SPECIAL PROSECUTOR REPORT REGARDING ALLEGED CRIMINAL VIOLATIONS BY IRON COUNT DISTRICT ATTORNEY MATTHEW TINGSTAD

July 16, 2020

Special Prosecutor Roy Korte

PROCEDURAL HISTORY:

On October 3, 2019, Attorney Steven Lucarelli requested that the Iron County sheriff conduct a criminal investigation into Iron County District Attorney Matthew Tingstad. At the time Attorney Lucarelli was representing a defendant who was being prosecuted by District Attorney Tingstad that involved the conduct described in this report.

On December 11, 2019, the Oneida County Sheriff's department advised Iron County Judge Anthony Stella that they had completed an investigation into alleged criminal activity of Iron County District Attorney Matthew Tingstad and requested the appointment of a special prosecutor. The Oneida county investigation was conducted at the request of the Iron County Sheriff due to a conflict.

On January 6, 2020, Judge Stella opened a John Doe file under Wisconsin Statute section 968.26 stating that he interpreted the Oneida county sheriff department request as one to convene a John Doe. Judge Stella then requested that another judge be appointed to handle the matter pursuant to Wisconsin Statute section 757.19(2)(g). Judge Stella also ordered the records sealed pending the appointment of a new judge and subsequent order. That order remains in effect. Judge Michael Bloom was assigned to handle the matter. District Attorney Tingstad did agree that he had a conflict of interest and that a special prosecutor should be appointed to review the matter. Judge Bloom made attempts to locate another district attorney to act as special prosecutor

without success. The Attorneys General office had also declined. [1] I was appointed as special prosecutor in mid-March 2020.

On January 8, 2019, Attorney Lucarelli requested the filing of a criminal complaint under Wisconsin Statute 968.02(3) and objecting to proceeding under the John Doe statute. Wisconsin Statute section 968.02 provides in relevant part:

> (1) Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint or the electronic signature of the district attorney as provided in s. 801.18 (12).
> (2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to s. 968.03. Such filing commences the action.
> (3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

On January 16, 2020, the Oneida County sheriff referred for charging only the offense of Simulating Legal Process in violation of Wisconsin Statute section 946.68.

The John Doe statute does not apply in this case. To be clear, the request made to Judge Stella from the Oneida county sheriff's department did not refer to Wisconsin Statute section 968.02 or the John Doe statute, section 968.26. Therefore there was a lack of clarity in what was being requested. However, Wisconsin Statute section 968.26 provides that a John Doe may only be used for the investigation of specified crimes. The crimes alleged in this matter, simulating legal process and misconduct in public office, are not included as offenses that may be investigated by a John Doe. *See* Wisconsin Statute section 968.26(1b)(a)1-5. Simulating legal process under Wisconsin Statute section 946.68 is a Class H or I felony and Misconduct in public office is a Class I felony. Neither of those offenses are specifically listed as an offense that is subject to a John Doe.

[1] I was previously employed by the Wisconsin Department of Justice as an Assistant Attorney General and prosecutor for approximately 25 years. District Attorney Tingstad took office in January of 2017. I left WDOJ in late June of 2017. I had no dealings with District Attorney Tingstad of note during that time

Therefore, I have proceeded in this case as a special prosecutor exercising the usual authority of a district attorney to make charging decisions on a criminal referral.

APPLICABLE CRIMINAL LAW:

The Oneida county sheriff's department referred a single charge of simulating legal process under Wisconsin Statute section 946.68. Attorney Lucarelli's request for a criminal complaint included simulating legal process as well as misconduct in public office in violation of Wisconsin Statute section 946.12(2).

Criminal slander of title is defined as sending or delivering to another a document which simulates legal process. "Simulate" is defined as imitating or having the appearance of without being genuine. Legal process includes a subpoena. WI JI-Criminal 1825.

Misconduct in public office is committed by a public official, who, in their official capacity, does an act which they knew they were forbidden by law to do in their official capacity.

Standard of Review:

In determining whether criminal charges are warranted, the standard which applies in all criminal prosecutions as required by Wisconsin and federal constitutions and Wisconsin statutes, is whether based on all the legally relevant and admissible evidence the charges can be proven beyond a reasonable doubt. Prosecutors are also guided and informed by ethical duties imposed by our Supreme Court and the American Bar Association. A prosecutor should refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. SCR 20:3.8(a). The ABA Standards for Criminal Justice Relating to the Prosecution Function, Standard 3-3.9 provides in part that "[a] prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges . . . in the absence of sufficient admissible evidence to support a conviction." *See also, Thompson v. State*, 61 Wis. 2d 325, 330, 222 N.W.2d 109 (1973) ("[. . .] it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction," citing a previous version of Standard 3-3.9).

The decision to charge is not limited to only a determination of probable cause. Courts have long recognized that prosecutors have considerable discretion in making charging decisions. Those standards have been summarized in various cases including *State ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, 27 Wis. 2d 633, 681 N.W.2d 110.

In *State ex rel Kalal* the court first addressed the scope of the general power in charging.

