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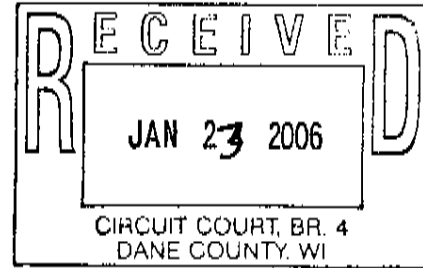
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January 23, 2006

Honorable Steven Ebert  
Dane County Circuit Court Branch 4  
City-County Building  
Madison, WI 53703



Re: State v. Scott Jensen and Sherry Schultz  
Case Nos. 02 CF 2453 and 02 CM 2455

Dear Judge Ebert,

Please find enclosed the state's Motions In Limine in the above referenced case.

The state submits that it would advance trial preparation for the parties and avoid unnecessary delay or confusion at the time of trial if the court set a hearing on these motions for the week of January 30, 2006, and at the same time addressed the substantive jury instructions. As the court is aware, the parties have submitted starkly different substantive jury instructions, and counsel are limited in preparing for opening statements and in reaching potential stipulations without knowing the court's view on the law that will apply. Thank you for your consideration of this request.

Sincerely,

Brian W. Blanchard

BWB/mlb

Enc

C (w/enc): Atty. Stephen Meyer  
Atty. Stephen Morgan  
AAG Roy Korte

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 4

DANE COUNTY

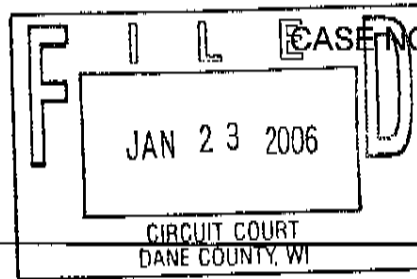
STATE OF WISCONSIN,

STATE'S MOTIONS IN  
LIMINE

Plaintiff,

-vs-

SCOTT R. JENSEN;  
SHERRY L. SCHULTZ



The State of Wisconsin hereby moves for orders before trial prohibiting defense counsel from making argument or attempting to present evidence on any of the following topics:

Uncharged Conduct By Others

(1) Whether persons not involved in the conduct charged in this case should have been investigated, charged, or otherwise sanctioned by any prosecution agency, regulatory agency, or tribunal in connection with conduct allegedly similar to that charged in this case.<sup>1</sup> Such prohibition should encompass evidence or argument regarding: (a) alleged selective prosecution, or (b) alleged vagueness or lack of notice in the Misconduct In Public Office provision at issue here, §

<sup>1</sup> Not subject to this motion in limine is proper cross examination of any witness called by the state to prove the facts alleged in this case regarding any potential bias of that witness related to lesser charges or the absence of charges pursued by the state against that witness. The state fully anticipates, as is ordinarily permitted, cross examination of witnesses called by the state regarding the witness's perceptions of any benefits conferred on them by the state.

946.12(3), stats. Such evidence is prohibited by §§ 904.01 and 904.02 as having no bearing on the alleged conduct of the defendant at issue in this trial.<sup>2</sup>

Defendants appear, from their shared witness list and comments defense counsel have made to potential witnesses, to be preparing to offer at trial “defenses” along the following lines: (1) some Assembly Democrats or employees working on their behalf were misusing state resources in the same way as the defendants during the time period at issue, so it would not be fair to convict a leader of the Assembly Republicans for doing the same thing at the same time, and (2) over the decades, Democrats and Republicans alike have long used state resources to fund and run campaigns, so it would be unfair to convict these defendants for doing so. Whatever the prospects the defendants would have of proving either proposition during this trial, they should not be permitted to attempt to distract and confuse the jury in this manner.

The defense apparently intends to attempt to “prove” at trial, in what would amount to a distracting mini-trial within this trial, that some Assembly Democrats or employees acting on their behalf were also stealing from the state in the same manner, with the purpose of arguing that therefore these defendants could not have had an intent to gain a dishonest advantage over Assembly Democrats. This is not a legal defense to the crime charged, would represent an enormous waste of time at trial, and would drag the jury through wholly irrelevant and distracting issues.

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<sup>2</sup> In addition, even if deemed in some manner relevant to proof of an element or a valid legal defense, the marginal probative value is certainly substantially outweighed by the dangers of confusion of the issues, misleading and wasteful of judicial resources, and therefore should be excluded pursuant to sec. 904.03, stats.

