

FILED
06-30-2023
CIRCUIT COURT
DANE COUNTY, WI
2022JD000005

BY THE COURT:

DATE SIGNED: June 30, 2023

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT¹
BRANCH 15

DANE COUNTY

In the matter of

SHARON IRWIN-HENRY,

Case No. 22-JD-05

Wis. Stat. § 968.02(3) petitioner.

DECISION AND ORDER

INTRODUCTION

On March 6, 2015, City of Madison Police Officer Matthew Kenny (“Kenny”) killed Anthony Robinson (“Robinson”). Dane County District Attorney Ismael Ozanne (“Ozanne”) reviewed the evidence and concluded “that this tragic and unfortunate death was the result of a lawful use of deadly police force ...” Ozanne Press Release (May 12, 2015), dkt. 20:7. Ozanne declined to issue a criminal complaint.

Sharon Irwin-Henry (“Irwin-Henry”) now asks me to do what Ozanne will not by issuing a criminal complaint charging Kenny with various homicide offenses under my independent

¹ Petitions under Wis. Stat. § 968.02(3) are heard by individual judges, not circuit courts. Wis. Stat. §§ 967.02(1t) and (2m); *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶21, 271 Wis. 2d 633, 681 N.W.2d 110. This decision is captioned in the ordinary manner only to prevent confusion.

authority. Wisconsin circuit judges have the authority to issue a criminal complaint if two conditions are met: (1) “a district attorney refuses or is unavailable,” and (2) “there is probable cause to believe that the person to be charged has committed an offense.” Wis. Stat. § 968.02(3). For purposes of this decision, I will assume that Irwin-Henry satisfies both conditions. In other words, this decision assumes that I *may* issue a criminal complaint and addresses only whether I *should*.

To answer this question, I begin by determining whether any person could prosecute the complaint Irwin-Henry seeks. Because the local district attorney refuses, and because a judge cannot also serve as an advocate, the only potential option is to appoint a special prosecutor. Irwin-Henry argues that I have authority to appoint a special prosecutor under Wisconsin’s special prosecutor statute, Wis. Stat. § 978.045(1r), or under my inherent authority as a judge. However, Irwin-Henry’s arguments fail under *State ex rel. Two Unnamed Petitioners v. Peterson*, which explains that “one of the nine conditions enumerated under Wis. Stat. § 978.045(1r) *must* exist for the appointment of a special prosecutor ...” 2015 WI 85, ¶127, 363 Wis. 2d 1, 886 N.W.2d 165 (emphasis in original). Because Irwin-Henry does not show that any of those conditions apply here, I have no authority to appoint a special prosecutor.

I. BACKGROUND

A judge may issue 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.” Wis. Stat. § 968.02(3). In anticipation of such a hearing, Irwin-Henry filed hundreds of pages of records describing and analyzing Robinson’s death. Her burden, if this matter had proceeded to a hearing, would have been to explain why these documents, plus any supporting testimony, show that Kenny probably committed a crime.

But for now, I have not held any such evidentiary hearing because a hearing would be a hollow gesture if I do not have authority to appoint a special prosecutor. I therefore summarize the allegations in Irwin-Henry's petition only to provide context for the threshold legal question presented—namely, the scope of a circuit judge's authority to appoint a special prosecutor. In doing so, I will assume without deciding that Irwin-Henry can satisfy her burden to show probable cause that Kenny recklessly killed Robinson.

A. March 6, 2015: Kenny kills Robinson.

These facts are drawn exclusively from Irwin-Henry's offer of proof. Irwin-Henry Offer of Proof, dkt. 18:2.

On March 6, 2015, in a second-floor apartment at 1125 Williamson Street in Madison, "Robinson began acting strangely." *Id.* Robinson "ran through traffic," prompting 911 calls. *Id.* Kenny arrived on the scene in response to those calls. He then drew his firearm and entered the stairwell to the second-floor apartment. *Id.* at 3-4. Fifteen seconds later, Kenny fired several shots. *Id.* at 6. Three shots struck Robinson in the chest, fatally wounding him. *Id.* at 9.

According to Irwin-Henry, Kenny then made a series of untruthful statements to a second police officer. *Id.* at 16. Three days later, on March 9, 2015, Kenny returned for a second interview at the 1125 Williamson Street apartment, at which Irwin-Henry implies Kenny lied about what happened. *Id.* at 16-22.

B. The District Attorney refused to prosecute because he concluded Kenny lawfully used deadly police force.

District Attorney Ozanne investigated the available evidence then declined to file any criminal charges. In delivering lengthy public remarks on his charging decision, Ozanne said he reviewed the following evidence:

- (1) photographs, videos, and inspection of the scene of the shooting;
- (2) official reports from five separate law enforcement agencies;
- (3) interviews from citizen witnesses, paramedics and other first responders, including at least one follow-up interview by the office of the district attorney;
- (4) an interview with Kenny;
- (5) video surveillance footage from both police and from local businesses;
- (6) radio, phone, and 911 communications recorded around the time of the shooting.

Tr. of Ozanne Press Conf., May 12, 2015, dkt. 46:4. Based on this evidence, Ozanne concluded that Robinson's death "was the result of a lawful use of deadly police force, and that no charges should be brought ..." *Id.* at 7.