> ¶ 27. District attorneys in Wisconsin have primary responsibility and wide discretion to determine whether to commence a criminal prosecution. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The authority is conferred by Wis. Stat. § 968.02(1), which provides that "[e]xcept as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed."
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> ¶ 28. But the district attorney's charging power is not unlimited or unfettered. "The district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial." *Kurkierewicz*, 42 Wis. 2d at 378 (citing *State v. Peterson*, 195 Wis. 351, 359, 218 N.W. 367 (1928)).[3] The district attorney's role is "quasi-judicial" in the sense that it is his or her duty to administer justice rather than simply obtain convictions. *Karpinski*, 92 Wis. 2d at 607; *Kurkierewicz*, 42 Wis. 2d at 378.
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> ¶ 29. The sine qua non of the charging decision is probable cause. *Bordenkirscher v. Hayes*, 434 U.S. 357, 364 (1978). "In our system, so long as a prosecutor has probable cause to believe that the accused has committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.*

State ex rel Kalal v. Circuit Court for Dane County, 2004 WI 58, 27 Wis. 2d 633, 681 N.W.2d 110.

The Court then addressed the discretionary power of a district attorney to not prosecute every offense.

> ¶ 30. We have recognized that "[t]here is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him." *Kurkierewicz*, 42 Wis. 2d at 378; see also *Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973). While the district attorney has the power and the duty to prosecute criminal offenders, "it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial." *Kurkierewicz*, 42 Wis. 2d at 378. In general, "the prosecuting attorney is answerable to the people of the state and not to the courts or the legislature as to the way in which he exercises power to prosecute complaints." *Karpinski*, 92 Wis. 2d at 608; *Kurkierewicz*, 42 Wis. 2d at 378; *State v. Kenyon*, 85 Wis. 2d 36, 42, 270 N.W.2d 160 (1978).
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> ¶ 31. We have in prior cases referred to American Bar Association Criminal Justice Standard 3.9 pertaining to the exercise of charging discretion, identifying two circumstances in which prosecutorial charging discretion may be abused: "[t]his standard

makes it abundantly clear that . . . it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction. It is also an abuse of discretion for a prosecutor to bring charges on counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." *Thompson*, 61 Wis. 2d at 329-30; *Karpinski*, 92 Wis. 2d at 609-10. A district attorney generally should not bring a charge unless he or she believes the evidence can sustain a finding of guilt beyond a reasonable doubt. Not all the guilty are convictable; moreover, convicting all the guilty may not be desirable. Full enforcement of the criminal laws "is neither possible nor desirable." 4 Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 13.2(d), at 22-23 (1999).

¶ 32. Accordingly, ABA Standard 3.9 specifies a number of discretionary factors beyond the question of the suspect's guilt that may legitimately be taken into consideration in the charging decision. These include the extent of harm caused by the offense; the threat posed to the public by the suspect; the ability and willingness of the victim to participate; the disproportion between the authorized punishment and the particular offense or offender; possible improper motives of a complainant; cooperation of the suspect with the arrest/prosecution of others; the possibility or likelihood of prosecution by another jurisdiction. American Bar Association Standards for Criminal Justice, Vol. 1, Standard 3-3.9 (2d ed. 1980); see also *Karpinski*, 92 Wis. 2d at 608-09; *Thompson*, 61 Wis. 2d at 329-30. There may well be other legitimate discretionary charging factors relating to the particular circumstances of each individual complaint.

State ex rel Kalal v. Circuit Court for Dane County, 2004 WI 58, 27 Wis. 2d 633, 681 N.W.2d 110.

The current ABA standards include consideration of the following factors in charging:

(i) the strength of the case;
(ii) the prosecutor's doubt that the accused is in fact guilty;
(iii) the extent or absence of harm caused by the offense;
(iv) the impact of prosecution or non-prosecution on the public welfare;
(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
(vii) the views and motives of the victim or complainant;
(viii) any improper conduct by law enforcement;
(ix) unwarranted disparate treatment of similarly situated persons;
(x) potential collateral impact on third parties, including witnesses or victims;
(xi) cooperation of the offender in the apprehension or conviction of others;
(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) changes in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and

(xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

3-4.4 *Criminal Justice Standards for the Prosecution Function*: American Bar Association, Fourth Edition (2017).

The National District Attorneys Association has adopted similar standards for charging:

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

a. Doubt about the accused's guilt;
b. Insufficiency of admissible evidence to support a conviction;
c. The negative impact of a prosecution on a victim;
d. The availability of adequate civil remedies;
e. The availability of suitable diversion and rehabilitative programs;
f. Provisions for restitution;
g. Likelihood of prosecution by another criminal justice authority;
h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
i. The charging decisions made for similarly-situated defendants;
j. The attitude and mental status of the accused;
k. Undue hardship that would be caused to the accused by the prosecution;
l. A history of non-enforcement of the applicable law;
m. Failure of law enforcement to perform necessary duties or investigations;
n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;
o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;

FACTUAL SUMMARY:

On May 29, 2018, Iron County District Attorney Matthew Tingstad issued criminal charges against Mr. Darrell Petrusha who was the fire chief for the City of Hurley (Iron County case number 18-CF-26). Referenced in the complaint was Mr. Joseph Pinardi, the former Mayor of Hurley and later head of the Iron County Board and longtime Hurley volunteer fire fighter. Mr.

Petrusha was charged with theft from a business setting by use of a negotiable instrument without consent and with intent to convert to his own use and identity theft.

Both charges against Mr. Petrusha were based on the use of a credit card that contained the name of the Hurley Fire Department, which Mr. Petrusha allegedly used for personal purchases between 2013 and 2016 while he was fire chief. According to the complaint, Mr. Petrusha decided to get the card in March 2007, to make it easier to obtain hotels rooms when traveling for department business or other department expenses. There is no evidence that the Hurley city council approved obtaining the credit card. However, as discussed below, Mr. Pinardi, who was the City mayor, was aware of and participated in approving and applying for and the card. The card was applied for at a bank in nearby Michigan where another Hurley firefighter worked as a banker. The bank had no other business relationship with the city of Hurley.