The defendants took all the way the Supreme Court on interlocutory appeals vagueness and lack of notice claims, and did not prevail. They have not filed a selective prosecution motion. A claim of selective prosecution is a question of constitutional dimension that must be the subject of a pretrial ruling that is issued only after the filing of a properly framed and well supported motion, not a defense to be presented to the jury.<sup>3</sup>

In brief, as a matter of law beyond the purview of the jury, a district attorney has great discretion in deciding whether there is merit in devoting the public resources necessary to prosecute an alleged offense. See *State v. Kramer*, 248 Wis. 2d 1009, 1022, 637 N.W.2d 35 (2001). The conscious exercise of some selective enforcement is not a constitutional violation, but is part of the job description. Only selective, persistent, and intentional discriminatory prosecution may violate a defendant's right to equal protection of the laws in the absence of a valid exercise of prosecutorial discretion. *Kramer*, 248 Wis. 2d at 1022. A defendant claiming he was unconstitutionally selected for prosecution has the initial burden to make a prima facie case of discrimination before he is entitled to an evidentiary hearing. *Kramer*, 248 Wis. 2d at 1023. To do so he must show both a discriminatory purpose and a discriminatory effect. *Kramer*, 248 Wis. 2d at 1023; *Wayte v. United States*, 470 U.S. 598, 608 (1985). A defendant establishes a prima facie case "when the facts presented are sufficient to raise a reasonable doubt as to the prosecution's purpose." *Kramer*, 248 Wis. 2d at 1023. To

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<sup>3</sup> The Hon. C. William Foust entertained and rejected a selective prosecution motion of this type advanced by the defendant in *State v. Brian Burke*, recognizing the substantial proof burdens necessary to prevail on such a claim.

establish discriminatory effect and purpose a defendant must "show that he or she was singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or other arbitrary (discriminatory purpose)." *Kramer*, 248 Wis. 2d at 1024.

Finally, refusal to prosecute some persons because of a lack of evidence that they committed a crime does not present a case of impermissible discrimination against those prosecuted. *State v. Rogers*, 315 S.E.2d 492, 505 (N.C. Ct. App. 1984), *appeal dismissed*, 469 U.S. 1101 (1985). It is also not selective prosecution to concentrate on violations that appear to be most flagrant, *United States v. Heilman*, 614 F.2d 1133, 1139 (7th Cir. 1980), the most open, *State v. Crabtree*, 487 S.E.2d 575, 579-80 (N.C. Ct. App. 1997) or which present the strongest case for conviction. *Wayte*, 470 U.S. at 607.

The arguments that defense counsel in this case apparently now intend to offer—variations on "campaign competitors did it," and/or "state officials and employees have always done it"—would be irrelevant to any element that must be proven or to any legitimate defense. This would be a naked appeal to the sympathy of the jury and would only confuse the genuine issues to be tried in this case.

#### Dishonest Advantage Sought Over Others Allegedly Using Same Form Of Fraud

(2) On a related note to #1 above, any form of argument that it would not be a "dishonest advantage" under the law for the defendants to have used state resources for campaign purposes due to the defendants' alleged beliefs that

state resources had been or would be used by others to operate competing political campaigns. Claims of this type would be akin to arguing that if Candidate A for Office X was aware that Candidate B for the same Office X had broken into the state Treasurer's office and stolen state funds to operate Candidate B's political campaign, then Candidate A would be privileged also to break into the Treasurer's office to steal money to use on Candidate A's campaign, in order to offset the advantage Candidate B gained by stealing state money. The Court of Appeals, as affirmed by the Supreme Court, has unambiguously ruled that using state resources to operate or raise money for a private political campaign is in itself a dishonest advantage. *State v. Jensen, Foti, Schultz*, 2004 WI App 89, 272 Wis. 2d 707, affirmed by 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56; see also *State v. Chvala*, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880.

A claim that "other guys were doing it" is a confession, not a defense, and it would be grossly misleading and confusing to a jury for defense counsel to be allowed to treat this as anything but a confession at trial.

#### Appeals To Ignore Settled Law In This Case

(3) "Jury Nullification." This encompasses arguments that the law is unfair or should be different than it is, or arguments that any prosecution pursued under the applicable law is unfair. The defendants have taken the position in exhaustive pre-trial submissions that the alleged conduct, even if proven, is lawful. This Court, the Court of Appeals, and the Supreme Court have denied those motions.

The excerpted passages from a colorfully written memoir of former Wisconsin Speaker Tom Loftus, "The Art of Legislative Politics," are submitted by counsel for Jensen to prepare for an argument to the jury that his client justifiably believed that, "If you are the Speaker or the leader of the state Senate, raising money for targeted seats is as much a part of your job as pounding the gavel to call the house to order." (P. 38) Read in isolation and taken literally as a statement that it was a duty of the job of Speaker to use state resources to raise money for private campaigns, the statement is directly and unambiguously contrary to the law as set forth in this very case by the Court of Appeals, and affirmed by the Supreme Court, and cannot form the basis of a defense theory or argument at trial.<sup>4</sup>