C. Irwin-Henry's petition under Wis. Stat. § 968.02(3).

On March 21, 2022, Irwin-Henry filed this petition for a criminal complaint under Wis. Stat. § 968.02(3). Dkt. 1. After one judge recused herself, Irwin-Henry substituted on a second judge and then demanded a third judge recuse.² On April 12, 2022, the Hon. Juan Colas was assigned. Dkt. 116. Irwin-Henry then twice sought scheduling extensions because her "research necessary to properly brief the issues ... has been a more difficult slog than was previously anticipated ..." *See* Irwin-Henry Letter to the Court (July 5, 2022), dkt. 126; Irwin-Henry Letter to the Court (July 29, 2022), dkt. 129. Irwin-Henry appeared on August 25, 2022 for a hearing to determine the evidentiary procedure.

Following the August 25 hearing, and after receiving Irwin-Henry's original and

² Initially, the Hon. Nia Trammell was assigned this matter. She recused herself on March 23 because of "[p]rior involvement with Madison PFC & relationship with counsel both relative to the subject matter." Dkt. 24. The next day, the Hon. Valerie Bailey-Rihn was assigned this matter and promptly held a telephonic scheduling conference. *See* Tr. of Mar. 23, 2022 Hr'g, dkt. 101. Irwin-Henry then requested substitution. Dkt. 102. After the Hon. Frank Remington was assigned this matter, Dkt. 103, Irwin-Henry moved for recusal and Judge Remington granted her motion, Dkt. 109-110.

supplemental briefing, Judge Colas issued an order setting forth the procedure for a future hearing on this petition. Order (Nov. 22, 2022), dkt. 134. However, Judge Colas neither scheduled any evidentiary hearing nor made any probable cause determination; he retired a few weeks later in December 2022.

On January 26, 2023, I was assigned this matter.³ Dkt. 153. I immediately reviewed the briefing before Judge Colas as well as his resulting order on procedure. While Judge Colas' order did briefly address the appointment of a special prosecutor, it provided no rationale for the conclusion that "a special prosecutor will be appointed to review the record ..." *See* Order (Nov. 22, 2022), dkt. 134:6. In fact, that order cited no statutes, cases, or other legal authority for the proposition that "a special prosecutor will be appointed." *Id.*

On January 30, 2023, four days after having been assigned this matter, I expressed my concerns about the scope of a circuit judge's authority to appoint a special prosecutor:

The problem, as I see it, arises because §978.045(1r) lists the circumstances in which a court may appoint a special prosecutor, and none of them apply here. Further, the Wisconsin Supreme Court has called into question a circuit court's inherent authority to appoint a special prosecutor. Under this circumstance, it appears that §968.02(3) allows for a court to permit the filing of a criminal complaint, but does not contain any mechanism for [prosecution] to actually occur.

Order (Jan. 30, 2023), dkt. 155:2. I then invited briefing from Irwin-Henry. *Id.* On March 31, 2023, Irwin-Henry responded with her argument for a circuit judge's authority to appoint a prosecutor.

³ On January 18, 2023, the Hon. Ryan Nilsestuen was assigned this matter. Dkt. 141. He recused himself because his "spouse provided crime victim services in the underlying matter." Dkt. 142. On January 20, the Hon. Diane Schlipper was assigned this matter. Dkt. 144. She recused herself because she had served as an Assistant District Attorney during the time Ozanne refused to prosecute. Dkt. 145. On January 23, the Hon. Rhonda Lanford was assigned this matter. Dkt. 147. She recused herself because she "ha[d] personal knowledge of events and parties that may make it appear she cannot act in an impartial manner." Dkt. 148. On January 24, the Hon. Everett Mitchell was assigned this matter. Dkt. 150. He recused himself because he "presided over the funeral of Tony Robinson, who is the subject of this request." Dkt. 151.

Dkt. 156.

II. APPLICABLE LEGAL STANDARDS

Two legal standards govern Irwin-Henry's argument in support of a circuit judge's authority to appoint a special prosecutor. First, there is the statutory and common law framework that allows a Wisconsin circuit judge, in certain circumstances, to issue a criminal complaint under Wis. Stat. § 968.02(3). Within this statutory framework judges should follow the same rules prosecutors are guided by when determining whether to issue a complaint. Second, I describe the statutory authority for the appointment of a special prosecutor under Wis. Stat. § 978.045(1r), along with Wisconsin courts' interpretation of that statute and the effect, if any, of recent statutory amendments.

A. Wisconsin judges may issue criminal complaints.

1. The text of Wis. Stat. § 968.02(3) is clear and unambiguous.

Ordinarily, "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." Wis. Stat. § 968.02(1). In certain circumstances, however, the law also allows a circuit judge to "permit the filing of a complaint." Wis. Stat. § 968.02(3). To determine what this statute means, "[a]s always, we begin with the text of the statute." *Fleming v. AAU*, 2023 WI 40, ¶21, ___ Wis. 2d ___, ___ N.W.2d ___; *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. The text of Wis. Stat. § 968.02(3) reads as follows:

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.

This statute “is clear and unambiguous.” *Kalal*, 2004 WI 58, ¶53. It creates a two-step process that requires a threshold determination of probable cause, then “contemplates an exercise of discretion by the judge following these threshold determinations: the statute says the judge ‘may permit’ the filing of a complaint.” *Id.* ¶6.

I assume for purposes of this decision only, that Irwin-Henry may satisfy the threshold determination of probable cause, and, therefore, will not discuss this requirement further.

2. Charging decisions are discretionary decisions.

Prosecutors have wide latitude in the criminal charging decision. Our supreme court explains that:

[I]t 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 ... In general, the prosecuting attorney is answerable to the people of the state and not to the courts or to the legislature as to the way in which he exercises power to prosecute complaints.