The main credit card account was listed under the name of the Hurley Fire Department with Mr. Petrusha and Mr. Pinardi having separate subsidiary accounts. While there were apparently some business related purchases beginning in 2007, later records showed that Mr. Petrusha used the card for personal expenses. The credit card statements were sent to the fire department and the bills were paid from Mr. Petrusha's personal account. There is no claim that the City of Hurley paid for any of the personal expenses incurred by Mr. Petrusha.

According to the complaint, both Mr. Petrusha and Mr. Pinardi used their Social Security numbers to apply for the cards. The complaint alleged that the City of Hurley's Employee Identification Number (EIN) was also used when applying for the cards. Mr. Petrusha and Mr. Pinardi claim that the Hurley EIN was added to the account by the bank through which it applied for the credit card or at some point by the credit card company. Both Mr. Petrusha and Mr. Pinardi had cards with their respective names and "Hurley Fire Department" on them. Mr. Pinardi was listed as the account holder with both listed as authorized users. Mr. Pinardi has stated that he did not use the credit card. The original credit card application documents are missing. The account was taken over by US Bancorp at some point which has stated that when they took over the credit card account that the

Hurley EIN number was part of the file but that it is not known how the EIN number became associated with the account.

In 2016 Mr. Pinardi filed for bankruptcy. Upon filing the credit card was cancelled. Mr. Pinardi said he tried to reactivate the card so the debt could be paid, but the bankruptcy proceedings prevented its reactivation. The complaint alleged Mr. Pinardi swore in a July 2018 affidavit that, on advice of his bankruptcy attorney, he listed the credit card debt in the proceedings as the card had been issued to him personally. The complaint alleges investigators didn't find the debt among those listed in the proceedings.

The Hurley city clerk learned of the credit card in January 2018 when she tried to obtain a card for the police department and was denied because the fire department card had a delinquent balance of $7,800. The city never paid for any of the credit card charges at any time. Mr. Petrusha states that he then paid off this delinquent balance with the assistance of the Hurley city attorney.

Mr. Pinardi told investigators that he didn't know Mr. Petrusha had been using the card for personal purchases until January 2018. Mr. Pinardi said he didn't talk with Mr. Petrusha about using it for personal purchasing, neither giving him permission or telling him not to use it for that purpose. Mr. Pinardi also told investigators that he didn't think it was a problem for Mr. Petrusha to use the card for personal purchases and make payments on the purchases. Mr. Pinardi later said Mr. Petrusha told him several years previously that he was using the card for personal items and would make the payments. Mr. Pinardi also stated he spoke with Hurley city attorney about Mr. Petrusha's debt in February 2018 and that the city attorney "indicated he did not think it was a crime for Petrusha to use the city credit card for personal purchases, but thought Petrusha should pay what he owed."

On January 31, 2019, Mr. Petrusha, by Attorney Lucarelli, and Mr. Pinardi filed a civil declaratory judgment action against the City of Hurley and US Bancorp seeking to have the court declare that Mr. Petrusha or Mr. Pinardi were acting in a personal, rather than professional, capacity when obtaining the card and that Mr. Pinardi, and not the City of Hurley, was the sole account holder of the credit card. The lawsuit also alleged that if Mr.

Pinardi was the sole account holder, and not the City of Hurley, then there was no basis for the criminal charges against Mr. Petrusha. On August 22, 2019, the City of Hurley was dismissed as a party to the lawsuit. On August 26, 2019, the court issued an order conclusively establishing that the credit card was not held by the City of Hurley and was held jointly and severally by Mr. Joseph Pinardi and the Hurley Fire Department.

On February 25, 2019, District Attorney Tingstad filed a criminal complaint against Mr. Pinardi (Case Number 19-CF-8) alleging identity theft relating to obtaining the credit card, obstructing the investigators by giving false information, and misdemeanor false swearing based on the affidavit Mr. Pinardi signed allegedly falsely stating that he had listed the credit card debt in his 2016 bankruptcy. On July 25, 2019, the felony identity theft charge was dismissed against Mr. Pinardi. A pretrial conference was scheduled on September 17, 2019, which was to involve only an informal meeting between defense counsel and District Attorney Tingstad.

In Mr. Petrusha's criminal case (Case number 18-CF-26), an amended criminal complaint was filed on October 15, 2018, amending the theft count to specifically list the credit card and eliminate the reference to a negotiable instrument. A number of motions were filed by Mr. Petrusha including motions to dismiss and on August 23, 2019, a request for the court to take judicial notice of the civil court proceedings and/or collateral estoppel based on the civil court proceedings. At a hearing on August 28, 2019, the court ordered that District Attorney Tingstad file a response by September 6, 2019, to the defense motion regarding collateral estoppel and other issues. The Court ordered that the defense respond by September 13, 2019. District Attorney Tingstad did file his response on September 6, 2019.

On September 5, 2019, the day before his response to the motions was due, District Attorney Tingstad had his office victim witness coordinator prepare a subpoena which he signed, directed to Attorney Eric Van Schyndle, who represented US Bancorp, the holder of the disputed credit card and party to the civil suit. The subpoena, which was captioned for both the Petrusha and Pinardi cases and including both the case numbers, directed that Attorney Van Schyndle appear at a pre-trial hearing scheduled for 1 pm on September 17, 2019, before Honorable Gary Carlson. Judge Carlson was the judge assigned to the Pinardi case. The subpoena indicated that testimony

was required and asked Attorney Van Schyndle to appear a half an hour before the hearing to discuss his testimony with Attorney Tingstad. The subpoena noted, as is standard, that failure to appear could result in a contempt finding.

