable cause." *Fiedler*, ¶25.

Judge Murray's "Preliminary Considerations" indicate that he never formally determined that Hipp's petition met the "reason to believe a crime has been committed" test per *Reimann*. (Initial Br. 10). Nevertheless, he concedes that "he implicitly determined that it met the threshold test when he proceeded with a hearing on the John Doe petition." (*Id.*). Judge Murray also distances himself from ADA Reddin, who argued that the purpose of the January 8th hearing was to determine whether there was "reason to believe" (rather than probable cause) that a crime had been committed and that no one has subpoena power until the "reason to believe standard is met." (*Id.* at 10-11).

Perhaps Judge Murray implicitly made a "reason to believe" finding. But it is also likely that Chief Judge Kitty Brennan made that determination when she performed a facial review of the petition and entered an order stating that she had found "cause to assign the matter for review" and that the "Petition for John Doe proceedings [is] assigned and forwarded to Judge Marshall B. Murray, Branch 43, for resolution." (R.2).

As for the line between Judge Murray's and ADA Reddin's positions, one did not exist at the circuit court level. ADA Reddin informed three witnesses that the subpoenas they had received were invalid and of no legal effect because Judge Murray had not yet held a "reason to believe hearing." (R.4). He said:" ***I have consulted with***

Judge Murray and he concurs with this advice." (R.4)(emphasis supplied). At the January 8th John Doe hearing, Judge Murray, to his credit, stated several times that his task was to determine "probable cause." (R-App.11, 52). Ultimately, however, he yielded to ADA Reddin and denied the petition because: "There is reason to believe that a crime hasn't been committed and by whom. And I'm not able to assert that given the testimony today." (R.App.52). Judge Murray now concedes that this was the wrong legal standard. (Initial Br. 10-11).

Granted, the correct legal standard—probable cause—is a higher burden of proof. It requires that a complainant "set forth certain facts which would lead a reasonable person to conclude that a crime had probably been committed and that the defendant named in the complaint was probably the culpable party." *Reimann*, 214 Wis. 2d at 605, 624 n.10. However, the undisputed testimony from the January 8, 2007 John Doe hearing, which established that Leslie Coleman took Mr. Hipp's property without his permission and refuse to return it, clearly meets the probable cause test. [8]

B. This Case Is Not Moot.

Judge Murray contends that this case is moot because Hipp alleged that the crime against him occurred before March 1, 2001, and § 939.74(1)'s six-year statute of limitations for felonies therefore expired in March 2007. (Initial Br. 12-13). Thus, even if the supreme court were to

[8] An appellate court reviews a probable cause determination de novo. *State v. Ploeckelman*, 2007 WI App 31, ¶21, 299 Wis. 2d 251, 729 N.W.2d 784. Therefore, the supreme court could, if it wished, review the January 8, 2007 transcript (App.1-54) and determine for itself whether Mr. Hipp established probable cause.

order a new John Doe hearing, "the six-year statute of limitations would bar the issuance of a warrant for the arrest of the accused." (Initial Br. 13).

Mr. Hipp filed his petition for writ of mandamus in the court of appeals on January 26, 2007. By Judge Murray's calculations, the statute of limitations ran while the case was pending in the court of appeals. Judge Murray never informed that court that the case was moot because the statute of limitations had expired. He invoked the supreme court's jurisdiction via a petition for review without whispering a word about mootness or the statute of limitations. The issue debuts here in Judge Murray's initial brief along with a footnoted request that, on remand, the supreme court direct Judge Murray to dismiss Hipp's John Doe proceeding as moot. (Initial Br. 14 n.3). As a general rule, issues not raised at the trial court level are deemed waived. *State v. Moran*, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884.

Regardless, Judge Murray leaps too quickly to the conclusion that the limitations period has passed. Section 939.74(3) provides, for example, that "in computing the time limited by this section, the time during which the actor was not publicly a resident within this state . . . shall not be included." Mr. Hipp subpoenaed Leslie Coleman at a Wisconsin address. (R.6:2). But the record for this appeal contains no information about whether Coleman has publicly resided in Wisconsin for a total of six years. The only way to know is to hold an evidentiary hearing at the circuit court level and examine Leslie Coleman under oath.

Moreover, limitations periods are generally subject to equitable tolling and equitable estoppel principles. *See e.g. Reimann*, 214 Wis. 2d at 626 n.11 (when determining whether crime is beyond statute of limitations court must also consider "the occurrence of events and the existence of factors that may have tolled the running of the statute of limitations.") Courts apply equitable tolling when the plaintiff has been prevented from asserting his rights. 54 C.J.S. Limitations of Actions § 114 (2008); *see e.g. State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 37, 270 Wis. 2d 235, 677 N.W.2d 259. They apply equitable estoppel when the conduct and representations of the defendant were so unfair and misleading as to outweigh the public's interest in setting a limitations period. *Hester v. Williams*, 117 Wis. 2d 634, 645, 345 N.W.2d 426 (1984).[9]

Here, it is uncontested that: (1) Adrian Hipp filed his John Petition well within the six-year statute of limitations; (2) Leslie Coleman was the target of the John Doe proceeding; (3) she was subpoenaed to testify at that proceeding; (4) she called and communicated with the district attorney about the John Doe proceeding; (5) the district attorney told her to ignore the subpoena; (6) the district attorney communicated ex

[9] More specifically, to grant relief on equitable estoppel grounds a court applies the following rules: (1) the doctrine may be applied when the defendant is guilty of fraudulent or inequitable conduct; (2) the aggrieved party must have failed to commence a timely action based on the defendant's actions; (3) the defendant's actions must have occurred before the limitations period expired; (4) after the cause for delay has ceased, the aggrieved party must not have unreasonably delayed further; (5) the defendant's conduct may be a representation that the plaintiff relied on to his disadvantage; and (6) actual fraud is not required. *Hester v. Williams*, 117 Wis. 2d 634, 644-645, 345 N.W.2d 426 (1984).

parte with the judge about the substance of the John Doe proceeding and the subpoena issue; and (7) the district attorney persuaded Judge Murray to apply what he now confesses to be an incorrect interpretation of the "reason to believe" requirement in order to prevent Leslie Coleman from testifying at the John Doe proceeding. In short, the combined conduct of the state and Leslie Coleman prevented the issuance of a criminal complaint against Leslie Coleman within the six-year statute of limitations. Given these circumstances, the court could grant equitable relief from the statute of limitations on Leslie Coleman's crime.

One purpose of a criminal statute of limitations is to assure that "law enforcement officials will act promptly to investigate and prosecute criminal activity. This helps to preserve the integrity of the decision making process in the trial of criminal cases." *John v. State*, 96 Wis. 2d 183, 194, 291 N.W.2d 502 (1980). Barring the prosecution of Leslie Coleman on limitations grounds would undercut this goal. It would encourage district attorneys who would rather not prosecute certain defendants to obstruct and delay citizen-initiated John Doe proceedings until the limitations period expires. This, as Argument Section II C demonstrates, is at odds with the raison d'être of § 968.26.

Additionally, barring the prosecution of a crime because the limitations period expired during the pendency of a writ of mandamus against a John Doe judge has the practical effect of shortening the statute of limitations by several years. It would mean that victims of a crime subject to a six-year limitation would have to file a John Doe petition

within about 3 ½ years of the crime so as to allow time for the first John Doe hearing, a court of appeals decision, a possible supreme court decision, and a second John Doe hearing on remand. It would mean that John Doe petitioners who are victims of crimes having shorter limitations periods might not have any meaningful avenue of appellate relief. It would mean that criminals who would have been charged, but for the John Doe judge's error, will not be prosecuted.

ARGUMENT

I. The Standard of Review.

The issues for review ask the Court to interpret and apply § 968.26 and § 885.01. The interpretation of a statute is a question of law, which the Court reviews *de novo*. *Hubbard v. Messer*, 2003 WI 145, ¶8, 267 Wis. 2d 92, 673 N.W.2d 676. "Statutory interpretation begins with the plain language of the statute. If the meaning of the statute is plain, [the court] ordinarily stop[s] the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. (Citations omitted).

Courts interpret statutory language in relation to surrounding or closely-related statutes and in a manner that avoids absurd or unreasonable results. They should strive to give effect to every word of a statute. "If this process of analysis yields a plain, clear statutory

meaning, then there is no ambiguity" and "no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*, ¶46.

II. The Court of Appeals Correctly Held that Either the Judge or the Clerk of Court May Issue Witness Subpoenas for a John Doe Proceeding.

A. The Court of Appeals' Interpretation Reflects the Plain Language of § 968.26 and § 885.01(1) and Judge Murray's Interpretation Does Not.

Section 968.26 states in part:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge ***shall examine*** the complainant under oath ***and*** any witnesses ***produced*** by him or her ***and may***, and at the request of the district attorney ***shall***, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed.

Wis. Stat. § 968.26 (emphasis supplied).

Everyone agrees that the word "shall" is mandatory and the word "may" is permissive. (Initial Br. 17)(citing *Reimann*, 214 Wis. 2d at 614-615). Thus, the plain language of this statute indicates that once the judge determines that there is "reason to believe" that a crime has been committed, he or she: (1) ***shall*** examine the complainant and witnesses produced by the complainant; (2) ***may*** subpoena and examine other witnesses; and (3) at the district attorney's request ***shall*** subpoena and examine other witnesses. In other words, the judge, the complainant and the district attorney each have the ability to bring witnesses to the John Doe proceeding.

The only real question is what the term "produce" means. Hipp contends, and the court of appeals ruled, that a complainant may "produce" a witness either by persuading them to attend the John Doe proceeding or by subpoenaing them via § 885.01(1), the mechanism for compelling the attendance of a witness, which provides in part:

> Subpoenas, who may issue. The subpoena need not be sealed, and ***may be*** signed and ***issued as follows***:
>
> (1) By any judge ***or clerk of court*** . . . to require the attendance of witnesses and their production of lawful instruments of evidence in ***any*** . . . ***proceeding pending***.

Wis. Stat. § 885.01(1)(emphasis supplied). This provision contains no exclusion for John Doe proceedings.

Several authorities support this reading of these two statutes. Black's Law Dictionary defines "produce" as: "(1) To bring into existence; to create. (2) ***To provide*** (a document, ***witness***, etc.) ***in response to a subpoena*** or discovery request." *Black's Law Dictionary* (8th ed. 2004)(emphasis supplied).

The seminal case on the subpoena issue reads the statutes the same way. *State ex rel. Long v. Keyes, Judge*, 75 Wis. 288, 44 N.W. 13 (1889). *Long* involved § 4776, Rev. St., a predecessor to § 968.26, which also included the phrase "shall examine, on oath, the complainant, and any witnesses produced by him." *Id.*, 44 N.W. at 14. *Long* also involved § 4053, Rev. St., a predecessor to § 885.01, regarding the issuance of subpoenas. The question presented was whether, under the John Doe statute, the judge himself could subpoena and examine witnesses besides

the complainant. *Id.* In the course of answering "yes," the *Long* court commented:

> Such witnesses must be produced by the complainant. He cannot "produce" them in any other way than to suggest their names to the magistrate. If they come voluntarily with the complainant, he cannot be said to produce them in any other way than to make them known to the justice as witnesses who know something about the case. ***They are produced as parties produce their witnesses in court. They may come voluntarily or on subpoena and attachment.*** . . . The complainant produces or suggests or names a great many witnesses . . . ***They are witnesses, and therefore may be subpoenaed.***

Id., 44 N.W. at 15. (Emphasis supplied).

The *Long* court also cited with approval the following language from *People v. Hicks*, 15 Barb. 153:

> When the statute says that the magistrate shall examine any witnesses who may be produced by the complainant, it means any witnesses who may be produced ***either voluntarily or by other means of such process as the law allows to compel the attendance of witnesses.***

Id., 44 N.W. at 16. (Emphasis supplied). More recently, the court of appeals noted that a John Doe judge exercises his authority to issue subpoenas via § 885.01. *Wisconsin Family Counseling Services, Inc. v. State*, 95 Wis. 2d 670, 675, 291 N.W.2d 631 (Ct. App. 1980).

Long and *Wisconsin Family Counseling* link § 968.26 and § 885.01. They show that the John Doe judge issues subpoenas by exercising his § 885.01 authority. *Long* further proves that a complainant "produces" witnesses either by persuading them to attend voluntarily or

by subpoenaing them. *Long* did not address the clerk of court's power to issue subpoenas. However, § 885.01(1) gives the clerk of court the ability to subpoena witnesses for ***any*** proceeding. It does not exclude John Doe proceedings. Therefore, one way a complainant may "produce" witnesses for a John Doe proceeding is by causing the clerk of court to subpoena those witnesses.

In contrast, Judge Murray interprets § 968.26 as follows:

> [A] John Doe ***judge may subpoena witnesses*** to appear at the John Doe hearing, either ***at the request of*** the petitioner or at the request of the district attorney.

(Initial Br. 11)(emphasis supplied).

> [W]hile Wis. Stat. § 968.26 requires the presiding John Doe judge in a John Doe proceeding to issue subpoenas requested by the district attorney, the judge has the discretion whether to subpoena any other witnesses, including those that the John Doe petitioner wishes to ***produce*** by subpoena.

(Initial Br. at 17)(emphasis in original).