Kalal, 2004 WI 58, ¶30 (citations and quotation marks omitted, quoting *State v. Karpinski*, 92 Wis. 2d 599, 608, 285 N.W.2d 729 (1979) and *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969)).

In *Kalal*, the Wisconsin Supreme Court applied this standard of prosecutorial discretion to circuit judges because the legislature specifically intended § 968.02(3) as a “check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued ...” *Kalal*, 2004 WI 58, ¶35 (emphasis added, citing Ch. 255, Laws of 1969, Judicial Council Cmte. Note to Wis. Stat. § 968.02). In other words, the legal standard a prosecutor applies when determining whether to issue a complaint is the same standard a circuit judge must apply.

Wisconsin’s Supreme Court Rule 20:3.8, summarizes the basic standard for prosecutorial discretion:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence ...

SCR 20:3.8 cmt. 1. The Wisconsin Supreme Court has repeatedly embraced this instruction. *See e.g. O'Neill v. State*, 189 Wis. 259, 207 N.W. 280, 281 (1926) (“The district attorney is not a mere legal attorney. ‘He is a sworn minister of justice.’”) (quoting *State v. Russell*, 83 Wis. 330, 338, 53 N.W. 441 (1892).); *State v. Williams*, 2002 WI 1, ¶43 n.38, 249 Wis. 2d 492, 637 N.W.2d 733 (“A prosecutor’s interest is not to win a case but to see that justice shall be done.”). This rule departs from the ordinary expectation that “[a]s advocate, a lawyer zealously asserts the client’s position ...” SCR Preamble.

To further expand on this duty to seek justice, prosecutors may consult written guidelines. The Wisconsin Supreme Court has repeatedly referred to the American Bar Association’s multi-factor standard for prosecutorial discretion. *Karpinski*, 92 Wis. 2d at 609; *Kurkierewicz*, 42 Wis. 2d at 378; *Kalal*, 2004 WI 58, ¶¶31-32. The very first of those factors inquires into “the strength of the case.” American Bar Association, *Criminal Justice Standards* (4th ed. 2017), Standard 3-4.4 § (a).

What this all means is that a judge who is asked to issue a criminal complaint must look beyond probable cause. In doing so, a judge must bear in mind that “it is an abuse of discretion for the prosecutor to bring charges when the evidence is clearly insufficient to support a conviction ...” *Karpinski*, 92 Wis. 2d at 609. And if a judge abuses her discretion by issuing a complaint that cannot support a conviction on the evidence, then it stands to reason that a judge similarly abuses her discretion by issuing a complaint that no person will prosecute—either result wastes public resources and undermines our justice system. But unlike a district attorney, a judge cannot serve

as an advocate and prosecute her own complaint. It is therefore of cardinal importance, when answering the question of whether a complaint should issue, to determine whether any person will actually prosecute that complaint.

B. Wisconsin’s special prosecutor statute authorizes judges to make appointments under certain enumerated conditions.

1. The text of Wis. Stat. § 978.045(1r).

I next turn to the legal standard for the appointment of a special prosecutor under Wis. Stat. § 978.045(1r). Once again, “we begin with the text of the statute.” *Fleming*, 2023 WI 40, ¶21. Here, in relevant part, is the text of § 978.045(1r):

(am) Any judge of a court of record, by an order entered in the record stating the cause for it, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney.

(bm) The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury proceedings, in proceedings under ch. 980, or in investigations. Except as provided under par. (bp), the judge may appoint an attorney as a special prosecutor only if the judge or the requesting district attorney submits an affidavit to the department of administration attesting that any of the following conditions exists:

1. There is no district attorney for the county.
2. The district attorney is absent from the county.
- 2m. The district attorney, or a deputy or assistant district attorney for the district attorney office, is on parental leave.
3. The district attorney has acted as the attorney for a party accused in relation to the matter of which the accused stands charged and for which the accused is to be tried.
4. The district attorney is near of kin to the party to be tried on a criminal charge.
5. The district attorney is unable to attend to his or her duties due to a health issue or has a mental incapacity that impairs his or her ability to substantially perform his or her duties.
6. The district attorney is serving in the U.S. armed forces.

7. The district attorney stands charged with a crime and the governor has not acted under s. 17.11.

8. The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

Wis. Stat. §§ 978.045(1r) (am)-(bm).⁴

In 2001, the Wisconsin Court of Appeals held that under “[a] plain reading of the statute ... *all that is required* of the court is that it enter an order in the record ‘stating the cause therefor.’”

State v. Carlson, 2002 WI App 44, ¶9, 250 Wis. 2d 562, 641 N.W.2d 451 (emphasis in original, quoting Wis. Stat. § 978.045(1r) (2001-02)).⁵ Fourteen years later, in 2015, the Wisconsin

Supreme Court rejected this interpretation outright:

Carlson is problematic to the point of being suspect. This is so because *Carlson* disregards the fact that one of the nine conditions enumerated under Wis. Stat. § 978.045(1r) *must* exist for the appointment of a special prosecutor ... The *Carlson* court’s failure to import this language from the governing statute is an inexplicable--and very likely fatal--defect in its holding.

Peterson, 2015 WI 85, ¶127 (emphasis in original).

⁴ Wis. Stat. § 978.045(1r) contains an additional two subsections. I omit subsection (bp) because it “does not apply after December 31, 2019” and I omit subsection (cm) because it applies only “in John Doe proceedings under s. 968.26.”