Included with the subpoena was a draft affidavit for Attorney Van Schyndle. The affidavit indicated the following:

1. That Attorney Van Schyndle represented US Bancorp
2. That Attorney Van Schyndle provided responses in the declaratory judgment action.
3. That the City of Hurley's EIN number was associated with the credit card account and credit card numbers at issue in the Petrusha case.
4. That in January 2018 the City of Hurley was denied credit because it was associated with the delinquent credit card account and credit card numbers that belonged to Petrusha and Pinardi. .
5. That after Petrusha paid the delinquent balance the City of Hurley's credit application was approved.

The subpoena and draft affidavit were emailed to Attorney Van Schyndle at 1:19 pm on September 5, 2019, by the victim witness coordinator. The email asked for an acknowledgment of receiving the subpoena and also stated that if Attorney Van Schyndle was in agreement with the affidavit he was asked to sign and return and if signed he would not have to appear at the September 17, 2019, court date. Finally, the email stated that if there were any changes he wanted made to the affidavit to call District Attorney Tingstad. There was nothing false or inaccurate in the draft affidavit.

At approximately 10 am on Friday September 6, 2019, Attorney Van Schyndle contacted Attorney Lucarelli who represented Mr. Petrusha, and emailed him a copy of the subpoena and affidavit. Attorney Van Schyndle told Attorney Lucarelli, that he was not comfortable signing the affidavit, and stating that he did not want to attend the hearing as it was a ten hour round trip from his office.

Attorney Van Schyndle also called District Attorney Tingstad apparently at least twice on September 6. At 12:53 pm the victim witness coordinator emailed Attorney Van Schyndle and

provided the District Attorney's office fax number "if you'd prefer to fax rather than scan and email." At 1:05 pm Attorney Van Schyndle responded and stated "I think I need to speak to the DA **again** to update him on a few things. Is he available this afternoon?" (emphasis added). Attorney Van Schyndle was advised to call Attorney Tingstad's cell phone. At 1:53 pm Attorney Van Schyndle emailed the victim witness coordinator stating that District Attorney Tingstad had asked Attorney Van Schyndle to send her a text from Attorney Lucarelli. That text stated that both Mr. Petrusha and Mr. Pinardi objected to the disclosure of any information regarding the credit card account including any associated EIN numbers. At 2:18 pm the victim witness coordinator emailed Attorney Van Schyndle a second affidavit. The victim witness coordinator stated that Attorney Van Schyndle had requested changes to the affidavit. Attorney Van Schyndle agreed that he made the request because he could not attest to all of the items in the affidavit. The second affidavit eliminated the last two items of the original affidavit relating to the denial of credit to the City of Hurley and later reinstatement after payment of the account delinquency. Neither affidavit was ever signed. On September 13, 2019, the victim witness coordinator informed Attorney Van Schyndle that he was not required to appear on September 17. As also noted below, the subpoena had been quashed on September 12, 2019, by the Pinardi case judge and on September 13, 2019, by the Petrusha case judge.

The Iron county district attorney office victim witness coordinator advised investigators that she prepared the subpoena and affidavit at the direction of District Attorney Tingstad and that he provided the language for the subpoena. She stated that it was her mistake that both case numbers were listed on the subpoena as her computer added both case numbers as they were related cases and she did not manually remove one. She indicated that the Petrusha case number should not have been included. She also stated that she was not aware that a pre-trial hearing was not an evidentiary hearing. However, she also stated that while District Attorney Tingstad reviews all documents she prepares he may not have read every word of the subpoena. The victim witness coordinator stated that Attorney Van Schyndle did not like some of the wording of the affidavit so did not sign it and she prepared an amended affidavit with some changed wording. She also stated that District Attorney Tingstad was going to try and get the pretrial hearing changed to something else in order to get Attorney Van Schyndle's testimony on the record. She further stated that while normal pretrial conferences are held in the District

Attorney's office, that it is common practice that if something is decided at the conference that the parties will contact the judge and request a hearing that same day. Near the end of the week prior to September 17 District Attorney Tingstad told her to call Attorney Van Schyndle and cancel his appearance. She stated that she and District Attorney Tingstad assumed that Attorney Van Schyndle would sign the affidavit.

District Attorney Tingstad was interviewed and acknowledged that Mr. Petrusha's case was not scheduled for a hearing on September 17, 2019, but that it was "anticipated" that both cases would be held on the same day as he anticipated that the Judge in the Petrusha case would also schedule a hearing for the same date and time as the facts were relevant to both cases. He believed that the presiding judge in the Pinardi case was flexible about scheduling hearings and would add the Petrusha case to the court calendar. However, he admitted that there was no scheduled hearing on the court calendar for September 17, 2019. District Attorney Tingstad also stated that he could not answer questions without reviewing the files. District Attorney Tingstad was again contacted in March of 2020 but without advance notice. District Attorney Tingstad said he could not remember the matter without reviewing all the information generated in the investigation. I also contacted District Attorney Tingstad and offered him an opportunity to provide any additional information and he declined.