The plain language of § 968.26 refutes these interpretations. The statute does not mandate that the ***complainant*** ask the judge to issue subpoenas. Under § 885.01(1), that is certainly one way a complainant could subpoena witnesses. But as § 885.01(1) shows, it is not the only way. Interpreting § 968.26 as forcing the complainant to request subpoenas from the judge would require the court to rewrite and add a new clause to the statute. *Aslakson v. Gallagher Basset Services, Inc.*,

2007 WI 39, ¶49, 300 Wis. 2d 92, 729 N.W.2d 712 (court cannot rewrite statute to add new provision).

In any event, if the statute so plainly requires the complainant to work through the judge, then Judge Murray would have explained that procedure in response to Mr. Hipp's question as to how he was to "produce" witnesses that might not voluntarily appear for the John Doe hearing. Instead, Judge Murray replied:

> Sir, I'm not the Judge in this case. I am just responding to the petition that you wrote. ***You*** have to bring in information to ***me***. I'm just a police officer trying to do an investigation here.

(R-App.71)(emphasis supplied).

B. The Court of Appeals' Interpretation Does Not Render § 968.26 a Nullity.

Judge Murray argues that the court of appeals' interpretation of § 968.26 and § 885.01 "would seem to permit district attorneys to exercise their general statutory authorization (like that of clerks of court) to subpoena witnesses to appear at John Doe proceedings, and would render the language in Wis. Stat. § 968.26 (requiring John Doe judge to issue subpoenas at a district attorney's request) a nullity." (Initial Br. 17-18).

The two statutes are easily squared. Section 885.01(2) gives the district attorney the general authority to issue subpoenas "to require the attendance of witnesses . . . in any court or before any magistrate." Section 968.26 prescribes the procedure for how a ***district attorney*** subpoenas witnesses for a ***John Doe*** proceeding—the district attorney

must request the subpoenas from the John Doe judge. As § 968.26 is the more specific statute regarding the ***district attorney's*** subpoena power, that statute controls for John Doe proceedings only. *State v. Taylor*, 170 Wis. 2d 524, 529, 489 N.W.2d 664 (Ct. App. 1992)(more specific statute prevails over general statute). Section 885.01(2) governs the district attorney's subpoena power for other types of proceedings.

In any event, this case is not about how the ***district attorney*** subpoenas witnesses. It is about how the ***complainant*** "produces" the witnesses that the John Doe judge "shall examine." Section 968.26 does not prescribe the procedure for the complainant. Therefore, § 885.01(1), the general subpoena statute, applies, allowing the clerk of court to issue subpoenas in "any" proceeding. Indeed, § 885.01(1) is the same statute that a judge uses to issue subpoenas for a John Doe proceeding. *Wisconsin Family Counseling*, 95 Wis. 2d at 675. In short, § 968.26 and § 885.01 fit comfortably together.

C. The Court of Appeals' Interpretation Advances the Purpose of § 968.26 Without Diminishing the John Doe Judge's Discretion.

A John Doe proceeding serves two purposes. First it is an "investigatory tool used to ascertain whether a crime has been committed and if so, by whom." *Reimann*, 214 Wis. 2d at 621. Second, it "is designed to protect innocent citizens from frivolous and groundless prosecutions." *Id.* Judge Murray's initial brief gives the first purpose short shrift.

In Wisconsin, a John Doe proceeding is used more often than a grand jury investigation because it is less expensive and less cumbersome. Betty R. Brown, *The Wisconsin District Attorney and the Criminal Case* at 16 (2 ed. 1977). The John Doe proceeding gives "crime victims and other complainants . . . recourse to the judicial branch when the executive branch fails to respond to their complaints." *Reimann*, 214 Wis. 2d at 622. John Doe complainants are not guaranteed a day in court. But if they have "reason to believe" that a crime has been committed, then, according to *Reimann*, they should have access to the courts:

> For some complainants, the John Doe procedures available under Wis. Stat. § 968.26 provide their only entrance to the state courts. Although we believe that circuit court judges must perform some gate-keeping functions under Wis. Stat. § 968.26, we do not here intend to close the doors of the courtroom to those persons who may have reason to believe a crime has been committed. In addition, the judge must recognize that many John Doe petitions are filed pro se by complainants not trained in the complexities of criminal law and procedure.

Id., 214 Wis. 2d at 625.

The court of appeals' interpretation of § 968.26 ensures that complainants who file petitions that pass the "reason to believe" test will have a meaningful opportunity to show probable cause that a crime occurred. They will have the ability to "produce" witnesses whom they cannot persuade to attend the proceeding—people involved in the crime, people afraid of the court system, people who are biased against the

complainant. Allowing the complainant to ask the John Doe judge to subpoena witnesses is no solution since, as Judge Murray insists, the judge may refuse the request. Under Judge Murray's interpretation, some crimes—especially those against unsympathetic victims—will not be properly investigated or prosecuted. This case is Exhibit A. Mr. Hipp, the crime victim/complainant, is a pro se prisoner. When he inquired about the procedure for producing unwilling witnesses, Judge Murray brushed him off. Then ADA Reddin obstructed his efforts to produce witnesses for the hearing. The court of appeals' interpretation ensures that powerless, indigent, or unrepresented people have the means to show that they are crime victims.

As for the judge's "broad discretion" in conducting a John Doe proceeding, it was never boundless in the first place, as even the Attorney General recognizes. *See* 51 Op. Atty. Gen 87 (Sept. 1 1987)(describing limitations on a John Doe judge's powers). The judge cannot, for example, refuse to issue subpoenas requested by the district attorney. Judge Murray does not complain that § 968.26's "district attorney" clause encroaches on the John Doe judge's discretion to subpoena and examine witnesses, to decide probable cause, and to ensure procedural fairness. (Initial Br. 15)(citing *Washington*, 83 Wis. 2d at 823-824).

The reality is that the court of appeals' interpretation of § 968.26 does not diminish the John Doe judge's discretion. While the complainant may subpoena witnesses via the court clerk, the John Doe judge still decides: (1) whether to grant relief from or quash those

subpoenas; (2) whether to subpoena additional witnesses; (3) the order of witnesses; and (4) the length of their examinations, etc. *Washington*, 83 Wis. 2d at 823; *In the Matter of John Doe Proceeding*, 2003 WI 30, ¶¶52-54, 260 Wis. 2d 653, 660 N.W.2d 260; *State v. O'Connor*, 77 Wis. 2d at 284. The court of appeals' interpretation does not remove any of these discretionary powers.

III. The Issue of Whether a John Doe Judge Must Subpoena and Examine Every Witness that the Complainant Requests Is Neither Presented Nor Preserved in this Case.

As his first issue for review, Judge Murray argues that § 968.26 should be interpreted as requiring a John Doe complainant to ask the judge to subpoena his witnesses. As his second issue for review, Judge Murray contends that although a complainant must request subpoenas from the judge, the judge need not subpoena and examine every one of complainant's witnesses. (Initial Br. 19).

The facts of this case do not give rise to the second issue for review. Mr. Hipp asked Judge Murray to explain the procedure for producing unwilling witnesses, and Judge Murray basically replied that Hipp was on his own. (R-App.71). Thus, Mr. Hipp did not request Judge Murray to subpoena witnesses on his behalf, which means that Judge Murray did not rule on any such request. Nor was the issue presented to the court of appeals. In fact, the court of appeals found that "the only issue ripe for review is whether persons filing a John Doe petition may compel witnesses to appear on their behalf." (App.106, ¶8). Thus, Judge

Murray is asking the supreme court to decide a hypothetical not posed by the facts of this case. Namely, if Hipp had requested Judge Murray to subpoena witnesses, then would Judge Murray have been required to subpoena and examine every one of Hipp's witnesses? Appellate courts will not decide cases based on hypothetical facts. *State v. Armstead*, 220 Wis. 2d 626, 628, 583 N.W.2d 444 (Ct. App. 1998).

Judge Murray claims that this is an important issue because a complainant may, for example, ask the judge to subpoena witnesses that are immune from testifying. Or some prisoner might request subpoenas for an entire cell block and an entire correctional staff at a prison. Without citation to legal authority, he argues that the John Doe judge must have the ability to "limit the issuance of subpoenas in advance." (Initial Br. 20).

The plain language of § 968.26 and *Reimann* provide the solution to Judge Murray's hypothetical. If the complainant's petition passes the "reason to believe" threshold, then the judge ***shall*** examine the complainant and any witnesses produced by him (regardless of how they are produced). The *Reimann* court held:

> There is one issue presented for review: when a person complains to a circuit court judge that such a person believes a crime has been committed within the judge's jurisdiction, does Wis. Stat. § 968.26 (1995-96) ***require*** the judge to examine the complainant under oath ***and any witnesses produced by him or her***. We conclude that Wis. Stat. § 968.26 ***requires a circuit court judge to conduct such an examination*** only when the complainant has sufficiently established that he or she has "reason to

> believe" that a crime has been committed within the judge's jurisdiction.

Reimann, 214 Wis. 2d at 611. (Emphasis supplied).

This requirement does not hamstring the judge or encourage mischief. (Initial Br. 20). If, for instance, a prisoner files a petition that fails to allege objective, factual assertions sufficient to meet the "reason to believe" standard or that is patently meritless, the judge may deny the petition without examining ***either*** the complainant or his witnesses. *Id.*, 214 Wis. 2d at 623. If the complainant subpoenas witnesses who are immune from testifying or subpoenas an excessive number of witnesses, the judge may quash those subpoenas or otherwise grant relief from them, provided that he makes a record of his ruling. *Matter of John Doe*, ¶57 (reminding John Doe judges that when rendering decisions they must create a record for possible review).

The bottom line is that Judge Murray seeks to rewrite § 968.26 in order to protect John Doe judges from a situation that does not exist in this case. Adrian Hipp was robbed by a private citizen when he was taken into custody, and he subpoenaed five perfectly legitimate witnesses to establish probable cause. He did not target a prison official or subpoena a cell block. If Judge Murray wants a new provision to address the hypothetical "prison cell block" scenario, his recourse is with the legislature. *Wood v. City of Madison*, 2003 WI 24, ¶38, 260 Wis. 2d 71, 659 N.W.2d 31 (courts cannot rewrite clear language of statute; remedy for change of policy lies with legislature). The plain language of § 968.26 and the governing case law do not support his interpretation.

CONCLUSION

For the reasons stated above, Adrian T. Hipp respectfully requests that the Wisconsin Supreme Court affirm the court of appeals' decision. Furthermore, if the court reaches the statute of limitations issue, then Mr. Hipp requests that it either: (1) rule based on the undisputed facts that the statute has been tolled on equitable principles; or (2) order that on remand an evidentiary hearing is necessary to determine whether the statute has been tolled on statutory or equitable grounds.

Dated this 24th day of March, 2008.

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SUPREME COURT

In the Matter of the John Doe Petition:

STATE OF WISCONSIN ex rel.
ADRIAN T. HIPP,
Petitioner-Respondent,

vs.

Appeal No. 2007AP0230-W
Circuit Court Case No.2006JD7

THE HONORABLE MARSHALL
B. MURRAY, PRESIDING,
Respondent-Petitioner.

FORM AND LENGTH CERTIFICATION

I hereby certify that the response brief of Adrian T. Hipp conforms to the rules contained in § 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 8,009 words.

Dated this 24th day of March, 2008.

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Respondent-Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on March 24th, 2008, I served 3 copies of Adrian T. Hipp's Brief and Appendix upon counsel for the State of Wisconsin by U.S. Mail at the address indicated below:

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CERTIFICATE OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been

so reproduced to preserve confidentiality and with appropriate references to the record.

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STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY BRANCH 43

In the Matter of
a John Doe Proceeding
Commenced on January 8, 2007.

January 8, 2007

HONORABLE Marshall Murray
Circuit Judge Presiding

ORIGINAL

APPEARANCES:

DISTRICT ATTORNEY'S OFFICE, by Jon Reddin, assistant district attorney, appeared on behalf of the State of Wisconsin.

LORI ZAHN, COURT REPORTER

(13)

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* * * * * *

TRANSCRIPT OF PROCEEDINGS

THE CLERK: In the Matter of John Doe. 06JD000007.

THE COURT: Appearances, please.

ATTORNEY REDDIN: Good afternoon, Your Honor. Jon Reddin on behalf of the State.

MR. HIPP: Adrian Hipp, Your Honor.

THE COURT: Turn the microphone on. Turn the microphone on. How you doing, sir?

Mr. Hipp, so I can have some preliminary understanding since I'm the investigator here, that's the other purpose I serve here, to determine whether or not a crime has been committed, you are serving a sentence for what crime?

MR. HIPP: The prison sentence that I'm doing right now, sir?

THE COURT: Yes, sir.

MR. HIPP: Okay. Theft, credit card theft and--which is a felony, and a misdemeanor count of theft of moveable property.

THE COURT: Okay. And the victim of those crimes, was one of them the relative of--of John Doe, the person that you asked me to investigate?

MR. HIPP: A relative, no, Your Honor.

THE COURT: Okay. An executive for the person's estate, a victim's estate?

MR. HIPP: Not that I know of. Not that I'm aware

of, no.

Let me ask the State.

ATTORNEY REDDIN: That's what you told me yesterday, yes.

THE COURT: Okay. And the allegations are that this person that you name in your petition, John Doe, Miss Coleman, that she took property of yours; is that correct?

MR. HIPP: That is correct.

THE COURT: And you have alleged that she removed property from your apartment?

MR. HIPP: That is correct.

THE COURT: Now, help me out a little bit here. Were you leasing the property at that time?

MR. HIPP: I was on a lease, Your Honor, yes.

THE COURT: Okay. And who had the key to the apartment?

MR. HIPP: I did.

THE COURT: How did Miss Coleman get into the apartment?

MR. HIPP: I-- The only thing I can imagine-- I don't know. She did not have my keys.

THE COURT: The reason I ask that question is, because you alleged that she went into your apartment trying to commit--a burglary was committed. I'm asking, you know how she gets into the apartment?