⁵ Here is the text of the special prosecutor statute as it existed at the time of *Carlson*, with strikethrough, underlining, and spacing to reflect several changes leading up to the modern form of this same statute:

(1r) [(am)] Any judge of a court of record, by an order entered in the record stating the cause therefor, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney.

[(bm)] The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury proceedings, ~~or John Doe proceedings in proceedings under ch. 980~~, or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exists: ...

Wis. Stat. § 978.045(1r) (2001-02) (spacing, alterations, strikethrough, and underlining added). Specifically, 2015 Wisconsin Act 64 removed the stricken text, while 2005 Wisconsin Act 434 and 2009 Wisconsin Act 24 added the underlined text.

Although *Peterson*'s interpretation directly contradicted the court of appeals, the Supreme Court continued to say that "we do not take the ultimate step of overruling *Carlson* because to do so would go further than the supervisory writ allows." *Id.* (note omitted). *Peterson* did not draw any principled distinction between "overruling" a former opinion and issuing a new, directly contradictory opinion. In the absence of authority for such a distinction, I will not attach talismanic significance to whether a case has been expressly "overruled." A circuit court cannot "withdraw language from a previous supreme court case." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶51, 324 Wis. 2d 325, 782 N.W.2d 682 (quoted source omitted); *See Wisconsin Justice Initiative v. WEC*, 2023 WI 38, ¶139, __Wis. 2d__, __N.W.2d__ (Hagedorn, J., concurring) ("Our opinions are explanations of how and why we decided a case a particular way.").

In sum, under § 978.045(1r), at least as it existed at the time of *Peterson*, a judge cannot appoint a prosecutor without proof of one of the listed conditions.

III. DISCUSSION

So far, I have examined the history and meaning of Wis. Stat. §§ 968.02(3) and 978.045(1r) to reach these three conclusions:

- (a) A judge may issue a criminal complaint upon a showing of probable cause, if a district attorney refuses. For purposes of this decision, I assume Irwin-Henry could show probable cause that Kenny recklessly killed Robinson.
- (b) A judge should not issue a complaint if no person will prosecute that complaint.
- (c) *Peterson* limits a judge's authority to appoint a special prosecutor to the factors set forth in Wis. Stat. § 978.045(1r), at least under the earlier form of that statute.

With these conclusions in hand, I next addresses Irwin-Henry's arguments for why I have the statutory or inherent authority to appoint a special prosecutor.

A. Wis. Stat. § 978.045(1r)(bm) limits judges' authority to appoint a special prosecutor.

Irwin-Henry's first argument is that Wis. Stat. § 978.045(1r) authorizes appointment of a special prosecutor because *Peterson*—decided July 16, 2015—predates material amendments in 2015 Wisconsin Act 64, §§ 9-11 (“the Act”) that took effect October 25, 2015. The Act divided former subsection (1r) into two smaller sub-subsections, (1r)(am) and (1r)(bm). Because of this act of division, according to Irwin-Henry, these new sub-subsections must “describe two different mechanisms by which a judge may appoint a special prosecutor ...” Irwin-Henry Br., dkt. 156:4. And, based on this amendment, Irwin-Henry concludes that “the analysis and holding, and certainly any dicta, of the *Peterson* decision is no longer relevant.” *Id.* at 5.

1. *Peterson's* interpretation of § 978.045(1r) is binding precedent notwithstanding a series of amendments to that statute.

The legislature amended Wis. Stat. § 978.045(1r) on two occasions shortly before and after *Peterson* was decided.⁶ The first amendment made these changes:

- i. The legislature added the following text to § 978.045(1r) (2001-02):

The judge may appoint an attorney as a special prosecutor only if the judge or the requesting district attorney submits an affidavit to the department of administration attesting that any of the following conditions exists:

- ii. The legislature created subsection (bm), but only for the limited purpose to include “parental leave” as a reason for which a special prosecutor might be appointed. 2015

⁶ In 2017, the legislature again made two sets of amendments to § 978.045(1r). These amendments are not material to this decision:

2017 Wisconsin Act 59, §§ 2261qm, 2261rm, and 2261rt created the time-limited subsection (bp), which ceased to have any effect “after December 31, 2019.”

2017 Wisconsin Act 366, § 90 was not a substantive amendment. This act clarified that “[t]he treatment of 978.045(1r)(intro.) of the statutes by 2015 Wisconsin Act 55 is not repealed by 2015 Wisconsin Act 64. Both treatments stand.”

Wisconsin Act 55, § 4737t. This provision survives as one of the conditions for the appointment of a special prosecutor in § 978.045(1r)(bm)2m.

2015 Wisconsin Act 55, §§ 4737-4737t. These amendments took effect July 14, 2015, or two days before *Peterson* was decided.

The second amendment to § 978.045(1r) then made these substantive changes:

- i. The legislature moved the first two sentences from former subsection (1r) and placed them in a newly-created sub-subsection (1r)(am).
- ii. The legislature then moved the remaining two sentences in former subsection (1r) to an amended sub-subsection (1r)(bm). The legislature further removed the words “or John Doe proceedings under s. 968.26” to eliminate the applicability of the special prosecutor statute to those proceedings. In this way, the legislature reorganized former subsection (1r) into two sub-subsections (1r)(am) and (1r)(bm) without adding, removing, or modifying any words beyond the reference to “John Doe proceedings under s. 968.26.”
- iii. The legislature moved and renumbered the pre-conditions for a special prosecutor from (1r)(a)-(h) to (1r)(bm)1. to 8.