On Monday September 9, 2019, Attorney Lucarelli filed a motion with Judge Carlson in *State v Pinardi* to quash the subpoena. The attorney for Mr. Penardi also filed an objection to the subpoena. Judge Carlson agreed to quash the motion on September 12, 2019, on the on the grounds that there was no actual court hearing scheduled on September 17, 2019, that a pre-trial hearing is not an evidentiary hearing, and that the pretrial hearing was actually an informal pre-trial meeting between the district attorney and defense counsel. An informal pre-trial hearing between only the district attorney and defense counsel that is scheduled by a Court is common practice in many counties. There was no court hearing or informal pre-trial scheduled in the Petrusha case on September 17, 2019. Finally, the information being sought by the subpoena had no apparent relevance to the charges against Mr. Pinardi which were at that time limited to false swearing relating to an affidavit relating to his bankruptcy and false statements to law enforcement. On September 13, 2019, Judge Ann N. Knox-Bauer also quashed the subpoena in *State v Petrusha.*

On October 3, 2019, Attorney Lucarelli requested that the Iron county sheriff conduct a criminal investigation into District Attorney Tingstad.

On October 8, 2019, in *State v. Petrusha*, Judge Ann N. Knox-Bauer, issued a decision denying Mr. Petrusha's motions to dismiss the complaint and for collateral estoppel based on the earlier civil court decision in the declaratory judgment action.

Mr. Petrusha was represented by Attorney Steven Lucarelli until November 25, 2019, when he withdrew from representing Mr. Petrusha. On December 16, 2019, a jury trial was scheduled for August 18, 2020. The case remains open and the trial remains pending.

ANALYSIS:

I have no doubt that District Attorney Tingstad acted inappropriately in issuing the subpoena for an essentially non-existent hearing and with the apparent purpose to obtain information he believed might help him in a pending criminal case. He knew or should have known that the pretrial scheduled in *State v Pinardi* was not an actual court hearing much less one at which testimony would be taken before a judge. No steps had been taken before the subpoena was issued to file a motion or schedule a court date to argue a motion or to seek to obtain testimony. While District Attorney Tingstad told investigators that he was planning to schedule a hearing on September 17, 2019, in order to take testimony, in fact no effort was made to do so prior to the issuance of the subpoena. It is not a usual practice to issues a subpoena before a court hearing is scheduled. That explanation also does not explain the attempt to obtain an affidavit from Attorney Van Schyndle. It is not even clear how the information he sought in the affidavit could have been obtained in a pending criminal case. Unless relevant to an evidentiary motion hearing, there was no authority to compel Attorney Van Schyndle to provide information or sign an affidavit. The subpoena appears to be nothing more than attempt to use the leverage afforded by compliance with an inconvenient potential court appearance to obtain an affidavit that would otherwise only be available by voluntary agreement. As such it was an abuse and misuse of a subpoena.

A determination of impropriety is only the beginning of the discussion. The next steps are to determine whether a crime was committed and if so, whether a charge is warranted under all the facts and circumstances.

The offense of simulating legal process contains two elements which must be proven beyond a reasonable doubt. First, that the simulated document, in this case a subpoena, was sent or delivered to another person. Clearly, the subpoena was sent or delivered to another person. The second element is that the document simulates legal process which is defined as "to imitate or have the appearance of without being genuine." The offense is a class I felony except where the document is sent to induce payment of a claim or constitutes criminal process in which case it is a Class H felony. The facts presented do not allege or prove that the subpoena was sent to induce payment of a claim or is criminal process such as a summons, warrant, writ, etc. Merely because the subpoena was issued in a criminal case does not make it criminal process. It was simply legal process that was used in a criminal case.

Under the statute the offense requires that the subpoena simulates which is defined as *"to imitate or have the appearance of without being genuine*." Merriam Webster defines "genuine" as authentic or bona fide as opposed to bogus, counterfeit, fake, or false. There are other definitions that that one may be able to argue involve something less than counterfeit. However, it appears that under the general accepted definition of "genuine" in order to be a simulated subpoena, the entire document must not be genuine. In this case District Attorney Tingstad certainly had the authority to issue a subpoena under Wis. Stat. sec. 885.01(2) and there was an actual underlying case involved so it was not a complete fabrication even though it may have been an abuse of his authority to issue and even contrary to the requirements of the statutes that presuppose that subpoenas are issued to compel testimony before a designated official at an actual hearing. Yet clearly in this matter there was no scheduled court appearance for the date and time indicated as well as before a judge. It is also alleged that the inclusion of extraneous statements in the subpoena also demonstrate that the subpoena was simulated. Specifically, that the subpoena advised the recipient that they should arrive 15 minutes early in order to meet the district attorney. I understand that some other subpoenas may include such extraneous information even though it is not part of the form or even specifically allowed by law. However, the court created subpoena form does allow for the form to be supplemented.

The statute also does not require any scienter or *mens rea* element. In other words, unlike other similar statutes elsewhere or even the original version of the statute (see discussion below), a violation does not depend upon an intent to defraud, harass, obtain anything of value or any other bad intent. This raises the question whether a subpoena with an erroneous date, court or judge, case number, or caption due to a mistake or error in judgment constitutes simulated legal process. There certainly was an apparent mistake by the victim witness coordinator in including the Petrusha case number. The meaning of "simulate" would suggest that mistakes or even deliberate omissions or affirmative false statements would not fall within the statute unless the document was devoid of <u>any</u> legitimacy including being unrelated to an actual case. Including within the scope of the statute mistakes or errors would have the potential for creating considerable mischief by parties to legal actions. Even though the majority of the conduct in this case does not involve a true mistake, the lack of any scienter element raises legal issues particularly outside of entirely fabricated or fictitious legal process.