MR. HIPP: Honestly don't know.

THE COURT: Okay. And when you say you were on the lease, were you also in custody at that time, at the time that you said she went into the apartment?

MR. HIPP: Yes, I was in custody at that time.

THE COURT: Did you make arrangements for your property in the apartment?

MR. HIPP: Yes, I did.

THE COURT: What arrangements did you make?

MR. HIPP: I asked my friend to pick it up.

THE COURT: Did you give them the key?

MR. HIPP: I gave-- No, I didn't give them the key, no.

THE COURT: How do you expect them to get in to get the property?

MR. HIPP: I asked them to speak to the apartment manager on my behalf.

THE COURT: Did you give them a letter back then to go there while you were in custody?

MR. HIPP: Yes, I did.

THE COURT: What did you want them to do with the property?

MR. HIPP: I wanted them to pick it up and store it and hold it for me, unless--until I was released.

THE COURT: Do you have receipts for that property?

MR. HIPP: In my possession, no.

THE COURT: Do you have receipts for that property?

MR. HIPP: I'm sure I do. Some of it.

THE COURT: Do you know if any of that property was purchased by the proceeds of the money or the fraud that you committed upon the victim, do you know what I mean?

MR. HIPP: Yes, I know what you mean; and no, no.

THE COURT: You don't think any of that was purchased?

MR. HIPP: I don't believe so, no.

THE COURT: You don't believe so. You are not sure?

MR. HIPP: What I'm saying is Your Honor, that I--I-- I do not know that I can say for certainty that it was not, but most of that property was property that I had prior to entering into an apartment, almost all of it; so whether or not any proceeds from the crime that was committed was used for that, I don't think is relevant, Your Honor. I don't-- I don't know--understand, I guess.

THE COURT: My question is if you purchased the property with stolen money?

MR. HIPP: I understand that. It was not stolen, no. No the money was not. The money that was used to purchase any of the property I had was my own. That--

THE COURT: That you got from working?

MR. HIPP: That and that I had in my possession

prior to entering into that apartment. Okay.

THE COURT: All right. I got a better picture of what I think is going on. Do you have any witnesses that you wish to call today.

MR. HIPP: Yes, I do. I don't know if anyone else is in the hallway. I had a list that I sent you. Could I ask one thing, Your Honor, could I have a free hand here.

THE COURT: I'm sorry. I'm not in charge of how--security. The sheriffs are in charge of security. You have to go by their rules.

MR. HIPP: So can you ask them, if I can have a hand?

THE COURT: No, sir, I will not. I'm not in charge of security. They don't ask me to do my job, I don't ask them to do their job.

MR. HIPP: Can I ask them?

THE BAILIFF: You have to stay in handcuffs.

MR. HIPP: Okay. Your Honor, I provided you with a copy of the proposed witness list, and on the list there were eight individuals named. I see three of them here. I do not know who else may or may not be here in the hallway. I don't know. I did subpoena them so--

THE COURT: You don't have subpoena power, sir.

MR. HIPP: Well, the circuit court issued the subpoenas that I have, that I sent you copies of.

THE COURT: The clerk of court doesn't have subpoena power.

MR. HIPP: Understand Your Honor. I have an ability to have witnesses on my half to be present on a John Doe.

THE COURT: You can ask witnesses to come. You don't have a right to subpoena them.

MR. HIPP: Your Honor, I need a moment. When we were here on the first occasion on the 15th of November, I had asked what I was to do if I needed to have people subpoened. And according to my understanding of Wisconsin Statutes 885.01 about who may issue subpoenas and what proceedings subsection 1 indicates that I do have an ability, Your Honor, indicating to me that the subpoena need not be sealed and may be signed and issued as follows: Any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of the witnesses and their production of lawful instruments of evidence in any action, matter, or proceedings pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee, or other person authorized to take testimony in the state.

It's based on that, Your Honor, that I asked the clerk of courts for the subpoena forms.

THE COURT: John Doe proceeding, neither the clerk,

nor you, nor the DA have subpoena power.

MR. HIPP: Who has subpoena power, Your Honor?

THE COURT: If anybody has subpoena power, it's me.

MR. HIPP: I asked when we first came, if I could get the subpoenas. Do you recall me asking for that, because I understood that this, Your Honor, this is--since I am the petitioner here, I'm in a situation that is not usual. It's the State, usually bringing a matter like this to the Court's attention; and so without having the ability to and resources to do the things that the State is doing, as a petitioner, I have a right to have people present that would be able to determine the probable cause that I'm looking to establish.

THE COURT: Well, okay, it's up to me to determine if there's probable cause or not.

Counselor?

ATTORNEY REDDIN: The way the John Doe statute 968.26 reads, Mr. Hipp has a right to produce witnesses voluntarily and to have them examined by himself or you in an effort to discover whether or not there's reason to believe that a crime has been committed.

The only subpoena power that lies in a John Doe, is the Court. It states, the judge may and at the request of the district attorney shall, subpoena--issue subpoenas. We are not there yet. This Court has not found that there is reason to believe a crime has been committed. There's a difference

between producing witnesses and compelling witnesses.

I became aware Thursday or Friday that a number of people including one of my assistants and one of the investigators, had been supposedly subpoenaed. I looked. I got copies of the subpoenas, and they clearly were without legal basis.

There was an attorney listed on them, and I called them and told me that the only reason that he let his name be put on the subpoena, because Mr. Hipp was incarcerated so if the witnesses being subpoened could call him and be told these were legal subpoenas.

I explained to them, they were not legal subpoenas. If he wanted to come and make a record, he could do that. He said he didn't want to do that. There is no subpoena power by anyone at this point, until the Court makes a finding that there is reason to believe a crime was committed, then you have subpoena power, not Mr. Hipp.

THE COURT: Mr. Hipp, do you want to call your first witness, please.

MR. HIPP: I have another question, Your Honor. Understand, I want to make sure, Your Honor, I'm not an attorney; and I'm really struggling to understand why. I feel that is such an adversarial--from the very beginning with the State.

THE COURT: The State's not involved here, sir.

MR. HIPP: It sure sounds like it.

THE COURT: No, sir, it isn't. You've asked me to determine whether or not there is probable cause that a crime has been committed.

MR. HIPP: Your Honor, based on that--excuse me--Based on that, our very first meeting that we had, we had statements from the State making claims that are unsubstantiated claims; and I'm very concerned that that only, based on your comments alone, you indicated that you were leaning toward what the State was saying and that frightens me to think that.

THE COURT: Don't be frightened, sir.

MR. HIPP: Won't have a fair opportunity to present what I'm here to present.

THE COURT: If you start calling witnesses, we can get started.

MR. HIPP: All right.

THE COURT: Right now we have allegations only, do you agree?

MR. HIPP: Absolutely.

THE COURT: Someone walks in a police station saying this is what happened.

MR. HIPP: Understand.

THE COURT: I'm a police officer. Give me your information. I read your petition. Call your witnesses.

MR. HIPP: I will. Kathy Schicker, please.

THE COURT: Miss Schicker.

Come up here, please. Please remain standing. Raise your right hand.

THE WITNESS, Kathryn Schicker, being first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: Yes, I do.

THE COURT: Please have a seat. Miss Schicker, I ask you to speak into the microphone and state your first and last name and spell your first and last name.

THE WITNESS: Legal name, K-A-T-H-R-Y-N S-C-H-I-C-K-E-R.

THE COURT: Thank you. Mr. Hipp, want to ask Miss Schicker some questions?

MR. HIPP: Yes, I do.

DIRECT EXAMINATION BY MR. HIPP:

Q Miss Schicker, first of all, I wanted to ask you, how long have you known me?

A I met you in--I would think the fall of 2000.

Q In the fall of 2000. Was there a point at which you knew that I was in Milwaukee county jail?

A Yes, it was, in the early winter, January or February.

Q Of--

A Of 2001.

Q Of 2001. And at that time, did I call you collect from the

county jail?

A Yes.

Q And over the time that I have called you, what was the purpose of my call, if you can remember, what was I asking? Was I asking you about anything?

A You asked if we could make arrangements to get your personal possessions removed from your apartment.

Q That apartment was where, do you recall?

A Bellow apartment up on Oklahoma Avenue in Milwaukee.

Q Belmont (phonetic). What did you do? Asked you to secure my property, what did you do?

A I made some phone calls to the apartment manager and explained who I was, and they said we need to get a little further confirmation. They wouldn't let anybody just come in and take your things, so there was several phone calls back and forth and it ended up they had told us in the end we could not come and get your possessions.

Q Did you, in the process of the calls that you made, did you ever speak to Mr. Robert Richter (phonetic)?

A Yes, I did; and he told me that I should get ahold of a Leslie Coleman. She would have keys, and I could make arrangements for the time.

Q I'm not sure I-- Mr. Richter, told you to contact Leslie Coleman and she had the keys, is that what you said?

A He said we would be able to make arrangements through her

somehow.

Q Okay. Did Mr. Richter give you-- How did you get in touch with Miss Coleman or did you get in touch with--

A Somebody had her phone number or may be the apartment manager or the main apartment manager Nancy Pearson, may be it was through her. We were put you know, in contact with Leslie Coleman.

Q That--that you were given her phone number, is that correct?

A Either she was given our phone number or we were given hers.

Q Okay. Did you ever speak with Leslie Coleman?

A I don't think I did personally but my boyfriend, David Mercado did.

Q Do you know Leslie Coleman?

A No.

Q Did Mr. Richter tell you that he had my possessions?

A No.

Q Did he say that Leslie had my possessions?

A He was really unaware of what was going on with the possessions at that time.

Q And this would have been when, approximately?

A Within a week or so of your calling us and asking us to make these accommodations for you.

Q So in February or March you are saying that--that would have occurred, correct?

A Yes.

THE COURT: One moment. You said around January

2001 you knew he was in jail. When did you first receive a call from Mr. Hipp?

THE WITNESS: You know, it's hard to remember exactly. If you knew what day he got arrested, probably shortly after that within a day or two of his being incarcerated.

THE COURT: That he called you?

THE WITNESS: Yes.

THE COURT: Was that shortly after that period that you tried to contact Mr. Richter, was that the apartment manager, Mr. Richter?

THE WITNESS: No, he was an acquaintance.

THE COURT: Mr. Richter is an acquaintance.

When you spoke to the apartment manager, how long after you knew Mr. Hipp was incarcerated that you contacted the apartment manager?

THE WITNESS: Within a few days.

THE COURT: Within a few days.

THE WITNESS: Most likely in February, not March. All going on in the end of January, beginning of February.

THE COURT: End of January beginning of February.

THE WITNESS: Yes.

THE COURT: And the apartment manager told you that you would not be allowed in the apartment?

THE WITNESS: Well, just on my calling there and saying we were friends of Adrian. Need verification of all of

this.

THE COURT: Sure.

THE WITNESS: She was covering herself.

THE COURT: What was your relationship with Mr. Richter?

THE WITNESS: I never met Mr. Richter.

THE COURT: You didn't?

THE WITNESS: No.

THE COURT: I--

THE WITNESS: I talked to him on the phone. He was-- I believe he was in a hospital or nursing home at the time.

THE COURT: Mr. Richter was in the hospital or nursing home?

THE WITNESS: Yes, I talked to him in October over the phone.

THE COURT: When was your conversation with him?

THE WITNESS: I was explaining who I was and that Adrian asked to go to the apartment and get his furniture and all his possessions.

THE COURT: And did Mr. Richter live in that apartment, do you know?

THE WITNESS: I believe he did before he was hospitalized.

THE COURT: Okay. Mr. Hipp.

CONTINUED DIRECT EXAMINATION BY MR. HIPP:

Q Is-- Miss Schicker, you mentioned when you spoke with Nancy Pearson, that she said, not in your words alone, did she require anything of you or tell you anything specifically?

A I believe she said we would need some kind of verification from you, that you were requesting that we went and get the property in your apartment.

Q Would that have been a letter of permission she would have required?

A Yes.

Q Did you ever tell me that she had requested a letter for me to write?

A I believe I did.

Q Have you ever spoken to Miss Pearson since that first Friday?

A Once or twice.

Q And for what purpose was that?

A Well, I was trying to help Mr. Hipp keep his records verified. I had her phone number. He wanted to know if that was her--still her phone number in case we had to recontact her. I had made some calls and asked her if I could have the address Adrian wanted to mail papers and she would not give me her address. She gave me her FAX number so he could FAX papers.

Q And the papers you--you are referring to, are papers I had asked you to give to her; is that correct?

A Yes.

Q And do you remember what those papers were, what that letter was from me?

A Were you-- You were asking for information on who came to your apartment and took your possessions on what authority they had and general questions like that.

Q And was she responsive to you at all?

A She was apprehensive. She asked me if I was any relation. I told her, no, just an acquaintance. Trying to help you out since you were in custody and easier for me to make the phone calls than you. And she just was a little cold and she said she wouldn't give me the address but the FAX.

Q You FAX'd her the information, correct?

A Yes.

Q Did she ever respond to you?

A No.

Q Miss Schicker, did I ever tell you that no one had permission to take my property from my apartment?

A Yes.

Q Did I state that Mr. Richter or Miss Coleman were the apartment managers?

THE COURT: Mr. Hipp, you can tell me what you said. You don't need her to tell me what you said.

ATTORNEY REDDIN: Okay.

MR. HIPP: No more questions for her.

THE COURT: Cross-examination.

ATTORNEY REDDIN: Just a few questions.

CROSS-EXAMINATION BY ATTORNEY REDDIN:

Q Ma'am, were you aware of the living arrangements, that is, Mr. Richter and Mr. Hipp had?