2015 Wisconsin Act 64, §§ 9-10 (“the Act”). These amendments took effect October 26, 2015.

The legislature did not explain why it split subsection (1r) into two sub-subsections (am) and (bm). Irwin-Henry’s offered explanation—that the legislature must have intended two distinct procedures—is one reasonable way to interpret this amendment. But because the legislature changed only one narrow part of the original text of subsection (1r), an alternative reasonable interpretation is that the legislature intended only one narrow change in meaning; to simply remove the applicability of the special prosecutor statute to “John Doe proceedings under s. 968.26.” These competing interpretations render § 978.045(1r) ambiguous. *Kalal*, 2004 WI 58, ¶47 (“a statute is

ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.” (citations omitted). “If a statute is ambiguous, the reviewing court turns to the scope, history, context, and purpose of the statute.” *Id.* ¶48. I turn, therefore, to the legislative history of the Act.

According to the Wisconsin Legislative Council, the purpose of the Act was to “make[] a variety of changes to Wisconsin’s John Doe law.” Wisconsin Legislative Council Act Memorandum, 2015 Wisconsin Act 64 - John Doe Proceedings, October 26, 2015, available online at: <https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act064.pdf>. This interpretation is persuasive because “[c]ourts rely upon the Council’s explanatory notes when examining history.” *Kalal*, 2004 WI 58, ¶69 (Abrahamson, C.J., concurring); *See e.g. Wagner v. Milwaukee Cnty. Election Com’n*, 2003 WI 103, ¶39, 263 Wis. 2d 709, 666 N.W.2d 816 (relying on a Legislative Council memo). Here, although the Legislative Council’s summary of the Act discusses various changes to Wisconsin’s John Doe laws at length, the Legislative Council discusses no changes to the special prosecutor appointment—the phrase “special prosecutor” does not even appear.

Consistent with the Legislative Council’s analysis, the proponents of the Act never explained any purpose to create new procedures for the appointment of a special prosecutor. At the public hearing on the Act, one co-sponsor explained its purpose as “a much-needed reform of the John Doe statute in Wisconsin law.” Rep. David Craig, Remarks to Senate Comte. on Judiciary and Public Safety (Mar. 11, 2015), available online: https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/sb43/sb0043_2015_03_11.pdf. In fact, despite commentary from the Milwaukee County District Attorney, the State Public Defender, and the Director of State Courts, no one acknowledged any change to the manner in which special prosecutors are appointed. *Id.*

Finally, although the chronology of the Act suggests a rapid correction to *Peterson*, the Act's history proves otherwise. On February 19, 2015, the Act began as 2015 Senate Bill 43 when introduced before the Wisconsin Senate. When *Peterson* was decided five months later, on July 16, 2015, that bill still remained in the senate. The senate had a golden opportunity to correct any error in the *Peterson* ruling. However, despite the fact that the senate proposed another twenty-three amendments to the Act in the months following *Peterson*, none of those amendments sought any change to the special prosecutor statute.⁷ If anything, this indicates the legislature approved of *Peterson*'s interpretation of the special prosecutor statute because “we presume that the legislature is aware that absent some kind of response this court’s interpretation of the statute remains in effect.” *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993); see *Allen v. Milligan*, 599 U.S. ___, slip op. at 42-43 (June 8, 2023) (Kavanaugh, J., concurring) (collecting cases to show that courts have “ordinarily left the updating or correction of erroneous statutory precedents to the legislative process.”)

So while it is perhaps unusual that the legislature would divide one statutory section into two while leaving the body of text substantially intact, the act of division does not persuade me to depart from *Peterson*'s interpretation for when a judge may appoint special counsel. Indeed, judges “should be wary ... of creating unforeseen meanings or legal effects from what is nothing more than a stylistic mannerism.” *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶24, 385 Wis. 2d 748, 924 N.W.2d 153 (alterations and quotation marks omitted, quoting ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 177 (2012)).

Looking past the legislature's stylistic amendment to § 978.045(1r), I must construe the

⁷ The Wisconsin Legislature publishes each amendment online. <https://docs.legis.wisconsin.gov/2015/proposals/sb43> (last visited June 12, 2023).

statutory subsections “as part of a whole ...” *Kalal*, 2004 WI 58, ¶46. As a whole, the text of § 978.045(1r) has not changed—outside the applicability to inapposite John Doe proceedings—since *Peterson* interpreted that text in 2015. I am therefore bound by that ruling. *Zarder*, 2010 WI 35, ¶58. And although Irwin-Henry characterizes this part of *Peterson* as dictum,⁸ I cannot “dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum.” *Id.* ¶58. In any event, it is not clear what Irwin-Henry means because the Wisconsin Supreme court has “ceased calling language in [its] own opinions dicta.” *Wisconsin Justice Initiative*, 2023 WI 38, ¶139 (Hagedorn, J., concurring).

To summarize the amendments to § 978.045(1r) following *Peterson*, the statutory text has changed in only one respect: judges may no longer appoint a special prosecutor in “John Doe proceedings under s. 968.26.” This limited textual change was consistent with at least one of the legislator’s stated purpose and it is further consistent with the Legislative Council’s analysis. And although the Act also divided one large subsection into two smaller sub-subsections, the purpose of this division could not have meant to legislatively overrule *Peterson* because the senate had already proposed the Act five months prior. I therefore must apply *Peterson*, which says that a judge has no authority to appoint a special prosecutor except for one of the legislature’s enumerated reasons. Irwin-Henry does not demonstrate any of those reasons apply here. So, unless I find some other authority to appoint a special prosecutor, I must dismiss her petition.