Related to the issue of mistake is simply a potential lack of understanding of basic practices and procedures in criminal cases and how to obtain evidence during an on-going criminal prosecution. District Attorney Tingstad could have personally asked the attorney to voluntarily sign an affidavit. Or he could have explored whether the pending motions by the defense would have permitted him to seek an evidentiary hearing. But is seems a basic concept of law that one cannot and should not use the issuance of a subpoena in an apparent attempt to leverage that subpoena and the inconvenience of a court appearance at a distant location to obtain an affidavit. While District Attorney Tingstad believed the information sought in the affidavit was important to his prosecution, there was apparently no other way to compel its production. If he truly believed that what he did in this case within the bounds of existing law and procedure then he has a serious misunderstanding of the law. Yet I do not believe that legal misunderstandings, mistakes or errors in judgment fall within the intent and language of the statute.

It may be argued that excluding the misuse or abuse of legal process from the scope of the statute overly narrowly limits the application of the statute. However, the history of the statute reflects that it was intended to deal with a limited range of activity. There is no relevant case law relating to the offense of simulating legal process. The statute was originally created to

deal with a very narrow type of conduct most often associated with debt collection by the use of misleading documents which had the appearance of a legal document. See: *Judiciary Committee Report on the Criminal Code*, p. 203 (1953). That report states that "For a good example of the sort of abuses which this section is designed to prevent, see 38 Atty. Gen. 61 (1949)." In that opinion the document in question even stated that "This is not legal process." Despite this language, and the fact that the document clearly did not appear to constitute anything which resembled traditional legal process, the opinion concluded that it simulated legal process. As stated in the opinion, "The question may well be asked, what is the purpose of the form using Latin terms and legal phraseology if it is not to lead the recipient to believe that it is some sort of legal process?" 38 Atty. Gen. 61, at 65. The opinion goes on to discuss the effect of such documents on the average layperson. *Id*. The opinion also quoted a court decision in which it was stated: "These documents were designed to delude and oppress the poor, the ignorant, and the unwary." *Id.* at 66. Perhaps the clearest statement is as follows:

> Such documents are prepared with generous use of large black type, large red type, and glaring underscoring of legal phrases, with very conspicuous seals attached. They are designed to terrorize the individual addressed, and to present to him as a monster of retribution the law, the courts of justice, and various and sundry processes, some legal and judicial, and some extra judicial, and unknown to the law, and all claimed by defendants to be subservient to defendants in carrying out their threats. While it is hardly possible that such threats should be taken seriously be an enlightened people, that is no argument that any such association has the right to engage in such chicanery in the name of the law, and under the pretense of legal and judicial sanction, and with a pretended authority and privilege to so employ and use legal and judicial process and procedure.

38 Atty. Gen. at 67.

At that time and until 1997 the simulating legal process statute was narrow in scope. It only applied to a summons, complaint or court process, required intent to induce payment of a claim and was a misdemeanor. The statute provided:

> (1) Whoever sends or delivers to another any document which simulates a summons, complaint, or court process with intent thereby to induce payment of a claim is guilty of a Class B misdemeanor.
> (2) Proof that the document was mailed or was delivered to any person with intent that it be forwarded to the intended recipient is sufficient proof of sending.

(3) This section applies even though the simulating document contains a statement to the effect that it is not legal process.

(4) Violation of this section may be prosecuted in either the county where the document was sent or the county in which it was delivered.

In 1997 the legislature changed the statute and in so doing it generally eliminated the intent requirement, although retaining that element for purposes of a more serious designated offense, increased the penalty to a felony and expanded the legal process definition to that which exists currently: "legal process" includes a subpoena, summons, complaint, warrant, injunction, writ, notice, pleading, order or other document that directs a person to perform or refrain from performing a specified act and compliance with which is enforceable by a court or governmental agency." *1997 Wisconsin Act 27* (section 5343j to m). The element of simulation remained unchanged.

The purpose behind the changes was to deal with the conduct of "common law courts" and sovereign citizens harassing public employees and officials by the issuance of bogus and fictitious legal documents. At the same time 1997 Act 27 made related changes to other statutes: criminal slander of title (section 5536m), falsely assuming to act as a public officer, public employe or utility employe (section 5343t), civil slander of title, and failing to file a statement terminating a UCC security interest under a financing statement.[2]

The only cases that I am aware of that have been charged in Wisconsin under the simulating legal process statute have involved, for lack of a better term, wholly bogus legal documents. This includes not only sovereign citizens but also, as examples, a business that issued phony parking tickets and a doctor who sent out a completely phony document entitled a cross claim complaint in response to a professional discipline matter. I have in fact charged several simulating legal process cases all of which involved documents for which there was absolutely no authority to issue and which involved demands for appearances before fictitious courts or involving fictitious cases. There are no cases which I am aware of that involve what is best described as abuse of process.

[2] Due to various issues related the current pandemic, I have not been able to personally obtain documents relating to the changes made to the simulating legal process statute. However I can attest that in 1997 I was an assistant attorney general who was handling issues and cases relating to common law courts and sovereign citizens, that I participated in drafting the legislative changes including those involving the simulating legal process statute, and testified in support of the changes.