A Somewhat, yes.

Q Were you aware of the fact they were living together?

A I'm not sure if they were living together I met Adrian, I think the doctor was already in the hospital. I'm not sure if I was aware he was living with Dr. Richter.

Q Were you aware he was living there because he needed a place to tell his parole officer were he was living when he got out of prison?

A No.

Q Do you know when he moved in?

A No.

Q ~~Are~~ you aware of the fact it was Mr. Richter's apartment and Mr. Hipp moved in with Mr. Richter--with Mr. Richter being the resident there before not--the very--

THE COURT: Let me ask the question, if I may.

ATTORNEY REDDIN: Please.

THE COURT: Do you have any idea what the lease arrangements were as far as this apartment, whether or not it was Mr. Richter on the lease or Mr. Hipp or Mr. Richter was first on the lease and Mr. Hipp was added later?

THE WITNESS: No idea about that at all.

CONTINUED CROSS-EXAMINATION BY ATTORNEY REDDIN:

Q Ma'am--and Mr. Hipp, I'm referring to Exhibit 3 on your petition--

ATTORNEY REDDIN: Does the Court have that?

THE COURT: Exhibit 3 on Mr. Hipp's petition.

Q Ma'am, I'm going to show you a three page document, which is titled property inventory, if you would just scan the items Mr. Hipp is claiming are missing. It's-- It's on all three pages.

Have you had a chance to do that?

A Yes.

Q Now, were you ever at Mr. Richter and Mr. Hipp's apartment?

A No.

Q Did you ever, to your knowledge, see any of the property that's listed on the three pages?

A No.

Q Do you know of own knowledge, when Mr. Hipp purchased those items?

A No.

Q Do you know what money he used to purchase the items?

A No.

Q Are you aware of the fact he has been convicted of stealing approximately $40,000 from Mr. Richter's credit card account?

A Yes.

Q And that's why he's in prison?

A Yes.

Q Did-- Do you know if he used any of that money to purchase any of the items listed on Exhibit 3?

A No.

Q Don't know?

A Don't know.

ATTORNEY REDDIN: That's all.

THE COURT: Redirect Mr. Hipp?

REDIRECT EXAMINATION BY MR. HIPP:

Q Miss Schicker, is the reason that you--you are unaware of this information is because-- Have you ever had an occasion to be at my apartment?

A No.

Q No. Isn't it true that most of the time that I had any dealings with you and with your boyfriend, it was at your place or in a restaurant ~~or~~ somewhere else?

A That is correct.

THE COURT: So-- May I ask a question?

You never been to his apartment?

THE WITNESS: No.

THE COURT: So you don't--you don't have any personal knowledge as to whether or not this property ever existed?

THE WITNESS: No, I don't know.

THE COURT: Okay.

Mr. Hipp, any other questions?

MR. HIPP: No further questions.

THE COURT: Thank you for coming today.

THE WITNESS: Okay.

Mr. Hipp, next witness.

MR. HIPP: David Mercado.

THE WITNESS, David Mercado, being first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE COURT: Thank you. Please have a seat.

Would you state your first and last name into the microphone and spell your first and last name please.

THE WITNESS: David, D-A-V-I-D Mercado, M-E-R-C-A-D-O.

DIRECT EXAMINATION BY ATTORNEY HIPP:

Q Mr. Mercado, have you ever spoken to--with Leslie Coleman?

A Yes.

Q Can you tell me how it came to be that you spoke with her?

A Well, Kathy did all the phone calls. When it came down to the responsibility of actually going to get the stuff, I called this woman and tried to make arrangements; and she was just rude to me and told me there was--that I was unable to receive it. That I was not going to get it. Referred to you as a devil and explained that she should not be rude to me. Trying to help a

friend. And she said to me that if I was your friend, that it was too bad for me. Like I said, she was just very rude. Denied me any entry or anything. That was it.

Q Can you tell me approximately when that was?

A Oh geez, in the same time period of Kathy was saying. She did all the phone calls when it came to the point of getting it. That's what I tried to do and I was refused.

Q When you are saying--when you said getting it, what were you referring to?

A Your property.

Q And how did you become aware that my-- Did I ask you to look into getting my property?

A Yes. Kathy did all the legwork. I would have been the guy to do the physical work.

Q Mr. Mercado, were you ever at my apartment?

A No.

Q Do you know how long I lived in this apartment?

A No.

Q Did you-- Before you spoke to Miss Coleman, have you ever met her before? Do you know who she is?

A No.

Q Do you know her connection with Mr. Richter?

A No idea.

Q When you asked her--spoke to her on the phone, did you ask her for the return of my property?

A I asked her when I could come pick up your property, and as I said she was just plain rude. We didn't speak of anything that was there or any mentionables. She was rude. Refused me.

Q Did she refuse to give me property, is that what she said?

A She said I could not get anything. She called you the devil and said, if I was her--your friend, I was no better.

Q You had no chance to say anything further?

A Nothing at all.

THE COURT: She said you couldn't get anything.

Q Did you ever mention to her that--anything about not having my permission to take--

A Nope.

Q --the property?

A Nope.

Q No. Is it true that you made arrangements to--to attempt to reclaim my property on my behalf?

A Sure. Kathy did all the phone calls at the time. I thought we were going to settle the matter. I was ready to physically go get it.

Q And in order to physically go get it, what were you planning to get?

A Well, the things you had mentioned to me; bedroom furniture, computer. I don't recall all of them, all the stuff.

Q So you--

THE COURT: Let me ask a question. Sorry to

interrupt.

Did Mr. Hipp give a list of the things to you to get?

THE WITNESS: Kathy had all the stuff.

THE COURT: To the best of your knowledge, the written list of things you were supposed to pick up--

THE WITNESS: Yes, I'm sure--

THE COURT: Did you see a written list?

THE WITNESS: I did not, no.

THE COURT: Okay.

Q In your arrangements that you made, Mr. Mercado, did you have a van or people helping you or you prepared to do this?

A Well, yes, I would have took care of it all. At that particular time, we were going to rent a truck and everything like that, yes.

Q Did I ever say to you anything to the effect that no one had permission to move my property from my bedroom?

A Several times.

MR. HIPP: No other questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION BY ATTORNEY REDDIN:

Q Mr. Mercado, I don't want to waste time and I showed Miss Schicker a list of property that you would have no way of knowing what it was, because you've never been in the apartment?

A Correct.

Q And would answer the question the same way she did, no knowledge of when Mr. Hipp purchased any of the property?

A Yes, I would. I'd answer in the same manner.

Q And you also never--you don't know whether or not the money he used to purchase the property--

A None.

Q You don't know if it was stolen money or Mr. Hipp--

A No idea.

Q Mr. Mercado, are you aware that Mr. Richter died?

A Yes.

Q Are you aware that Miss Coleman is Mr. Richter's personal representative?

A Only because you are telling me.

Q You have no personal knowledge?

A No.

ATTORNEY REDDIN: That's all.

THE COURT: Mr. Mercado, did you ever see a list that was put together by Mr. Hipp that would tell you what property, if you were able to get access to the apartment, to pick up?

THE WITNESS: If my girlfriend received it I would have seen it. It's been so long ago.

THE COURT: Need to ask Miss Schicker. And then she would know if there was a list or not.

THE WITNESS: Right.

THE COURT: Then I'll ask her.

MS. SCHICKER: Come back up?

THE COURT: I will call you back and ask you--

MS. SCHICHTER: Okay.

THE WITNESS: That's it?

THE COURT: Any more questions?

MR. HIPP: No further questions.

THE COURT: Thank you.

ATTORNEY REDDIN: No, sir.

THE COURT: Okay. Step down.

(Witness excused.)

THE COURT: Mr. Hipp.

MR. HIPP: Jeff Polinske, please.

THE WITNESS, Jeffrey Polinske, being first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE COURT: Thank you. Please have a seat. Speak into the microphone. State your first and last name. Spell your first and last name.

THE WITNESS: Jeffrey, J-E-F-F-R-E-Y P-O-L-I-N-S-K-E.

DIRECT EXAMINATION BY MR. HIPP:

Q Mr. Polinske, approximately how long have you known me?

A I would say about fifteen years.

Q In that time that you have known me you've--do you know that I lived in a couple of different places; is that correct?

A Correct.

Q You know that I-- Do you know that I had owned my own home?

A Yes.

Q Do you know where my home was? Have you been to my home?

A Yes, I have. I don't remember the address or anything.

Q Okay. But you have been in my home?

A Yes, I have.

Q Mr. Polinske, can you recall how big my house was?

A Well, it was a two bedroom, I believe.

Q Okay. Was my house furnished?

A Yes, it was.

Q Do you recall-- Do you remember what city?

A Milwaukee.

Q Mr. Polinske, do you remember a time when I spoke to you by telephone from the county jail?

A Yes, I do.

Q Can you tell me approximately when that was?

A Oh geez, not real good on a date right now. But I believe it was early 2000, 2001.

Q Early 2001?

A One, I believe.

Q Can you tell me what the purpose of my conversation was with you?

A You wanted me to make arrangements about picking up your furniture.

Q What did I ask to you do?

A First of all, I had to wait until you sent me a letter giving me authorization to go to the apartment and pick it up.

Q Okay. Did you ever receive that letter?

A Yes, I did.

Q Do you have that letter?

A No, I don't.

Q Okay. What did you do once you received my letter?

A I went down to the property manager, because I didn't have a phone. She let me in with the letter; and when I got there, there was nothing there besides a pile of your clothes in the middle of the living room and the carpet had been ripped out and still working on repairs for the next tenant.

Q So the apartment manger let you into the apartment; is that correct?

A Correct.

Q And when you first went into the apartment, did you tell her where you going to collect the materials from?

A I'm sorry. I didn't understand that.

Q Did you--she indicate to you or you indicate to her where my property was located?

A No. She just took me right straight in the apartment.

Q Did you have an idea of what you were going to pick up from the

apartment?

A Not necessarily. You just wanted me to pick up your personal belongings.

Q Did you ever speak with either David Mercado or Kathryn Schicker?

A Yes, I have on a couple of occasions.

Q Can you tell me what that was in regard to?

A Well, first it was for them to inform me that this is what you wanted me to do. And then I ended up calling them once we got to the apartment and letting them know nothing was there besides your clothes.

Q My clothes. So the only thing that you recovered by the apartment were my clothing?

A Your clothing and a box of papers and stuff.

Q So a box of miscellaneous papers. Where was this located?

A It was laying on the floor, middle of the living room, in a pile.

Q Did you look at the apartment at all during the time you were there?

A I don't know what you mean by that.

Q How many bedrooms in the apartment?

A Two bedrooms.

Q Do you know anything about my relationship with Mr. Richter?

A I was under the assumption that you were taking care of him.

Q Would I have had my own bed room in this place?

A Yes, you did.

THE COURT: Let me ask you a question.

Did you ever go to Mr. Hipp's bedroom?

THE WITNESS: No.

THE COURT: How do you know if he had his own bed room?

THE WITNESS: There was two bed rooms in there.

THE COURT: No. Mr. Polinske, do you have any personal knowledge that Mr. Hipp had his own bedroom in the apartment?

THE WITNESS: No, I don't.

CONTINUATION OF EXAMINATION BY MR. HIPP:

Q Mr. Polinske, I spoke to you many times on the telephone?

A Correct.

Q Where would I have been calling you from when I called you, from my apartment?

A Yes.

Q That is correct?

A Yes.

Q When I spoke to you on the phone, in fact, when you-- When you spoke to me, did you ever speak to Mr. Richter or did I answer the phone?

A Yes, he did.

Q So you know that I was living in the same apartment with Mr. Richter?

A Correct.

Q When you retrieved my belongings of what was left in the middle of the floor, you say my clothes, how do you think they were my clothes?

A I can only assume they were your clothes.

Q Did the manager say anything to you when she let you in the apartment? Did she know what you were there for?

A Yes, because I gave her the letter that was okayed from you; and she kept the letter.

Q Did she ask you to sign anything?

A No.

Q When you picked up my personal property, you did not sign anything from her; is that correct?

A No, I did not.

Q Did she say anything to you about where the rest of the furnishings of the apartment was?

A No, she didn't.

Q Did you ask her where any of the rest of the--

A I did. She said she had no idea.

Q The property manager told you she had no idea; is that correct?

A Correct.

Q During the time that we spent together as friends Mr. Polinske, was there ever an occasion that I brought over any of my property to your apartment?

A No.

Q Specifically, during the summer of 2000, we had dinner as I recall; and I brought with me some--I brought a box of materials to your house. Do you recall that?

A I believe there were some patent things for envelopes.

Q Do you remember me ever sharing with you some video tapes?

A No.

MR. HIPP: No other questions.

THE COURT: Cross-Examination.

CROSS-EXAMINATION BY ATTORNEY REDDIN:

Q Do you have any personal knowledge as to what happened to that property?

A No, I do not.

Q But for you know, the property manager could have confiscated it for rent?

A I don't have any clue.

Q When you went to pick up that property, did you have some idea what you were picking up?

A Look, I said I just assumed whatever was going to be left there. Mr.--Dr. Richter had been removed from the premises.

Q Do you ever see a list of property from Mr. Hipp? Did Mr. Hipp ever give a list of property before you went there?

A No.

Q Did you go by yourself or somebody with you?

A My roommate.

Q And who was your roommate?

A Richard Leagler (phonetic).

Q How did you get there?

A At the time I owned a van.

Q And what kind of van; minivan, large minivan?

A Larger van.

Q Were you aware you were supposed to pick up a large number of items according to Mr. Hipp's list among which was a bedroom set, computer set, 300 video tapes, 150 compact discs, various other things?