2. Irwin-Henry’s interpretation of § 978.045(1r) creates surplusage.

Even assuming *Peterson* did not control the interpretation of § 978.045(1r), I would also reject Irwin-Henry’s statutory authority argument because it creates surplusage. This is a problem

⁸ Dictum refers to “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ... Often shortened to dictum.” *Obiter dictum*, BLACK’S LAW DICTIONARY (11th ed. 2019).

because “statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Kalal*, 2004 WI 58, ¶46 (citation omitted).

Irwin-Henry’s offered interpretation of § 978.045(1r) creates this problem: if (1r)(am) and (1r)(bm) create two distinct procedures, and the first of those procedures allows a judge to appoint a special prosecutor for any reason so long as that appointment is “by an order entered in the record stating the cause for it,” then what meaning could possibly remain for the second procedure? If he or she has the option in (1r)(am) to appoint a prosecutor for unlimited reasons, why would any judge need to resort to the set of limited reasons in (1r)(bm)?

Irwin-Henry offers no answer except to summarily conclude that the canon that “*expressio unius est exclusio alterus*” must apply so that “(1r)(am) and (1r)(bm) describe two different mechanisms by which a judge may appoint a special prosecutor ...” Irwin-Henry Br., dkt. 156:4. Under this canon, “the express mention of one matter excludes other similar matters not mentioned.” *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶12, 239 Wis. 2d 26, 619 N.W.2d 123. So, for example, the conditions in (1r)(bm) under which a special prosecutor may be appointed, by their express mention, exclude other unmentioned conditions. But I do not understand why Irwin-Henry thinks this canon has anything to do with the legislature’s choice to create sub-subsections (1r)(am) and (1r)(bm). I will not develop an argument for her: judges “do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case.” *Serv. Emps. Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

In sum, the legislature could not have meant for § 978.045(1r) to create two procedures for the appointment of special counsel because the first procedure—appointment for any reason stated in the record under (1r)(am)—would swallow any other procedure whole. Instead, when the

legislature chose to divide (1r) into (1r)(am) and (1r)(bm), it also chose to leave the statutory text almost entirely intact. Irwin-Henry's interpretation would render the entire second half of that text—the current (1r)(bm)—surplusage. For this reason, I would reject Irwin-Henry's interpretation even if *Peterson* did not control.

B. Judges have no inherent authority to appoint a special prosecutor.

Irwin-Henry next argues that even if Wis. Stat. § 978.045(1r) offers no statutory authority under which a judge might appoint a special prosecutor, a judge must have the inherent authority to make such an appointment. The absence of this inherent authority, according to Irwin-Henry, renders § 968.02(3) a dead letter because judges will never issue complaints that cannot be prosecuted. The Court disagrees for the reasons that follow.

1. Wis. Stat. § 968.02(3) is fraught with inconsistent enforcement.

Irwin-Henry relies on the history of judge-initiated criminal prosecutions to shed further light on the application of Wis. Stat. § 968.02(3). Irwin-Henry Br., dkt. 156:9. Although I am not certain that a historical examination will be useful for understanding an inherent grant of authority under § 968.02(3), it is nevertheless true that judges may resort to this sort of extrinsic analysis “to confirm or verify a plain-meaning interpretation.” *Kalal*, 2004 WI 58, ¶51.

This history of § 968.02(3) is fraught with inconsistent interpretations. “From statehood until 1945, the decision to file criminal charges was vested entirely in local magistrates.” *Kalal*, 2004 WI 58, ¶33 (note omitted) (citing *State v. Unnamed Defendant*, 150 Wis. 2d 352, 363, 441 N.W.2d 696 (1989)). Since then, Wisconsin shifted the authority to issue a criminal complaint away from local judges:

Over time, the role of the district attorney became more prominent: from 1945 until 1969, criminal complaints were issued by magistrates or district attorneys, and in 1969, the statutes were revised to confer upon district

attorneys the primary power to charge criminal offenses, subject to certain limited exceptions such as the one involved in this case.

Wisconsin Stat. § 968.02 was enacted as part of a revision of the state's criminal procedure code initiated by the Criminal Rules Committee of the Judicial Council. This new statute governing the issuance and filing of criminal complaints represented a major concentration of charging power in the district attorney's office.

Id. ¶¶33-34 (internal citations omitted).

The Wisconsin Supreme Court confronted this shifting authority in two diametrically opposed cases between 1987 and 1989. In *State ex rel. Unnamed Petitioners v. Connors*, a petition asked Circuit Judge Arlene Connors to issue a criminal complaint after “two professional football players ... allegedly assaulted a female dancer ... in the dressing room of a Milwaukee night club.” 136 Wis. 2d 118, 122-23, 401 N.W.2d 782 (1987). The Wisconsin Supreme Court granted a writ of prohibition⁹ before Judge Connors could hold a hearing. *Id.* at 122. Explaining the role of the prosecutor “as a minister of justice,” *Connors* held that “the discretion to charge or not to charge, and the discretion of how to charge, rests solely with the district attorney.” *Id.* at 128. The court continued to explain that, “[o]nly where there has been an aura of discrimination has this court indicated that checks were to be placed upon a prosecutor’s charging decision.” *Id.* Under *Connors*, Wis. Stat. § 968.02(3) was “unconstitutional beyond a reasonable doubt.” *Id.* at 142.