The doctrine of abuse of process is described as “One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.” *Brownsell v. Klawitter*, 102 Wis. 2d 108, 114, 306 N.W.2d 41 (1981), quoting RESTATEMENT (SECOND) OF TORTS § 682 (1977). There are two elements of abuse of process. “First, a "wilful act in the use of process not proper in the regular conduct of the proceedings." *422 *Brownsell*, 102 Wis. 2d at 115. This element requires evidence of "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Thompson v Beecham*, 72 Wis. 2d 356,362, 241 N.W.2d 163 (1976).” *Schmit v. Klumpyan*, 2003 WI App 107, ¶ 7, 264 Wis. 2d 414, 663 N.W.2d 331. “The second element of abuse of process is a subsequent misuse of the process. *Id.* at 362. This element requires evidence of "coercion to obtain a collateral advantage, not properly involved in the proceeding itself," *id.*, or of use of the process "to effect an object not within the scope of the process," or of any other improper purpose. *Brownsell*, 102 Wis. 2d at 113 (citation omitted) (emphasis omitted).” *Schmit*, ¶ 8. Abuse of process contemplates the type of activity that occurred in this case. However, this is only a civil claim and there is no corresponding criminal statute.

The above discussion establishes a reasonable basis to conclude that both the language and history of the simulating legal process statute was and is intended to be limited to legal process that is wholly fabricated or can be considered an imitation or counterfeit legal document. The statute does not appear to cover a situation involving the abuse or misuse of process in an actual pending case. There are other safeguards in place to deal with misconduct, abuse or even mistakes. That includes professional discipline, judicial sanction, and even potential civil liability.

To be clear, my conclusion that the conduct in this matter does not appear to fall within the intended scope of simulating legal process does not mean I condone or excuse the conduct. The conduct was clearly an abuse of the subpoena process and one that warrants some form of sanction.

The Oneida county Sheriff's department only made a referral for a single charge of simulating legal process. Attorney Lucarelli has also alleged a violation of misconduct in public office. The crime alleged is committed by a public official, who, in their official capacity, does an act which they knew they were forbidden by law to do in his official capacity. The forbidden by law element is based upon a violation of the simulating legal process statute. As I conclude that the simulating legal process statute does not apply there is also then no basis for the misconduct in public office offense.

Even assuming that the conduct would fall within the definition of simulating legal process, I find that there are other reasons not to issue criminal charges. The basis for that decision is predicated upon the prosecution standards established by the American Bar Association and the National District Attorney Association as cited above. These standards include:

- *The extent or absence of harm caused by the offense; Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;*

  There is obviously some degree of harm that exists when a public official takes action that calls into question the validity of legal process issued by their office. It can erode public trust and diminish respect. However, the subpoena was challenged within a day and ultimately quashed. The only direct actual harm was temporary inconvenience. The issues regarding the subpoena were discovered within 24 hours. No appearance pursuant to the subpoena was made and no affidavit was signed. Obviously the conduct did not result in any physical harm or direct financial loss although legal fees were obviously incurred in challenging the subpoena.

- *The impact of prosecution or non-prosecution on the public welfare:*

  I do not believe that the public interest or welfare will be seriously or adversely impacted by a decision not to prosecute. As will be discussed below, there is an available consequence for the conduct that seems best suited to the situation. I also do not expect that the conduct will be repeated.

- *The background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation: Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;*

To my knowledge District Attorney Tingstad has no prior criminal record or other proven misconduct. His behavior in this matter does appear to be an aberration. In some respects the conduct seems based on desperation, lack of knowledge or inexperience and was obviously an attempt to obtain evidence to oppose motions filed by a defendant. It was desperate as it was highly unlikely to go undiscovered for any period of time and in fact took about 24 hours to unravel. It exhibited incredibly poor judgment and short sighted thinking. It may also be reflective of a lack of experience or understanding of criminal process. It does not appear to me to constitute a crime or conduct that deserves a criminal sanction.

- *Whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender:*

The crime in question is a felony which carries substantial direct and collateral consequences which do seem disproportionate to the facts of the case including the minimal direct harm and the failure of the attempt to pursue the subpoena and obtain the affidavit. It also is disproportionate based on the Attorney Tingstad's background and history.

- *A history of non-enforcement of the applicable law;*

As noted above I can find no Wisconsin cases that involve prosecution for simulating legal process based on abuse of process by a district attorney or any lawyer. Based upon by employment as a prosecutor in the Department of Justice for 25 years, and my continued work as a special prosecutor, I believe I would have likely heard of any such case. It may be that no such case has ever arisen in Wisconsin. Yet it is still noteworthy that as best as I can determine, the statute has only been applied to cases involving wholly fictitious and counterfeit legal process.

I have also looked nationally to locate any similar cases and how they may have been handled. While I cannot claim that I have located every instance of similar conduct I

am confident that based on what I have found and the lack of reference to any criminal prosecutions, that cases against prosecutors or attorneys for abuse or misuse of subpoenas in actual cases have not been criminally prosecuted. Unfortunately there have been cases where state and federal prosecutors have misused subpoenas including compelling people to appear and answer questions where no such legal authority exists. Clearly such conduct is improper. Prosecutors and others who have been found to abuse their authority to issue subpoenas have faced court sanction, forced to resign or referred for professional discipline.

- *Whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.*

  There are other remedies available to address the conduct. First and foremost is a referral to the Office of Lawyer Regulation. There are various ethical rules that are implicated by District Attorney Tingstad's conduct. These include SCR 20:3.1 Meritorious claims and contentions, SCR 20:4.1 Truthfulness in statements to others, SCR 20:4.4 Respect for rights of 3rd persons, and SCR 20:8.4 Misconduct.

  District Attorney Tingstad is also an elected public official who will face the judgment of the citizens of Iron County. The public awareness of this behavior will also likely have a negative effect on his standing within the legal community and public at large which will have adverse consequences for the performance of his duties. That itself is a substantial impact for the conduct.