A There was no list. He wanted me to go pick up his remaining things.

ATTORNEY REDDIN: That's all.

REDIRECT EXAMINATION BY MR. HIPP:

Q When you just said that I had asked you to pick up what was remaining, remaining from what?

A I'm assuming what didn't belong to your roommate. You mean was I aware I wouldn't pick up an entire apartment full of furniture?

MR. HIPP: Thank you.

THE COURT: Thank you, sir.

Mr. Hipp, I'll give you an opportunity to make a statement. I'll swear you in to make a statement. You'll be subject to examination by myself as well as the State.

Would you like to make a statement at this time?

MR. HIPP: I would. Excuse me for a second.

THE COURT: What's the statute, what number 968.26?

ATTORNEY REDDIN: I believe that I was corrected. Remember that the complainant be under oath. I ask you to swear him.

THE COURT: I told him I would swear him. I said I would swear him in and subject to questioning by the State.

ATTORNEY REDDIN: Heard that. I didn't hear it.

THE COURT: Mr. Hipp-- Then I asked him if he wanted to make a statement.

ATTORNEY REDDIN: Right.

THE COURT: And he said, yes.

Adrian Hipp, being first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. HIPP: I do.

THE COURT: Thank you. I'll give you an opportunity to make a sworn statement at this time. What do you want to tell me? I read the petition. What would you like to tell me?

MR. HIPP: What I would like to tell you is that I lived at the residence 8821 West Oklahoma, apartment 108. I moved into that apartment on the very same day that Mr. Robert Richter moved in. I moved him in to that apartment. I secured the apartment. I was the one who found the apartment for him. He was living on--

He was living at 3136 West Oklahoma when I first

knew him. He was unable to negotiate stairs. I found an apartment, and the apartment I just described, it had no stairs so he could live there.

THE COURT: May I ask you a question? You say in the same area, might you say that you found the apartment, you located the apartment. Prior to that he was living somewhere else.

MR. HIPP: Yes.

THE COURT: Assume he was left on the lease. Who signed for the new apartment? What's the address of the apartment, of the new apartment, 8821 West Oklahoma Avenue, apartment 106, 08 excuse me.

Now, asked you this question because I remember when I got an apartment. The apartment was in her name. My name was never on the apartment, even though we were married. What was the situation here?

MR. HIPP: My name was on the lease. I signed the lease. The credit check was done. I was issued keys. My name was on the mailbox. I lived in the apartment.

THE COURT: Okay. What else did you want to tell me?

MR. HIPP: That I had possessions that belonged to me prior to moving in to that apartment. Mr. Richter lived in a--in a home that he had rented prior to moving to this apartment Mr. Richter did not have--he only had one bedroom. He

did not have furnishings for a two bedroom apartment. The stuff was mine.

And even though my friends had not been at the apartment--and the reason that they had not been to the apartment, Your Honor, I think is important is because we moved to that apartment in June, the first of June of 2000. Now this situation happened--that I'm alleging happened on January 16 or thereabout of 2001, only six months later. So I'm asking that there is no inference drawn to my friends not seeing my place. If the other witnesses had been here, you know I would be able to ask different questions about recovering my property.

The fact of the matter is Your Honor, this proceeding, and my understanding is that we're looking for probable cause that a crime has been committed. Whether or not my crime that I was convicted of was--occurred at a similar time or around this time has no bearing on the fact that my property was taken without my permission.

THE COURT: What you have to show is that your property was taken and by whom.

MR. HIPP: Yes.

THE COURT: And you named one person.

MR. HIPP: And I've named one person.

THE COURT: Leslie Coleman.

MR. HIPP: Yes. Yes. Because at the time that I was in custody at Milwaukee county jail, I was not arrested

under this case that was cited in the beginning by the prosecutor, the State, anything that had to do with this. The judgment of conviction, sentencing happened two years later. It happened on June 25, 2002.

THE COURT: Mr. Hipp, do you want to focus on the allegations here that you made in the petition in your statement.

MR. HIPP: I'd love to. I feel the State brought it up in the beginning and it's something that is highly prejudicial to me, and I feel that I have to defend myself from that.

THE COURT: You are not here to defend yourself.

MR. HIPP: Okay.

THE COURT: You--you-- You are here-- You made an allegation that someone has taken something from you with a certain value. And you've-- You are asking the Court to be--to investigate the situation, to determine whether or not probable cause exists, and that's what I'm trying to do. So talking about what happened to you or what the State is saying about you, I understand it may go to your character; but frankly, I'm trying to stay with the facts about what happened, what didn't happen.

Is there anything here that I can hang my hat on? I'm trying to figure it out, if you could.

MR. HIPP: I guess part of that--where I was going

with that, Leslie Coleman, I have no relationship with Leslie Coleman. If she had a friendship with Mr. Richter, that is something that was a part of this. If he gave her permission, I do not know. She did not have permission to go into my apartment and--

THE COURT: But you don't know. You just said, you don't know if Mr. Richter gave permission.

MR. HIPP: But Mr. Richter cannot give her my permission.

THE COURT: He was on the lease, was he not?

MR. HIPP: He was.

Not going into the apartment.

THE COURT: He could give her permission to go in the apartment. He may have. He could, would you agree with that?

MR. HIPP: Yes, he could.

THE COURT: So-- And the reason I ask that question, because I'm trying to determine whether or not a burglary occurred; and there is no evidence of how she got in the apartment, if she went into the apartment at all. There is no evidence she went in the apartment offered at this proceeding. It's your allegation--

MR. HIPP: Yes.

THE COURT: --that she went in the apartment. And what you are telling me is that Mr. Richter could have given her

permission to go in the apartment; and if he did, then she would have gone to the apartment with permission of the owner of the apartment, if that occurred, right?

MR. HIPP: One of the owners, yes.

THE COURT: Did the police come to your home?

MR. HIPP: Yes.

THE COURT: And one of the people in the apartment says, yeah, come in; and the police have a right to be there; is that right?

MR. HIPP: Sure.

THE COURT: Or even after you get home later, person living there says, I don't want you here; but initially they have permission to be in the apartment.

MR. HIPP: To be present there. I'll accept that. Not to take my property.

THE COURT: Now continue with your statement.

MR. HIPP: I'm concerned about the allegation or the statement that has been made that was made just earlier as well that Miss Coleman was somehow appointed by Mr. Richter. I am aware of no such arrangement that they had. There was a statement made when we first were together on November 15 that stuck in my mind how she was executor, beneficiary, guardian. Those were the words used. Those are very strong, legal words.

THE COURT: Let's assume for the now she was not.

MR. HIPP: She had absolutely no business taking my

stuff. Not my permission.

THE COURT: Unless someone gave her permission to go in the apartment and remove the items. I have no information that she had or had zero, no permission.

MR. HIPP: By virtue of--

THE COURT: I have no information that she went into the apartment.

MR. HIPP: If she were here--

THE COURT: I don't do things on if's, sir.

MR. HIPP: She's not here. I can't ask her. I have every reason to believe that based on what-- My friends went to my apartment to pick up what was mine and nothing was there but my clothes, somebody.

THE COURT: Somebody.

MR. HIPP: Somebody, yes and that's what I'm asking the Court to look at. Somebody, because it's somebody and alleging is the John Doe. The John Doe in this case is Leslie Coleman.

THE COURT: Based on what?

MR. HIPP: Based on the fact she would not release any of my property when she was asked to return it. She was asked when Mr. Mercado asked her to give her my stuff, which came as a result of the phone number that was given to him by either someone from the apartment or Mr. Richter. We aren't clear but my friends don't know Leslie Coleman. Have no

interest in Leslie Coleman and contacting her on my behalf and she did not respond and give any of the property that she had.

THE COURT: Anything else you want to tell me?

MR. HIPP: No, nothing further.

THE COURT: Okay. District Attorney, do you want to ask questions of Mr. Hipp?

ATTORNEY REDDIN: Yes.

EXAMINATION BY ATTORNEY REDDIN:

Q Mr. Hipp, isn't it a fact that you were convicted of stealing approximately $40,000 dollars from Mr. Richter?

A Yes.

Q And the date on the criminal complaints were July 29, 2000 through September 17, 2000, correct?

A As I recall.

Q And that was approximately the time that you moved in with Mr. Richter?

A I moved in with Mr. Richter in June of 2000.

Q And so that's approximately about a month later. The allegation is and convicted of theft started in July and went through September, right?

A Yes.

Q And for the most part, that money was taken out in cash, correct?

A I beg your pardon?

Q Cash withdrawals from the credit cards rather than direct

purchases?

MR. HIPP: Your Honor-- Your Honor, I have an objection to this.

THE COURT: You don't if you don't have an answer.

MR. HIPP: I have an answer. I'd like to say because I don't think it's appropriate this isn't a matter-- This is external to my petition.

THE COURT: Well, that's what you think sir. The State's asking you questions. You brought the action. You-- They have a right to ask questions. If you don't want to answer it, don't; if you do, answer it.

A What was the question?

Q Is it true that most of the $40,000 was taken out through credit cards in cash rather than direct purchases?

A That's probably true, yes, sir.

Q Okay.

THE COURT: No questions of you. I do have one more question of Miss Schicker.

MR. HIPP: That's partially true, yes, sir.

THE COURT: You are still under oath. I have one question I want to ask you.

FURTHER EXAMINATION BY THE COURT OF MS. SCHICKER:

Q When Mr. Mercado, your significant other or boyfriend I guess is best, was up here, I asked him whether or not he saw a list from Mr. Hipp of the property that he was to pick up from the

apartment. Did you have a list?

THE WITNESS: No. It was a verbal list we had gotten from Adrian during the phone conversations.

THE COURT: It was not a written list or anything like the list that we have in Exhibit No. 3?

THE WITNESS: No.

THE COURT: Okay. Do you remember, just if you remember, when the State asked you to look at it and I'll let you look at it again, if you like, do you remember any of the items that he told you over the phone to pick up?

THE WITNESS: He said a bedroom set, computer desk, and all the computer components. I believe he said stereo and CD's and movies, things like that. His personal clothing, probably file cabinets, personal papers.

THE COURT: Did he tell you where to get them from?

THE WITNESS: Everything would be in the bedroom.

THE COURT: Did he describe the bedroom to you?

THE WITNESS: No.

THE COURT: Did he tell you which bedroom it was?

THE WITNESS: No.

THE COURT: He didn't?

THE WITNESS: Wasn't going to be in person for moving.

THE COURT: But you were taking the information. As David said, you were doing all the legwork and he was doing the

arm work or heavy lifting?

THE WITNESS: Right.

THE COURT: Did Mr. Hipp-- I'm sorry, go further then I expected to-- Did Mr. Hipp ever make or provide the keys to you for the apartment so you could get in?

THE WITNESS: I don't believe so. I believe that's why we were making calls to the apartment managers.

THE COURT: Okay. I'll ask Mr. Hipp about that. They were probably in his possession. Could have gotten them from the jail.

I'll ask--

THE WITNESS: I don't know about the keys.

THE COURT: Any questions based on my questions Mr. Hipp?

MR. HIPP: I don't believe I have any other questions, Your Honor.

THE COURT: Assistant district attorney, DA?

ATTORNEY REDDIN: No, sir.

THE COURT: Thank you. I'll take that back from you.

(Witness excused.)

THE COURT: Okay.

Mr. Hipp, the keys to your apartment. Do you know where your set of keys were? Were they in the custody of the sheriff?

MR. HIPP: Yes.

THE COURT: Did you attempt to try to get the keys to Miss Schicker or Mr. Mercado?

MR. HIPP: Well, after I found out Your Honor that everything had been removed-- No, I did not.

THE COURT: When you were calling them, did you ask them to come down and try to talk to the sheriff about releasing their property so that you could give them the keys so she could go and move your property out of the apartment?

MR. HIPP: I did not.

THE COURT: Did you ever provide them with a written list, something somewhat like you had written on Exhibit No. 3?

MR. HIPP: It was all verbal Your Honor.

THE COURT: All verbal. So you could have. You wrote out a list, a property list here.

MR. HIPP: Yes.

THE COURT: You probably could have back in January of 2001 provided them with a listing of your property in writing, could you not?

MR. HIPP: I could have.

THE COURT: Okay. And you could if you had one or two since you were on the lease, on the lease you had keys to the apartment, gotten the keys so they could have gotten in the apartment and looked for the specific items that you allege were taken; is that correct?

MR. HIPP: Yes.

THE COURT: Did you have any knowledge of whether or not the landlord had removed the property from the apartment?

MR. HIPP: I have no knowledge.

THE COURT: So the only knowledge you have today is that when Mr. Polinske went there, even though that they were starting to refurbish the apartment, already pulled up the carpet, obviously working on the apartment--

MR. HIPP: Yes.

THE COURT: --you had no longer-- You had paid your rent or the lease had expired. Do you know when the rent was last paid on the apartment?

MR. HIPP: It was paid until the end of January, I'm certain, certain. That was part of the reason Your Honor why I wanted my friends to contact Mr. Richter. He would have known what had happened in my absence.

THE COURT: Today, you are telling that you did not give them to your friends, Mr. Mercado and Miss Schicker, a written list nor did you provide them with the keys to the apartment at the end of January, the lease would have been up or at least would have been paid for February and anything that happened to the apartment after that could have, would have been in the control of the landlord; is that correct.

MR. HIPP: Yes.

THE COURT: All right. I have the picture.

Anything else you want to tell me today?

MR. HIPP: No.

THE COURT: Any other argument by either the assistant district attorney DA or Mr. Hipp? Any comments?