Nor is an attempt to prove similar law violations by other persons or entities relevant to the issue of intent of either defendant Jensen or defendant Schultz. As set forth in the state's proposed jury instruction: "The use of a state resource to promote a candidate in a political campaign or to raise money for the candidate, provides to that candidate a dishonest advantage." This language is an accurate summary of the law; engaging in such activity creates a dishonest advantage by definition. *State v. Jensen*, 2004 WI App 89, ¶¶21, ¶¶29, 272 Wis.2d 707, 725, 728, 681 N.W.2d 230 (waging partisan political campaigns with state resources on state time violates one's duty as a public official and creates a dishonest advantage;

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<sup>4</sup> Mr. Loftus clearly did not intend this statement to describe ethical or lawful standards, any more than he meant to convey, when he stated on the same page that the qualifications of a candidate for the legislature are irrelevant, that it would be sound policy for legislative leaders completely to ignore the qualifications of candidates they recruit. The book is written with a heavily ironic tone, and does not purport to describe the legal authority or limitations of public officials in Wisconsin. It is a regretful look back at the dangers of self-interest that can accompany obtaining and holding onto governmental power.

Jensen ... had a duty to avoid using the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates in (his) own campaigns and the campaigns of other candidates); *State v. Chvala*, 2004 WI App 53, ¶19, 271 Wis.2d 115, 136, 678 N.W.2d 880 (directing state employees to “engage in political campaign activity with state resources is inconsistent with the rights of others and is intended to obtain a dishonest advantage”). The result of such conduct is

public financing of private campaigns without the public's permission. There is no reasonable argument that this alleged activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

*Jensen*, 2004 WI App 89, ¶93.

The defendants apparently will attempt to argue that because others allegedly engaged in similar illegal activity, the defendants had no intent to obtain a dishonest advantage. This claim is absurd and not legally viable. The misconduct in public office statute is not one of comparative liability, or dependent on the legality or illegality of the actions of others. The issue is whether providing aid and assistance to candidates running for office in the form of state employees and state resources is a dishonest advantage. The courts, supported by common sense and the clear terms of the statutes, tell us that this is a dishonest advantage. The jury instruction merely defines for the jury what a dishonest advantage is, consistent with controlling case law and instructs the jury that it still must find, beyond a reasonable doubt, that the defendants intentionally engaged in such conduct. It is difficult to even construct an argument that engaging in such conduct would create an honest advantage, and in any case *Chvala* and *Jensen* establish that such

activity is clearly and unambiguously improper and illegal. This court should reject any attempt by the defendants to invite the jury to ignore or reject the rationale and reasoning of those controlling decisions by simply recasting their argument in a different light.

Under the defendants' logic, it would be entirely lawful for a state Representative to have his Assembly staff compile his private campaign finance data on a state computer up until the day on which another candidate officially entered the race against the incumbent. What would be a felony once an identified opponent appears would be entirely lawful before that time. This example demonstrates the hollow nature of the defense argument. It is a dishonest advantage to run a private campaign using unauthorized state dollars, regardless of whether one has zero or five opponents and regardless of how one believes any opponent's campaign is being run.

Regardless of resolution of the jury instruction provisions, the evidence of alleged violations of the law by others is simply irrelevant and is not a defense. To allow such evidence under the guise of proof of "intent" would serve only to confuse, mislead, and extend the length of the trial.

#### Punishment / Sentence

(4) Punishment, disposition, sentence, or any other adverse consequence(s) potentially or allegedly suffered by a defendant resulting from prosecution in this matter. Any such mention would be only an attempt to elicit sympathy or prejudice in favor of a defendant and is outside the province of a jury.

### Prior Convictions

(5) Any prior conviction or adjudication of any witness, absent prior determination by the Court that the probative value substantially outweighs the danger of unfair prejudice. See §§ 901.04, 906.09, Stats.

### Lack Of Prior Convictions

(6) The lack of either defendant's criminal record. *State v. Bedker*, 149 Wis. 2d 257, 268, 440 N.W.2d 802 (Ct. App. 1989).

### Level Of Charging Decisions; Categories Of Crimes


(7) The degree of the offenses charged, *i.e.* felony or misdemeanor or charges that either defendant believes could or should have been issued. Such information is irrelevant to a determination of guilt or innocence under Wis. Stat. §904.02. In arguing the defendant's lack of guilt on the counts charged, the defense may not argue that conduct may have violated some other provision of the law, since this would only confuse and divert the jury from its obligation to assess whether the state has introduced proof beyond a reasonable doubt of his violation of the charged offenses.

### Other Acts Evidence

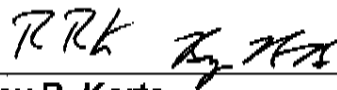
(8) Any "other acts" evidence regarding any witness or the victim, under Wis. Stat. § 904.04(2), unless and until a hearing is first held outside the jury's presence as to the admissibility of such evidence.

Dated at Madison, Wisconsin, this 27<sup>th</sup> day of January, 2006.

Respectfully Submitted,



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