I also do not believe that a deferred prosecution agreement is warranted. As a starting point I would need to conclude that a crime has been committed. As described above, I do not make that conclusion. Even if I did, District Attorney Tingstad has no needs that would justify a period of deferred prosecution in order to address those needs. The only need is a better understanding and appreciation of his ethical responsibilities relating to subpoena power and court procedure. If this investigation and report do not cause that result, then nothing will.

CHARGING DETERMINATION

For the reasons set forth above I decline to issue charges of simulating legal process and misconduct in public office against Matthew Tingstad. I do not find probable cause that a crime was committed.

However, I will make a report on this matter to the Wisconsin Office if Lawyer Regulation as required under Wisconsin Supreme Court rule 8.3(a).

> *SCR 20:8.3 Reporting professional misconduct (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.*

MOTION TO HAVE A JUDGE ISSUE A CRIMINAL COMPLAINT

As noted above, Attorney Lucarelli has made a motion under Wisconsin Statute section 968.02(3) seeking to have a judge find probable cause of a crime and authorize the issuance of a criminal complaint. That statutory section provides:

> If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

The process a judge is to follow under Wisconsin Statute section 968.02(3) was discussed in *State ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, 27 Wis. 2d 633, 681 N.W.2d 110.

In *Kalal*, an employee of attorney Ralph Kalal requested that a judge authorize the filing of a criminal complaint against attorney Kalal and his wife for theft of 401K funds. *Kalal* at ¶ 9. The judge held a hearing with the complainant and the district attorney. *Kalal* at ¶ 10. The judge addressed the elements of the theft charge, made a factual finding that the district attorney had refused to prosecute, and concluded that probable cause existed to believe the Kalals were guilty of theft and directed the filing of a complaint "consistent with the criminal complaint that

is proposed by the victim." *Kalal* at ¶ 12.The judge also then ordered the appointment of a special prosecutor. *Kalal* at ¶ 12.

The Kalals moved for reconsideration, arguing that the record did not establish that the district attorney had "refused" to issue a complaint as required by Wis. Stat. § 968.02(3). *Kalal* at ¶ 4. The judge held that the Kalals had no standing to be heard, but addressed the motion anyway and denied it. *Kalal* at ¶ 4. The judge specifically held that the Kalals had no standing to contest the order permitting the filing of the complaint because the statute "contemplates an ex parte proceeding with no right of cross-examination by the defendants or anyone else." *Kalal* at ¶ 15. The Kalals sought a supervisory writ in the court of appeals which was denied because applicable writ standards had not been met. *Kalal* at ¶ 4. The Supreme Court accepted review and affirmed the denial of the writ. *Kalal* at ¶ 4. The Supreme Court also concluded that the statute allowing the judge to authorize the filing of a complaint does not violate the doctrine of separation of powers. *Kalal* at ¶ 35.

In the present case the decision set forth in this memo makes clear that there now has been a decision not to prosecute the charges requested by Attorney Lucarelli. That was the primary matter at issue in *Kalal*. However, the decision in *Kalal* is also important for its analysis of the process. I am providing the information only in an effort to assist the court in how to proceed further in this matter.

Wis. Stat. § 968.02(3) expressly specifies an ex parte proceeding. *Kalal* at ¶ 5. The scope of the proceeding is within the discretion of the judge. While the court in *Kalal* took testimony, the matter could also be heard and decided by available written materials including existing documents submitted by Attorney Lucarelli as well as the Oneida County Sheriff investigative reports. This could be supplemented by argument is desired.

The statute requires a judge to make two determinations. *Kalal* at ¶ 6. The first is whether the district attorney refuses or is unavailable to issue a complaint. *Kalal* at ¶ 6. In this matter a decision not to issue has been made. The second is whether there is probable cause to believe the person to be charged has committed a crime. *Kalal* at ¶ 6. That decision is a discretionary one as the statute states that the judge "may permit" the filing of a complaint. *Kalal* at ¶ 6.

If a decision is made to permit the filing of a criminal complaint then another special prosecutor needs to be appointed to prosecute the matter. That is because neither a judge nor the complainant has the legal authority to prosecute the case. Only a district attorney or special prosecutor acting with the power of the district attorney has the legal authority to prosecute a criminal case. Not only do the statutes refer to the district attorney in the criminal procedure statutes there are also long standing policy considerations. See *State v. Scherr,* 9 Wis. 2d 418, 426, 101 N.W.2d 77 (1960) ("It is against public policy and the impartial administration of criminal law for a court to allow attorneys for private persons to appear as prosecutors.") and *State v Peterson,* 195 Wis. 351, 356, 218 N.W.367 (1928).

It should be noted that any special prosecutor is not bound by the decision to authorize the filing of a complaint. A special prosecutor possesses inherent authority under the law and based upon their ethical responsibilities to not prosecute a complaint if they so choose. Interestingly, that appears to be exactly what happened in the *Kalal* case. The judge authorized a complaint to be filed and appointed a special prosecutor. However, a review of CCAP reflects that no actual criminal charges were ever filed or prosecuted by the special prosecutor against Attorney Kalal or his wife. Attorney Kalal was later subject to professional discipline for the taking of the 401K funds as well as other misconduct. *In the Matter of Disciplinary Proceedings Against Kalal*, 2005 WI 138, 286 Wis. 2d 10, 704 NW 2d 575.

Dated this 16th day of July 2020.

Respectfully submitted,

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ROY KORTE
SPECIAL PROSECUTOR FOR IRON COUNTY
State bar Number 1019492