ATTORNEY REDDIN: Well, judge, the only comment I would have is the state of the record so woefully short of probable cause that anybody took anything here. The only evidence, implication of Miss Coleman is Mr. Mercado's statement when he called her. She said he can't have any property, and I don't like Mr. Hipp. There is no indication as to what that property was, if even--if it was Mr. Hipp's property. Certainly not the list that we have here.

And what you have is an allegation by someone who admittedly took out approximately $40,000 in cash in credit cards over a three month period from the person whose property--or with whom he was living.

I would submit to the Court there's no way to show the source of any of the money. No evidence of source money used to purchase the property. The likelihood at least part was purchased with stolen money, certainly no proof. He is living there accumulating property at the same time he's stealing the money. There is simply not any indication. It could perfectly well be the company renting the apartment has the property. We don't know that.

And one brief, rather hostile and ambiguous

conversation with Mr. Mercado and Miss Coleman, is hardly enough to find probable cause that a reason to believe a crime has been committed. I would urge the Court not to make that finding. I don't think the evidence is there on this record.

THE COURT: Mr. Hipp, any closing comment before I make my decision?

MR. HIPP: Well, for what it's worth Your Honor, the State makes a statement whether they believe probability of the property being the result of stolen monies. The State's making allegation there as well; and Your Honor, I own my own home. I had a house full of possessions. It's unreasonable that I would move into some place with no property. I put my clothes in the middle of the floor? It's preposterous.

THE COURT: I don't think anybody thinks it would be reasonable to move to a place without any property, I think. You know what happened, where that property was, Mr. Hipp; and what happened to that property, I have no idea. There's been nothing provided to me that the property as that--you have listed, just because you could have had it doesn't mean that you had it.

I don't have any receipts presented to me. I have no pictures. I have nothing to show that what you listed here are $17,000 worth of property which, by the weigh, I don't know how old, I don't know when you purchased it, if you purchased it. I have none of that. Let me finish. I know that you want

to say something to me. I'll give you a chance to.

I want to be clear that you've asserted that a crime has been committed by someone in this county. You've asked me to investigate this potential crime. I'm asking as the police and I'm telling you, I don't have any evidence. I have your allegation.

You know, suppose someone came to court and said, you know what, Mr. Hipp stole this from me. And suppose they went to the DA and said, Mr. Hipp stole this from me. Without any evidence, they couldn't bring charges against you. They couldn't go to Court and try to prove it to a jury that this occurred.

I used to be a former DA and charged many cases. Some cases I didn't charge, because the police didn't come in with the evidence; so I couldn't charge a case that I could prove beyond a reasonable doubt.

Now here, I don't have to do that. I just have to determine probably that a crime was committed and based on the evidence that I have before me, which is that you tried to get some good friends who have been here twice for you and tried to do everything to assist you, you asked them to go and get property of the apartment that you jointly shared with Mr. Richter, jointly shared with Mr. Richter and that you didn't give them a list of the property. You gave them a verbal list. Nothing in writing to go on and identify this is yours; this is

his. This yours; this is his. You didn't make arrangements for either. Nothing.

No arrangements for them to get the keys to go into the apartment. You asked them to make arrangements with the landlord who said without any of documentation, I'm not allowing you in the apartment. And someways, because of your inaction by not acting and doing things, you could have done as if you abandoned your property. I understand you want it back now. You didn't take the proper action to protect your property. You didn't do as much as you could have done. You could have written to the landlord, could you not?

MR. HIPP: Yes, I could have.

THE COURT: Yes. Did you?

MR. HIPP: No, I did not.

THE COURT: So you have to look at your inaction and what you ~~do~~ to protect your property. If I leave home and I don't go back and do nothing to protect my property and after a year I come back and expect everything to be there and if it's not there, and I said, I think my wife must have taken it--

MR. HIPP: This isn't a year later. It's a mats of weeks.

THE COURT: Okay. I go a way for three weeks. My wife is going away for two weeks tomorrow. She comes back. Something is missing. Nothing to secure her property. Lock it up in her office and the allegations are Judge Murray must have

taken it. Didn't see him do it. Don't know if he did it, but he had access. He must have taken it. Maybe we should ask Judge Murray. We have to bring Judge Murray in and Judge Murray is not here.

MR. HIPP: How can I bring Judge Murray--

THE COURT: Sir, that's not my problem or issue. My issues is investigator to determine whether or not-- You know what, at this point, I wouldn't even bring her here.

You have not given me evidence. I'm denying your petition for probable cause. I don't find there is probable cause a crime is committed by Miss Coleman or anyone else as it relates to your property. I know that you probably disappointed with my decision. I'm sorry. You had the burden den.

MR. HIPP: Absolutely.

ATTORNEY REDDIN: Judge--

THE COURT: And you did not meet the burden.

ATTORNEY REDDIN: I believe the finding that you need to make, there is not reason to believe a crime has been committed rather than probable cause.

THE COURT: I'm sorry. There is reason to believe that a crime hasn't been committed and by whom. And I'm not able to assert that given the testimony that I've heard today. One moment please. These are the Court's findings. These proceedings are done.

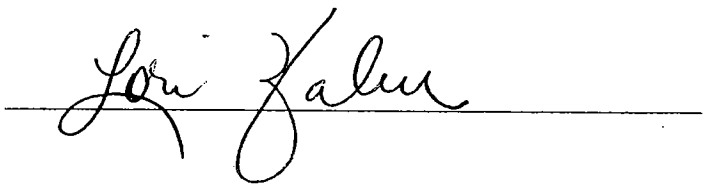
ATTORNEY REDDIN: Thank you, Your Honor.

(Proceeding concluded.)

STATE OF WISCONSIN)
) SS.
COUNTY OF MILWAUKEE)

I, LORI ZAHN, a court reporter for Branch 6 of the Circuit Court, Milwaukee County, Wisconsin, do hereby certify that the foregoing is a full, complete and correct transcript of my machine shorthand notes taken in the foregoing proceedings.

Dated at Milwaukee, Wisconsin, this 25th day of June, 2007.



Lori Zahn
Court Reporter

Lori Zahn, Court Reporter

R-App. 54

STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY BRANCH 43

In the Matter of a
John Doe Proceeding
Commenced on 12-13-06

CASE NO: 2006JD000007

PROCEEDINGS held in the above-entitled matter on the 13th day of December, 2006, before the Honorable Marshall B. Murray, Circuit Court Judge presiding in Branch 43, Room 515 of the Courthouse, Milwaukee County, Wisconsin

APPEARANCES:

DISTRICT ATTORNEY'S OFFICE, by JON REDDING, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

FRANCINE L. O'CLAIRE, OFFICIAL COURT REPORTER

(11)

TRANSCRIPT OF PROCEEDINGS

(Proceedings were commenced at 3:04 p.m.)

THE CLERK: In the matter of John Doe hearing, 13JD7. Appearances.

MR. REDDING: Jon Redding on behalf of the State. Good afternoon, Your Honor.

THE COURT: Good afternoon. In the matter of John Doe, State of Wisconsin, Attorney Redding, want to place on the record our conversation this morning?

MR. REDDING: Yes, I called the court; and when I got to work this morning, I discovered that I had not -- I had neglected to produce Mr. Hipp. For that, I apologize to the Court. I know this has been set for some period of time. I have no excuse for not doing that, but I didn't do it. I suggest that we set it over, and I will make sure that I do get him produced for the next appearance.

THE COURT: We also discussed the fact that because the timing that Mr. Hipp believes that the theft occurred, he did not give a specific date in January. He -- The allegations are is that things were taken from him once he was arrested, but he is not offering a specific date of the offense; so I don't think we are up against any time lines.

MR. REDDING: He's -- He says he was

arrested on January 16th and that the theft was some time after that.

THE COURT: Right.

MR. REDDING: So we certainly have until at least July -- or January 16th.

THE COURT: Right.

MR. REDDING: Uhm, I also received a phone call from the person whom he believes stole his property. She is, in fact, the executor of the estate of the victim of the theft for which Mr. Hipp is serving his -- his time.

The allegations in those cases were that he -- he ran up about $40,000 in charges. I have reviewed the documents of the charge cards, and most of that money was taken in cash; so there's no way to trace what it was used for.

She believes that it was used to buy various things, some of which are the property that is in dispute here; and she also told me that she had been contacted by someone by the name of Geoffrey -- with a G -- Santena (phonetic).

THE COURT: Is that person in court today? Folks, what are you here for?

MS. SCHICKER: We're here on the case of Adrian Hipp.

THE COURT: What are your names? Please come up and have a seat.

MS. SCHICKER: My name is Kathy Schicker.

THE COURT: Good morning, Ms. -- S-C-H-I-C-K-E-R -- K-E-R?

MS. SCHICKER: Yes.

MR. MERCADO: I'm David Mercado.

THE COURT: M-E-R-C-A-D-O?

MR. MERCADO: Yes.

THE COURT: Good afternoon. What we're talking about here is a case that Mr. Hipp has brought to the attention of the court. I'm doing an investigation. And so far what I've learned is that there are allegations that things that he left at an apartment once he was arrested have been removed from that apartment by someone. He's alleging that the things were stolen.

I've also learned that Mr. Hipp has -- he's serving a sentence for taking money from a person, and I'm not sure but I guess we'll find out if he used that money to purchase the items that he's saying that were allegedly taken; and if that's true, then I don't think he has an argument. Something was stolen from him under -- if this were a repo kind of situation, he would have lost it anyway 'cause the items were

obtained wrongfully and by use of money that he had no right to.

He was not produced today, so we're gonna have to set another date. I know that he has you down as his witnesses. I don't know if you've had contact with the alleged defendant. If you have, I need to ask you not to have any contact with her right now. These are only allegations. She has not been charged with anything, and I don't know what the outcome of this John Doe hearing will be.

But, please, if you know people that know her or if you know her, it's best that you leave things alone and let the Court handle this matter. Okay.

MS. SCHICKER: We don't know her.

THE COURT: Very good. I appreciate that. I hope that you don't, and that's what we've been told, not to talk to anyone. Frankly, she doesn't even have to be here to answer to what Mr. Hipp is saying. So we're gonna find a date. And if there's a problem with that date, please let me know. Okay. Madam clerk?

THE CLERK: January 8 at 1:30.

THE COURT: January the 8th at 1:30, is that a problem for the parties that are here? We'll have Mr. Hipp brought in on that day, and we'll conduct a hearing -- or I will conduct a hearing, and we'll see

what the result is. Yes, madam clerk?

THE CLERK: They remain under subpoena?

THE COURT: Yes, were you given a subpoena by Mr. Hipp?

MS. SCHICKER: He said he sent them in the mail, but we never did get them.

THE COURT: Well, if you receive them, remember that you're under subpoena until the next court date. Okay?

MS. SCHICKER: (Nods head.)

THE COURT: Thank you for coming today.

THE CLERK: January 8, 1:30, hearing.

THE COURT: Mr. Hipp sent a proposed witness list, and he included Attorney David Feiss and investigator Bonnie Parsons. I don't know if you received that.

MR. REDDING: I did not.

THE COURT: Okay.

MR. REDDING: I don't know if he subpoenaed --- and I don't -- I mean, the way the statute is, he does not have subpoena power. At that time he doesn't have subpoena power. In any event --

THE COURT: Right, but he put them down as witnesses.

MR. REDDING: He can certainly ask

witnesses to come --

THE COURT: Right.

MR. REDDING: -- and be examined.

THE COURT: Okay.

MR. REDDING: But he has no --

THE COURT: That's right.

MR. REDDING: -- authority to require them.

THE COURT: Thank you.

MR. REDDING: Thank you.

(Whereupon proceedings were concluded.)

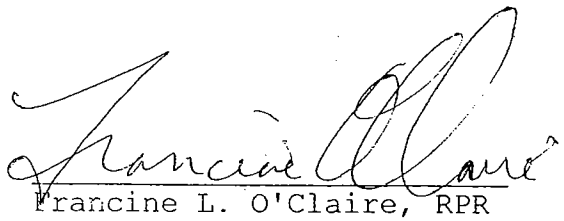
* * * *

STATE OF WISCONSIN)
) SS:
MILWAUKEE COUNTY)

I, FRANCINE L. O'CLAIRE, an official court reporter in and for the Circuit Court of Milwaukee County, do hereby certify that I have carefully transcribed from and compared the foregoing pages with the original electronic recording from said proceeding and that this transcript is true and correct to the best of my ability.

Dated at Milwaukee, Wisconsin, this

14th day of June, 2007



Francine L. O'Claire, RPR
Transcriber

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

BRANCH 43

In the Matter of

a John Doe Proceeding

Commenced on November 15, 2006

PROCEEDINGS held in the above-entitled matter on the 15th day of November, 2006, before the HONORABLE MARSHALL MURRAY, Circuit Court Judge presiding in Branch 43, Milwaukee County, Wisconsin

APPEARANCES

JON REDDIN, Chief Deputy District Attorney, appeared on behalf of the State of Wisconsin.

DAVID FEISS, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

KATHLEEN S. WORDEN, Official Court Reporter

P R O C E E D I N G S

THE COURT: On the record regarding a John Doe proceedings pursuant to 968.26. Mr. Adrian Hipp is the complainant. He is present today. He was produced for these proceedings, and also appearing for the District Attorney's Office would be place your names on the record, please?

MR. REDDIN: Jon Reddin.

MR. FEISS: David Feiss.

THE COURT: Okay. That microphone doesn't work. So I apologize.

Mr. Hipp, you are the complainant in this matter. The State believes that they have some information from you. So I wanted you to be here to hear the information, and then I'll hear any information that you want to bring to my attention. I don't believe I see any other witnesses today. Did you call or were planning on having any other witnesses?