Only two years later, the Wisconsin Supreme Court reversed course. In *State v. Unnamed Defendant*, a “complainant alleged that she was sexually assaulted in Waukesha county by the unnamed defendant ...” 150 Wis. 2d 352, 441 N.W.2d 696 (1989). The prosecutor “decided that he would not commence criminal proceedings against the defendant because he did not believe

⁹ A writ of prohibition is an order to restrain “to restrain the exercise of judicial power by a court when it exceeded or usurped jurisdiction which did not belong to it.” *State ex rel. Freeman v. Cannon*, 40 Wis. 2d 489, 491, 162 N.W.2d 32 (1968).

that he would be able to establish guilt beyond a reasonable doubt.” *Id.* at 356. The complainant then petitioned under Wis. Stat. § 968.02(3) and Circuit Judge Walter Swietlik, after taking evidence, “directed [the prosecutor] to reevaluate his charging decision.” *Id.* at 356-57. When the prosecutor still refused, Judge Swietlik “ordered the Waukesha county district attorney, or his designee, to file charges against the defendant.” *Id.* at 357. The Wisconsin Supreme Court then “specifically overrule[d] *Connors* ...” *Id.* at 365. After re-examining our state’s history of criminal complaints, *Unnamed Defendant* held that “Wisconsin constitutional history leads inexorably to the conclusion that the complaint in this case was issued as a result of a valid, time-honored and constitutional procedure.” *Id.* at 366.

Chief Justice Heffernan, writing for the majority in both *Connors* and *Unnamed Defendant*, filed a separate concurrence in which he expressed “a sense of unease over the validation of secs. 968.02(3) and 968.26, Stats, when viewed from a public policy aspect.” *Id.* at 367 (Heffernan, C.J., concurring). According to Chief Justice Heffernan:

Our imprimatur upon these statutes may well give a gloss that runs counter to the legislative intent of Wisconsin’s criminal law reforms. The writer is not unmindful of the predicament of a victim of a crime who is afforded no relief by a recalcitrant prosecutor. It would appear, however, that this situation might better be alleviated by legislative approval of a limited judicial review of a prosecutor’s declination to prosecute.

Id. at 368. Two other justices concurred to express support for the statute. Justice Steinmetz—the vindicated dissenter in *Connors*—explained that the Chief Justice’s fears were unfounded. As Justice Steinmetz saw it:

The fear that, “What will be charged can lie within the whim of any complainant” is an unfounded one. Section 968.02(3), Stats., requires the circuit judge to find “that there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing” and the judge “may” then issue a complaint.

Id. at 373 (Steinmetz, J., concurring) (internal citation omitted). Thus, for Justice Steinmetz at least, it was important that § 968.02(3) gave refuge neither to the “whim of any complainant” nor “the pernicious practice of private prosecutions.” *Id.*

The Wisconsin Supreme Court revisited this issue for the last time in *Kalal*, noting only that “Wis. Stat. § 968.20(3) is not a substitute for the district attorney’s exercise of charging discretion. Rather it operates as a limited check upon the district attorney’s charging power ...” *Kalal*, 2004 WI 58, ¶8. In the two decades that have followed, no majority opinion of the Wisconsin Supreme Court has revisited this application of Wis. Stat. § 968.02(3).

However, several prominent commentators have expressed a narrow view of this “limited check” on the prosecution function. Writing only six years after *Unnamed Defendant*, a group of professors reported that: “While the historical accuracy of this view can be debated, exclusive prosecutorial responsibility for charging is now generally accepted.” FRANK J. REMINGTON & DAVID E. SCHULTZ, ET AL., THE ROLE OF THE STATE TRIAL JUDGE IN CRIMINAL CASES – THE NEED FOR CHANGE 120-121 (1995) (emphasis added, footnote omitted).¹⁰ Justice Prosser has similarly expressed skepticism for a closely-related sort of inherent authority that Irwin-Henry now asserts:

[Wis. Stat. § 968.02(3)] authorizes the judiciary to check the district attorney in specific circumstances and, in a sense, its present existence validates the

¹⁰ Prof. Frank J. Remington laments in the preface to this commentary that:

There is no consensus with regard to who, if anyone, is responsible for ensuring that the criminal justice system is prompt, fair, and effective. ... The current lack of any clearly defined leadership responsibility is one important reason why criminal justice decisions today are made almost entirely on the basis of political expediency rather than on the basis of detailed and reliable knowledge of what works best. ...

Is the trial judge only an applier of the rules of law, rules relating to the definition of the crime charged, rules relating to the admissibility of evidence and other evidentiary and procedural rules? Or does the trial judge also have a discretionary role to play in deciding what is a fair outcome of the case after considering all of the information available with respect to the commission of the crime and the characteristics of the offender and the victim? In other words, is the quality of justice a trial judge’s responsibility?

Frank J. Remington, *Preface* to FRANK J. REMINGTON & DAVID E. SCHULTZ, ET AL., THE ROLE OF THE STATE TRIAL JUDGE IN CRIMINAL CASES – THE NEED FOR CHANGE, at xi-xii.

assertion that the charging decision is a power the judiciary continues to share with the executive. However, the concurrence misses the larger point that this shared power is (1) grounded in statute; and (2) limited by statute. If the judiciary had “inherent authority” to initiate prosecutions, the limiting statutes that have been in place since 1969 would invade judicial power and might be unconstitutional.