MR. HIPP: With the exception of the ones that I listed. I wasn't even aware that this hearing was taking place until yesterday.

THE COURT: No one told you?

MR. HIPP: Absolutely not. I didn't even know until I got here.

THE COURT: Okay. I should probably reschedule

the hearing. Let me see what the State has to provide to the Court.

MR. REDDIN: Well, Judge, it's my understanding that Mr. Coleman (sic) has alleged that when he was arrested, his roommate whose name is Robert Richter, R-i-c-h-t-e-r, or that his guardian whose -- I'm sorry. Mr. Hipp. I misspoke -- Robert Richter's guardian whose name is Lisa Coleman apparently took $17,000 worth of his property and will not return it.

Putting the evidence in the best light for Mr. Hipp it is my understanding that in Case Number 2001CF1328 Mr. Hipp was convicted of credit card fraud against Mr. Richter and against MNBA, and as a result of that -- the disposition in that case, he was sentenced to prison in which I understand that's where he's serving now.

In addition, he was ordered to make restitution to Robert R. who is now diseased. So I would assume that would accrue to the estate of which Ms. Coleman is apparently the personal representative although I have not confirmed that -- I assume that since she was his guardian -- in the amount of $19,648 and $20,504.80 to MBNA. It would be my assumption and not knowing any more about it that this is something -- a matter that should be either addressed in a civil form or that it should be addressed on parole or extended supervision by the probation officer who

would be assigned to him to enforce the restitution order.

There seems to be a dispute. It appears to me without knowing the facts -- and I don't know if this would be a fact -- that it appears to me that there may be some self-help going on here of holding property that was apparently abandoned by Mr. Hipp when he was arrested. I don't know if there is an issue of back rent or not, but the whole thing strikes me as being civil in nature, not a crime--

THE COURT: Any other--

MR. REDDIN: --in this case.

THE COURT: Any other information from your office?

MR. REDDIN: No.

THE COURT: Mr. Hipp, you heard the information that was placed on the record by the District Attorney's Office. Is there a restitution order that you pay Mr. Richter's estate about $1900 -- $19,000 plus dollars?

MR. HIPP: Yes, there is.

THE COURT: And also MBNA?

MR. HIPP: That's correct.

THE COURT: Am I correct?

MR. HIPP: Uh-hum.

THE COURT: And do you believe that Lisa Coleman is the person who is in charge of that estate or the trustee

of that estate?

MR. HIPP: I have no knowledge of fact that she has anything to do with the estate. At the time of the occurrence she had nothing whatsoever to do with that. That had to have been determined at a later point if that indeed is the case. I do not know that that is the case.

I would dispute that. I would like to see evidence of that if that's the case. I do not know that, Your Honor. No.

THE COURT: When were you sentenced, sir?

MR. HIPP: I was sentenced in 2002, June.

THE COURT: And why did you wait until now to bring this petition for a John Doe?

MR. HIPP: Well, part of the reason, Your Honor, is that for the last three years I've been out of state. I was out of state in prison. I was in Oklahoma and Minnesota, and these are very difficult things to try to glean any information especially being in prison trying to find out where my property is. I tried piece by piece to get it. It's taken me this long. I realize that the statute of limitations is six years, and I was just finally able to get all the information that I needed when I submitted the petition to you.

THE COURT: And is it because of the statements by David Ricardo and other people that you listed that you

believe that Ms. Lisa Coleman has your property?

MR. HIPP: Absolutely.

THE COURT: And this property that you list--

MR. HIPP: Yes.

THE COURT: --in the petition that you say is valued at $17,860, I assume that you have receipts and such to show that that's what the value of these items are?

MR. HIPP: Yes.

THE COURT: You have receipts?

MR. HIPP: Well, she has everything.

THE COURT: Well--

MR. HIPP: That's the situation.

THE COURT: She has the receipts?

MR. HIPP: She has all of my paperwork as well. Yes. She has everything.

THE COURT: How do you know this?

MR. HIPP: Because I was informed by the two affiants who told me specifically when we went to find where my material was and where my possessions were that she had admitted to taking them. She had them, and she was not returning anything. Those were her words.

So I never gave her permission to take anything. She came into my dwelling. I was living at this place. She walked out with it. Lisa Coleman came in my apartment and cleaned out my possessions from my apartment.

THE COURT: All right. What I'm going to do is it's your responsibility to get your witnesses here. You look at the statute, sir.

MR. HIPP: I did not know. No one informed me.

THE COURT: I'll set another date to continue the hearing and have these people come, and I will question them about what they know and about what information they have, and I'll make a determination as to whether or not there is enough here that I believe that a complaint should be issued against Ms. Coleman.

I will tell you at this point I'm inclined to agree with the State that this probably more appropriately should come before a small claims or a large claims Judge, but, you know, I'll make a determination based on what I hear and whether or not I believe a theft has occurred. So we'll take it from there.

Do I have any questions, sir?

MR. HIPP: I do. I have a couple of questions, Your Honor.

THE COURT: What are they?

MR. HIPP: Well, first of all, is the position that the State has stated about Ms. Coleman and all of that, is there something that I can have that states that or confirms what they say that would make this an appropriate civil claim?

MR. HIPP: All they said was that you owe money--

MR. HIPP: Right.

THE COURT: --to the estate.

MR. HIPP: Okay. Okay. But that Lisa was somehow involved with that is not the issue that I'm bringing to this court. My question is--

THE COURT: Well, there may be a balancing that's going on. I mean, if you owe money, she's a trustee. She may have secured your items in leu of payment for it.

MR. HIPP: But the items, Your Honor, were taken before any kind of adjudication took place or before anything happened.

THE COURT: Well, that's what you are asserting.

MR. HIPP: That's what I'm asserting absolutely. Yes.

THE COURT: Okay. So I said we will have a hearing. It will be your job to get your witnesses here for that date, and we'll take it from there.

MR. HIPP: Fair enough.

THE COURT: Okay. I assume that the State will stay involved at least to do the hearing?

MR. REDDIN: Yes.

THE COURT: The District Attorney's Office, rather. Okay. Did you have any other questions?

MR. HIPP: I guess that's all.

THE COURT: Okay. Do you know-- Have you recently been in contact with your witnesses?

MR. HIPP: In regards to this? No. Other than--

THE COURT: Yes. In regards to this. Do you have any idea if they are available?

MR. HIPP: I don't, but I'm sure they will be.

THE COURT: Okay.

MR. HIPP: Your Honor, it's my responsibility to have them here; is that correct?

MR. HIPP: The statute says the Judge shall examine the complainant under oath and any witnesses produced by him or her.

MR. HIPP: That's correct. But if people are not willing to come, then what?

THE COURT: Sir--

MR. HIPP: I mean, not my own witnesses, but the people that were involved in my apartment complex. I don't know that they will show up. I mean--

THE COURT: Sir, I'm not the Judge in this case. I am just responding to the petition that you wrote. You have to bring in information to me. I'm just a police officer trying to do an investigation here.

MR. HIPP: Okay.

THE COURT: Okay.

MR. HIPP: Good.

THE COURT: All right.

MR. HIPP: Fair enough.

(Whereupon, a discussion was held off the record to set a date.)

THE CLERK: December 13, three o'clock.

THE COURT: Okay. Sir, we'll see you then, and I'll be waiting to hear your witnesses. Okay.

MR. HIPP: Thank you.

(Whereupon, the proceedings were concluded.)

* * *

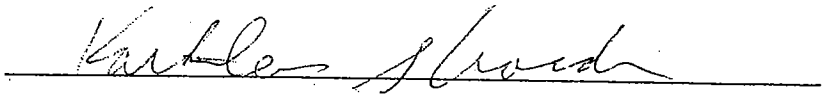
STATE OF WISCONSIN)

) SS

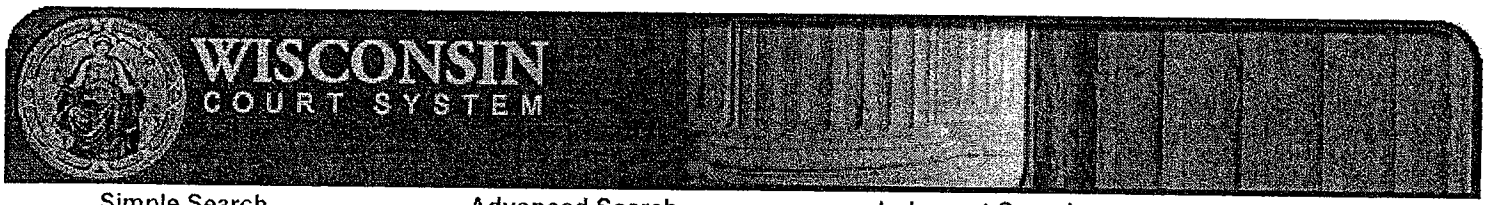
COUNTY OF MILWAUKEE)

I, KATHLEEN S. WORDEN, an Official Court Reporter, in and for the Circuit Court, Milwaukee County, Wisconsin, do hereby certify that I reported the foregoing 11 pages of proceedings and that the same is true and correct in accordance with my original stenographic notes taken at said time.

Dated this 14th day of February, 2008, at Milwaukee, Wisconsin.



KATHLEEN S. WORDEN, OFFICIAL COURT REPORTER



In the Matter of John Doe

Milwaukee County Case Number 2006JD000007
Court Record Events

What is RSS? RSS

	Date	Event	Court Official	Court Reporter
1	10-16-2006	Motion to request John Doe proceeding **Additional Text:** Received, Petition for John Doe proceeding.		
2	10-16-2006	Responsible court official changed	Murray-43, Marshall B.	
3	10-16-2006	Order **Additional Text:** Filed, signed order appointing Hon. Marshall Murray to hear and resolve John Doe petition.	Brennan-06, Kitty K.	
4	11-03-2006	John Doe proceeding **Additional Text:** PRESENT IN COURT ADA: Jon Redding and David Feiss Complainant: Adrian T. Hipp (in custody) /cdl BASED ON HEARING HELD, COURT ORDERS complaint to subpoena witness for next court date. Adjourned hearing scheduled 12-13-06 at 3:00pm.	Murray-43, Marshall B.	Worden (Moravec), Kathleen
5	12-13-2006	John Doe proceeding **Additional Text:** PRESENT IN COURT: ADA: Jon Redding Witness(es): Kathy S. and David M. /cdl Complainant not produced for today's hearing. Court orders matter adjourned. State to prepare OTP. Adjourned hearing scheduled 01-08-07 at 1:30pm.	Murray-43, Marshall B.	O'Claire, Francine

6 01-08-2007 John Doe proceeding Murray-43, Marshall B. Zahn (Kondrakiewicz), Lori

Additional Text:

PRESENT IN COURT:
ADA: Jon Reddin.
Court reporter: Lori Zahn. Deputy clerk: alp
Witnesses (3) sworn and testified. Court denies complainant's petition.
Proceedings concluded on 1-8-07.

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7 01-09-2007 Petition denied Murray-43, Marshall B.

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8 06-27-2007 Notice

Additional Text:

Transmittal of record to the court of appeals on Appeal No. 07AP230-W #14 doc.

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9 08-20-2007 Other papers

Additional Text:

Petition for Review by the Supreme Court filed on Appeal # 2007AP000230 W

by Asst. Attorney General: David C. Rice
per notice dated August 16, 2007. jd

Return to Case 2006JD000007

STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP0230 W

In the Matter of the John Doe Petition:

STATE OF WISCONSIN ex rel. ADRIAN T. HIPP,

Petitioner,

v.

THE HONORABLE MARSHALL B. MURRAY, presiding,

Respondent-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I

REPLY BRIEF OF THE HONORABLE MARSHALL B. MURRAY

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PRELIMINARY CONSIDERATIONS

A. Judge Murray never ordered Hipp to subpoena witnesses.

Hipp cites the CCAP record containing the clerk's minutes for the hearing held on November 15, 2006, as follows: "BASED ON HEARING HELD, COURT ORDERS complainant to subpoena witness for next court date" (R-App. 74). A fair reading of the transcript of that hearing, however, reveals that Judge Murray never made any such order (R-App. 63-73). Rather, when Hipp asked

Judge Murray what would happen if witnesses, other than his witnesses, were not willing to appear at the continued hearing, Judge Murray responded:

> THE COURT: Sir, I'm not the judge in this case. I am just responding to the petition that you wrote. **You have to bring in information to me**, I'm just a police officer trying to do an investigation here.

(Tr. 9; R-App. 71) (bold added).

A comparison of the transcript and the clerk's minutes show that the minutes do not fairly reflect what transpired at the hearing. The judge made no mention of subpoenas and his statement "You have to bring information to me" cannot reasonably be understood to mean that Judge Murray was ordering Hipp to subpoena witnesses.

B. The Supreme Court should decide the issues presented for review even though this case likely is moot.

A case is "moot" when it seeks a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon an existing controversy. *See State ex rel. La Crosse Tribune v. Circuit Ct.*, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983). Hipp's case likely is moot because the determination of whether there is probable cause to believe that a crime has been committed probably can have no practical legal effect.

The primary purpose of a John Doe hearing is to determine if it is probable that a crime has been committed and who committed it. *See* Wis. Stat. § 968.26. If it appears probable, a written complaint may be prepared and a warrant issued for the arrest of the accused. *See id.* Wis. Stat. § 939.74(1) provides that a prosecution for a felony must be commenced, *i.e.*, a warrant must be issued, within six years after the

commission of the felony. Thus, a determination of whether there is probable cause to believe that a crime has been committed, in the John Doe hearing required on remand by the court of appeals, likely can have no practical legal effect. This is because the six-year statute of limitations would bar the issuance of a warrant for the arrest of the accused.