State v. Conger, 2010 WI 56, ¶135, 325 Wis. 2d 664, 797 N.W.2d 341 (Prosser, J., dissenting) (emphasis added).

2. Circuit judges have limited inherent authority to accomplish their constitutional function.

Having set forth the history of § 968.02(3) and the role of the judge as a limited check on the prosecutor, I turn next to the circumstances under which judges have inherent authority. In general, “a power is inherent when it is one without which a court cannot properly function.” *State v. Schwind*, 2019 WI 48, ¶15, 386 Wis. 2d 526, 926 N.W.2d 742 (quoting *State v. Henley*, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350). Because inherent authority generally relates to the proper function of the court, judges exercise inherent authority “in three areas”:

- (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system;
- (2) to regulate the bench and bar; and
- (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice.

Id. ¶16 (quoted source omitted, formatting added). Inherent authority, however, “is not a license for courts, unconstrained by express statutory authority, to do whatever they think is ‘fair’ at any given point in time.” *Henley*, 2010 WI 97, ¶75.

Applying this framework to her petition, Irwin-Henry first asserts that I must have inherent authority because § 968.02(3) authorizes a judge to issue a complaint and that authorization “by its very nature includes those powers necessary to fulfill the jurisdictional mandate.” Irwin-Henry

Br., dkt. 156:10 (quoting *State v. Cummings*, 199 Wis. 2d 721, 736, 546 N.W.2d 406 (1996)).

Cummings dealt with a judge's inherent authority to seal a search warrant under then-existing John Doe procedure. 199 Wis. 2d at 736. That procedure gave judges discretion to examine witnesses in secret. Wis. Stat. § 968.26 (1995-1996) ("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."). As the *Cummings* court explained, given this broad discretionary authority for secrecy, "it is only logical that when a John Doe judge determines that it is necessary to keep the proceedings secret ... he should be able to keep the warrant and supporting documents secret too." *Cummings*, 199 Wis. 2d at 737. Thus, *Cummings* held that if a judge has authority to take evidence in secret, the judge must logically have inherent authority to keep secret the warrants for that secret evidence.

Irwin-Henry's comparison to *Cummings* is not persuasive because here, unlike *Cummings*, one statute simply limits the authority granted by another. Put another way, § 968.02(3) creates a jurisdictional mandate just like the former § 968.26 did in *Cummings*. But the comparison ends immediately because § 971.045(1r) limits that mandate to certain enumerated conditions, while in *Cummings*, no other statute limited the manner in which search warrants might be sealed. This is altogether ordinary. Some of the most routine grants of judicial authority are limited by statute—for example, take Wis. Stat. chs. 901-911 (Wisconsin's rules of evidence), which *limits* judicial authority to take evidence in almost any matter, or take Wis. Stat. ch. 895, which *limits* judicial authority on numerous issues of liability and damages, or finally, take Wis. Stat. § 939.74, which *limits* judicial authority to punish most criminal offenses pursuant to statutes of limitation. Ultimately, the fact that the legislature chose to grant authority in one statute, then limit it another says nothing about a court's inherent authority.

Finally, Irwin-Henry seeks support for her inherent authority argument in two places in the majority and non-majority opinions in *Peterson*. First, she points to the fact that our supreme court concluded “no law expressly prohibits a John Doe judge from exercising his inherent authority to appoint a special prosecutor ...” *Peterson*, 2015 WI 85, ¶131. If Irwin-Henry understands this statement to mean that a circuit judge has inherent authority to appoint a special prosecutor, then she does not explain why. More important, Irwin-Henry does nothing to explain away the contrary conclusion that the “conditions enumerated under Wis. Stat. § 978.045(1r) *must* exist for the appointment of a special prosecutor.” *Peterson*, 2015 WI 85, ¶127 (emphasis in original). Second, Irwin-Henry highlights Justice Abrahamson’s opinion that—in a John Doe proceeding under then-existing § 968.26—a judge did have inherent authority. *Peterson*, 2015 WI 85, ¶551. Justice Abrahamson’s solo concurrence/dissent on a separate statutory procedure is interesting but neither binding nor material to the present matter.

C. Conclusion

The district attorney has not filed the complaint Irwin-Henry seeks and the legislature has not authorized the appointment of a special prosecutor. Perhaps, in doing so, the political branches of Wisconsin’s government shut their doors to Irwin-Henry. But I need not decide the wisdom of these choices—the circuit judge’s role in this process is as “a limited check upon the district attorney’s charging power.” *Kalal*, 2004 WI 58, ¶8. In that role, I have neither the statutory nor inherent authority to pry those doors open and appoint a special prosecutor. I conclude that no prosecution can proceed from the complaint Irwin-Henry seeks, so it makes no difference whether she could show probable cause at an evidentiary hearing. I therefore dismiss Irwin-Henry’s petition.

ORDER

For these reasons,

IT IS ORDERED that Sharon Irwin-Henry's petition for a criminal complaint under Wis. Stat. § 968.02(3) is dismissed.

This is not a final order for purpose of appeal. Wis. Stat. §§ 967.02(2m) and 968.02(3).¹¹

¹¹ As the petitioner is well-aware, "a circuit judge's order under sec. 968.02(3) is not appealable because it is not a judgment or order of a court." *Gavcus v. Maroney*, 127 Wis. 2d 69, 377 N.W.2d 200 (Ct. App. 1985). Irwin-Henry may seek review of this decision by extraordinary writ. *Id.*; *Kalal*, 2004 WI 58, ¶5.