Hipp cites *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 626 n. 11, 571 N.W.2d 385 (1997), for the proposition that in determining whether crimes alleged by a John Doe petitioner are beyond the appropriate statute of limitations, the John Doe judge "must consider not only the time having passed since the alleged crime occurred, but also the occurrence of events and the existence of factors that may have tolled the running of the statute of limitations." Significantly, however, this court also said that **if the John Doe judge "determines that the crimes alleged in [the John Doe] petition are beyond the applicable statute of limitations, he may deny the petition without conducting an examination of the John Doe petitioner**." *See Reimann*, 214 Wis. 2d at 626 (bold added). Accordingly, on remand, Judge Murray must decide whether the crimes alleged in Hipp's petition are beyond the statute of limitations before he is required to proceed further with the John Doe hearing.[1]

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[1] Hipp legitimately points out that Judge Murray never raised the mootness issue either in the court of appeals or in his petition for review in this court. Although Judge Murray filed his response in the court of appeals before the expiration of the six-year limitation period, the undersigned counsel for Judge Murray acknowledges that the statute of limitations issue did not occur to him until he was preparing Judge Murray's initial brief in this court. Nonetheless, it would be improper for him to argue the primary issues presented on review without alerting the court that if Judge Murray makes the statute of limitations decision contemplated by *Reimann*, 214 Wis. 2d at 626, and determines that the statute of limitations bars the issuance of a warrant, then Judge Murray would not be required to proceed or to subpoena any witnesses for the John Doe proceeding.

Hipp points out that Wis. Stat. § 939.74(3) provides that in computing the six-year time limitation, "the time during which the actor was not publicly a resident within this state . . . shall not be included." Hipp is correct that the record contains no information about whether the John Doe publicly resided in Wisconsin for six years following the commission of the alleged crime, and that Judge Murray will have to conduct an evidentiary hearing to determine the residence issue.

Hipp also suggests that the John Doe should not be afforded the protection of the statute of limitations because she ignored the subpoena issued by the clerk of circuit court which required her to appear at the John Doe hearing. As Hipp acknowledges, however, the John Doe communicated with the assistant district attorney who advised her to ignore the subpoena. Hipp suggests that the "combined conduct" of the assistant district attorney and the John Doe could require Judge Murray to grant "equitable relief" from the statute of limitations on the John Doe's alleged crime. Although Hipp possibly could be correct that the John Doe's conduct could "toll" the statute of limitations and deprive her of its protections,[2] it is unlikely that the conduct of the state could operate to remove the John Doe's protection afforded by the statute of limitations. Nonetheless, Judge Murray must keep an open mind and will consider any evidence and legal authority presented by Hipp, the John Doe, or the assistant district attorney when he decides the issue of the applicability of the statute of limitations.

[2] Counsel for Judge Murray could find no case where the six-year statute of limitations contained in Wis. Stat. § 939.74(1) was "tolled" by the conduct of the defendant.

ARGUMENT

I. A JOHN DOE JUDGE HAS EXCLUSIVE AUTHORITY TO SUBPOENA WITNESSES FOR A JOHN DOE PROCEEDING.

Wisconsin Statute § 968.26 provides that the presiding judge in a John Doe proceeding "shall examine the complainant under oath and any witnesses produced by him or her" (bold added). In addition, the statute provides that the judge "**may**, and at the request of the district attorney **shall**, subpoena and examine other witnesses" (bold added). Under Wis. Stat. § 885.05(1) a judge and a clerk of court have authority to issue subpoenas, and under Wis. Stat. § 885.05(2), a district attorney has authority to issue subpoenas, in any action or proceeding before a magistrate. If a clerk of court or a district attorney can independently subpoena witnesses to appear at a John Doe hearing under Wis. Stat. § 885.05(1)-(2), then the language in Wis. Stat. § 968.26 either is redundant or is in conflict.

A John Doe judge has authority to issue a subpoena for a John Doe hearing under Wis. Stat. § 885.01(1). If that is the sole source of his subpoena power, then the language in Wis. Stat. § 968.26 granting the John Doe judge discretion to issue subpoenas to persons other than district attorneys and requiring the John Doe judge to issue subpoenas to district attorneys must have some meaning. Judge Murray respectfully submits that the language in Wis. Stat. § 968.26 exists to confer exclusive subpoena power on the John Doe judge, *i.e.,* to confer discretion on the John Doe judge whether to issue subpoenas to persons other than district attorneys and to require the John Doe judge to issue subpoenas to district attorneys.

If a clerk of court can issue subpoenas for John Doe hearings under Wis. Stat. § 885.05(1), to persons other than district attorneys, then the language in Wis.

Stat. § 968.26 granting the John Doe judge the discretion whether to issue subpoenas to persons other than district attorneys is eviscerated. If a district attorney can issue subpoenas for John Doe hearings under Wis. Stat. § 885.05(2), then the language in Wis. Stat. § 968.26 requiring the John Doe judge to issue subpoenas at the request of the district attorney is redundant or in conflict

To avoid this redundancy and conflict, the language in Wis. Stat. § 968.26 is more reasonably read as conferring exclusive authority upon a John Doe judge to subpoena witnesses for a John Doe proceeding. This reading also in consistent with long-standing historical practice.

In *State ex rel. Long and another v. Keyes*, 75 Wis. 288, 44 N.W. 13(1889), this court recognized the right of the John Doe judge (then called a "magistrate") to subpoena witnesses for a John Doe hearing, even though the John Doe statute did not contain express language authorizing such subpoenas. It is true that the court cited the predecessor of Wis. Stat. § 885.05(1) as providing the authority for the judge to issue subpoenas. Significantly, this court stated:

> . . . (1) Other witnesses than the complainant may be examined on oath. (2) Such witnesses must be *produced* by the complainant. **He cannot "produce" them in any other way than to suggest their names to the magistrate.** If they come voluntarily with the complainant, he cannot be said to produce them in any other way than to make them known to the justice as witnesses who know something about the case. They are produced as parties produce their witnesses in court. They may come voluntarily or on subpoena, and on attachment if necessary. . . . The complainant produces or suggests or names a great many witnesses . . . . They are witnesses, and therefore they may be subpoenaed. The main purpose is to obtain the facts in relation to the offense from the complainant and other witnesses, and the justice has the power to have or bring such other witnesses before him to be examined as to their knowledge of the facts. . . .

> So far we have considered the language of the section. It seems that the magistrate has the power to have before him in some way all the witnesses required to make it appear that the offense has been committed. If, as in this case, the complainant does not assume to know the facts except on information, he **produces or suggests the names of such witness as do know the facts, and the magistrate has them brought before him for examination**. . . .

See State ex rel. Long, 75 Wis. at 293-294 (italics in original; bold added).

Hipp legitimately asks why, if Wis. Stat. § 968.26 confers exclusive authority on a John Doe judge to issue subpoenas in a John Doe proceeding, Judge Murray did not say that he had exclusive subpoena authority when Hipp asked him how he was to produce witnesses who would not appear voluntarily. The answer, frankly, is that Judge Murray did not fully understand the scope of his authority and responsibility as a John Doe judge at the time. Yet the proper interpretation of Wis. Stat. § 968.26 should not depend upon Judge Murray's understanding of the statute in this case; the proper interpretation of Wis. Stat. § 968.26 should be enunciated by the Supreme Court to guide circuit judges, district attorneys, clerks of court, and John Doe petitioners in future cases.

Hipp concedes that with respect to district attorneys, the language contained in Wis. Stat. § 968.26 conflicts with Wis. Stat. § 885.05(2). Hipp recognizes that the solution to this conflict is that a district attorney cannot issue subpoenas for John Doe proceedings, and that the John Doe judge must issue subpoenas at the request of the district attorney, because Wis. Stat. § 968.26 is a specific statute that controls over Wis. Stat. § 885.05(2) which is the general statute. *See State v. Taylor*, 170 Wis. 2d 524, 529, 489 N.W. 2d 664 (Ct. App. 1992) (more specific statute controls over general statute).

Hipp argues, however, that this case is not about how district attorneys subpoena witnesses for John Doe proceedings, and that Wis. Stat. § 968.26 does not prescribe the procedure for John Doe petitioners. Judge Murray respectfully disagrees. The procedure for more than a century has been that the John Doe petitioner "suggests the names of such witness as do know the facts, and the magistrate has them brought before him for examination." *See State ex rel. Long*, 75 Wis. at 293-294. The language in Wis. Stat. § 968.26 codifies this longstanding practice and confers discretion upon the John Doe judge to subpoena witnesses at the request of persons other than district attorneys.

Hipp argues that because a John Doe proceeding is the "only entrance to the state courts" for some John Doe petitioners, *see Reimann*, 214 Wis. 2d at 525, they will not have a fair opportunity to demonstrate that a crime has been committed and by whom the crime has been committed if they are "at the mercy" of John Doe judges who might refuse their request to subpoena witnesses. As both Hipp and Judge Murray recognize, however, a John Doe judge's discretion whether to issue subpoenas at the request of a John Doe petitioner is not unlimited, and any refusal by a John Doe judge to issue a subpoena or to quash a subpoena already issued can be reviewed under an erroneous-exercise-of-discretion standard. *See Reimann*, 214 Wis. 2d at 625-26.

In summary, Judge Murray respectfully submits that a John Doe judge has exclusive statutory authority under Wis. Stat. § 968.26, to subpoena witnesses for a John Doe proceeding.

II. A JOHN DOE JUDGE IS NOT REQUIRED TO SUBPOENA EVERY WITNESS THAT THE JOHN DOE PETITIONER REQUESTS OR TO EXAMINE EVERY SUCH WITNESS AT THE JOHN DOE PROCEEDING.

Although it might not otherwise be necessary in this case to reach beyond the issue of whether a John Doe judge has exclusive authority (as opposed to a clerk of court) to issue subpoenas for a John Doe proceeding in the first instance, the decision of the court of appeals is recommended for publication and intimates that a John Doe judge must subpoena and examine each and every witness that a John Doe petitioner requests. Judge Murray respectfully submits that such result is not consistent with good public policy and is not required by Wis. Stat. § 968.26.

Judge Murray respectfully submits that a John Doe judge does not have to subpoena every witness that the John Doe petitioner wishes to produce, or to examine every such witness at the John Doe proceeding, for at least two reasons. First, a John Doe judge has both statutory and inherent authority "in determining the need to subpoena witnesses," *see State v. Washington*, 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978), and has broad discretion to determine the extent of the examination of witnesses, *see In Matter of John Doe Proceeding*, 2003 WI 30, ¶¶ 52-54, 260 Wis. 2d 653, 684, 660 N.W.2d 260. Second, if a John Doe judge were required to subpoena and to examine every witness requested by the John Doe petitioner, the judge's ability to efficiently and fairly conduct the John Doe proceeding would be jeopardized.

Hipp argues, correctly, that the facts of this case do not give rise to this second issue because Judge Murray never expressly refused to subpoena any witnesses named by Hipp and never refused to examine any witnesses produced by Hipp, except for the reason that they were

subpoenaed by the clerk of court and not by Judge Murray. On March 18, 2008, following the granting of review in this case, and following the filing of Judge Murray's initial brief, this court issued an order in *Robins v. Madden*, No. 2007AP1526-W, a case precisely raising the question of whether a John Doe judge must examine every witness produced by the John Doe petitioner in a John Doe proceeding. This court ordered that the petition for review in *Robins* be held in abeyance pending the disposition of the *Hipp* case.

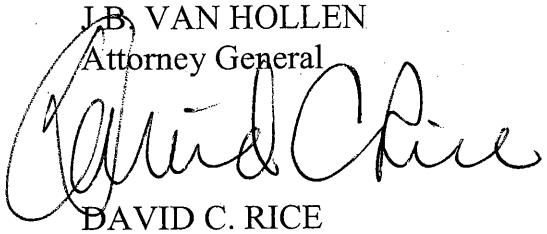
If the court does not decide the second issue presented in this case, and instead chooses to address the issue in the *Robins* case, Judge Murray believes that the court at least should make clear in this case that the decision of the court of appeals should not be understood to mean that a John Doe judge is required to subpoena every witness that the John Doe petitioner requests or to examine every such witness at the John Doe proceeding. Alternatively, if the court does choose to decide the second issue in this case, Judge Murray respectfully submits that the court should decide that a John Doe judge is not required to subpoena every witness that the John Doe petitioner requests and to examine every such witness at the John Doe proceeding.

CONCLUSION

Judge Murray respectfully requests that the Supreme Court reverse the decision of the court of appeals, and decide (1) that a John Doe judge has exclusive authority to subpoena witnesses for a John Doe proceeding, and (2) that a John Doe judge is not required to subpoena every witness that the John Doe petitioner requests and to examine every such witness at the John Doe proceeding. In addition, Judge Murray requests that the court clarify the mandate of the court of appeals directing further proceedings on remand, and instead direct Judge Murray to determine first whether the crimes

alleged in the John Doe petition are barred by the applicable statute of limitations.

J.B. VAN HOLLEN
Attorney General



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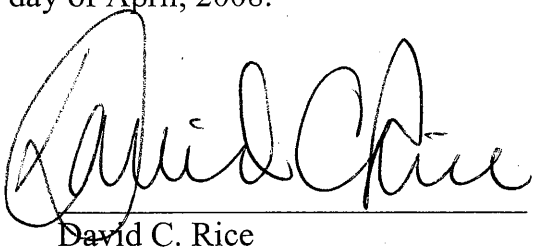
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,935 words.

Dated this 7th day of April, 2008.



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