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STATE OF WISCONSIN

CIRCUIT COURT  
CRIMINAL DIVISION

BROWN COUNTY

State of Wisconsin,

Plaintiff,

v.

Court Case No.: 16CM001239

James J. Schmitt,

Defendant.

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**STATE'S SENTENCING MEMORANDUM**

The State of Wisconsin respectfully submits this Sentencing Memorandum in anticipation of the proceeding presently scheduled for Monday, December 5, 2016 at 9:00 a.m.

This is a case where the cover-up was the real crime, involving conduct far worse than the campaign reporting infractions it was intended to hide. The criminal case centers on campaign finance reports filed in January and February of 2015 by Mr. James J. Schmitt, as candidate for the Office of Mayor in the City of Green Bay. Mr. Schmitt<sup>1</sup> faced re-election in Spring 2015. At the start of the campaign season, a citizen complaint was submitted to the Brown County District Attorney's Office. It concerned earlier campaign reports filed by Mr. Schmitt between 2011 and 2014, well before the conduct at the heart of the present criminal complaint. Based on campaign finance reports available for – in some cases – years, the citizen complaint was part of an overall political attack. It focused on excess contributions and corporate money accepted. Noting a conflict of interest, District Attorney David Lasee requested a special prosecutor. On January 24, 2015, the undersigned Milwaukee County Assistant District Attorney accepted the appointment and agreed to conduct an investigation. The investigation led to the discovery of multiple intentional misrepresentations, all filed as part of campaign finance reports in January and February 2015, designed to hide the fact that Mr. Schmitt had indeed – as his political opponents alleged – accepted excess and otherwise illegal campaign contributions.

<sup>1</sup> The complaint concerns the activities of a candidate for office, James Schmitt. A candidate conducts his or her campaign as a private citizen, even if he or she is also an incumbent office holder. Consequently, this Memorandum refers to the defendant as "Mr. Schmitt," not "Mayor Schmitt."

**A. PLEA AGREEMENT**

The plea offer letter is attached as Exhibit A. After the close of the investigation, I approached Mr. Schmitt's attorneys and provided an early draft form of the criminal complaint.<sup>2</sup> I offered to resolve this matter in exchange for a plea of guilty to three misdemeanor criminal charges. Mr. Schmitt accepted. I then selected the three representative charges contained in the complaint now before the court.

Upon his guilty plea to the charges as filed, I promised I would not recommend jail and/or probation. This effectively was a promise to limit my recommendation to one of fines and/or community service.

The agreement is intended to resolve all allegations of misconduct set forth in the complaint and in the affidavit in support of a subpoena for documents, returned September 15, 2015. See Exhibit B. To the extent that these papers contain uncharged allegations of misconduct, Mr. Schmitt has consented to this court considering them as "read-ins." The court may use those allegations in fashioning an appropriate sentence.

Related to the settlement, Mr. Schmitt also agreed to terminate (and now has terminated) his campaign committee. Of necessity, this required him to empty his campaign coffers. He has transferred the balance of his campaign account, as of September 7, 2016, to the Common School Fund. The amount transferred was \$23,198.<sup>3</sup>

**B. CRIMINAL CHARGES SUMMARY**

James J. Schmitt was mayor of the City of Green Bay facing re-election in the 2015 Spring General Election. As a candidate, he had previously formed the campaign committee known as Friends of Jim Schmitt (FOJS). For the "campaign period" of 2011 to 2015, Mr. Schmitt's campaign contribution limit per person was \$1,040. By law, Mr. Schmitt and his campaign committee were required to file periodic campaign finance reports. These are regularly filed in January and July each year, with special "pre-election" reports filed before a primary and a general election.

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<sup>2</sup> The facts contained in that early draft, in all material respects, mirrored the facts contained in the criminal complaint.

<sup>3</sup> The plea agreement letter contemplated the surrender of the sum of \$26,545.75. After review of the 2016 campaign account bank records, the actual balance as of the time of the agreement was \$23,198, all of which was surrendered to the Common School Fund.

In the criminal complaint, Mr. Schmitt is charged with misdemeanors relating to intentional misrepresentations in his campaign finance reports. The complaint charges three “representative” charges, but it details all of the misconduct discovered during the investigation. In other words, while there are more actual violations than those alleged in Counts 1 to 3, these charges represent the “types” of violation discovered during the investigation.

The criminal complaint charges: (1) False Statements to an Election Official (Attempt) contrary to Wisconsin Statutes §§ 12.13(1)(b),<sup>4</sup> 12.60(1)(a) and 939.32;<sup>5</sup> (2) Acceptance of Campaign Contribution Funds Not Belonging to the Reported Contributor (Attempt) contrary to Wis. Stat. §§ 11.24(1), 11.61(1)(a) and 939.32;<sup>6</sup> and (3) Acceptance of Campaign Contribution In Excess of Statutory Limits (Attempt) contrary to Wis. Stat. §§ 11.26, 11.61(1)(b) and 939.32. The facts relating to these charges are summarized here:

- **Count 1.** When Mr. Schmitt learned that William Kress had exceeded his lawful contribution limit by \$200, without ever contacting Mr. Kress, he amended his report attributing the excess \$200 contribution to a “William Kress, Jr.,” a person who does not exist (Complaint Section G);
- **Count 2.** When Mr. Schmitt learned that William “Red” Lewis had exceeded his lawful contribution limit by \$1,000, he contacted Mr. Lewis’ office and asked to report \$1,000 in the name of Mr. Lewis’ wife. When told that Mr. Lewis was unmarried, he asked to report the name of the contributor as Mr. Lewis’ daughter, Rebecca. Although he received no money from the daughter, he nevertheless publicly reported that he received \$1,000 from Rebecca Lewis, the President of R. Lewis Technologies, Inc., while listing her occupation as “retired” (Complaint Section F); and
- **Count 3.** Mr. Schmitt cashed a campaign contribution check in the amount of \$1,250. Mr. Schmitt himself deposited that check in the bank when – *on its face* – it exceeded the campaign contribution limit of \$1,040. Making matters

<sup>4</sup> Chapter 11 contains a like prohibition. Under Wisconsin Statutes § 11.27 (2013-14), “[n]o person may prepare or submit a false report or statement to a filing officer under this chapter.”

<sup>5</sup> Each of these crimes, when completed, is a Class I felony. An attempt to commit a Class I felony is a Class A misdemeanor. Wisconsin Statutes § 939.32(1)(bm).

<sup>6</sup> All references to Wisconsin Statutes Chapter 11 in this Memorandum are to the 2013-14 edition of the Wisconsin Statutes. Chapter 11 was revised in December 2015 after all relevant allegations in the complaint.

worse, he then falsely reported the \$1,250 contribution of Philip Hendrickson as a \$250 contribution so as to avoid disclosure of that excess contribution (Complaint Section E).

While relating to three distinct events, these three charges are representative of the types of violations discovered during the investigation and recounted in the criminal complaint. These "violations types" involve: (1) lies; (2) about the source of campaign contribution funds; (3) which if properly attributed, would amount to an excess (or otherwise illegal) contribution.

Each of the charges is a misdemeanor punishable by imprisonment up to nine months or a fine of up to \$10,000 or both.

### **C. THE READ-IN CHARGES**

Mr. Schmitt agreed to a full disclosure of the findings of the investigation and consequently many uncharged "read-in" violations are alleged in the complaint. In fact, the plea agreement is intended to settle all campaign violations described in the criminal complaint.

The uncharged misrepresentations contained in the complaint are summarized here.

- Mr. Schmitt accepted a \$5,000 contribution from Robert Toonen but reported the contribution in the name of Mr. Robert's Toonen's daughters and son-in-law (Complaint Section B);
- When Mr. Schmitt learned that he had publicly reported \$2,000 in Robert Toonen contributions (without respect to the misreported \$5,000 contribution described in the previous paragraph), he simply changed the name of the contributor from "Robert Toonen" to "David Toonen" without ever receiving any money at all from David Toonen (Complaint Section C);
- After first reporting a corporate contribution of Cantilever Studios LLC as "C S," Mr. Schmitt amended the report to falsely reflect a contribution from his brother, Carl Schmitt (Complaint Section D);
- When Mr. Schmitt learned that David Charles had exceeded his lawful contribution limit by \$500, after contacting Mr. Charles, he reported that \$500 contribution in the name of David Charles, Jr., a person who exists but who did not give the money to the campaign (Complaint Section H).

The settlement also extends to all uncharged allegations in the subpoena papers returned to circuit court on September 15, 2015. For the court's convenience, a copy of the affidavit in support of that subpoena request is filed with this memorandum and attached as Exhibit B. These uncharged violations generally pertain to acceptance of (a) corporate contributions and (b) excess contributions. They are summarized as:

- Corporate contributions returned to contributor (Affidavit ¶¶29-30);
- Corporate contributions not returned to contributor (Affidavit ¶31);
- Misreported and excess campaign contributions (Affidavit ¶¶35-36);
- Unreported contributions (Affidavit ¶37);
- A Claim of "No Activity" in Form GAB-2A (Affidavit ¶39); and
- Unadjusted<sup>7</sup> excess campaign contributions (Affidavit ¶¶23-28).

#### **D. RECOMMENDED SENTENCE**

I note that the court's sentence will be based on – calculated conservatively – thirty-seven (37) campaign finance violations. Seven incidents (each involving multiple campaign finance violations) are alleged in the criminal complaint. An additional thirty violations are contained in Exhibit B, the affidavit in support of the subpoena for bank records.

Because Count 1 represents the most serious of the violations discovered during the investigation, I recommend the court assess the largest fine as to that count. In this regard, I recommend a fine of \$3,575. As to Counts 2 and 3, I recommend a fine of \$1,000 each for Counts 2 and 3.

I also recommend that, in lieu of \$1,575 of the fine imposed in Count 1, Mr. Schmitt be ordered to perform forty (40) hours of Community Service. See Wisconsin Statutes § 973.05(3)(a).

Consequently, the total recommended sentence is a fine of \$4,000 and forty (40) hours of Community Service.

#### **E. SENTENCING FACTORS**

As in any criminal case, the court must consider the three primary sentencing factors to arrive at a just disposition. They are (1) the character of the defendant; (2) the seriousness of the offenses; and (3) the need to protect the community.

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<sup>7</sup> As explained in the affidavit, many of the contributions were "adjusted" by changing the name of the contributor to the contributor's spouse. While that method itself may be questioned, some of the excess contributions went unadjusted, e.g., the Susan Van Boxel contribution.

### **1. Character of the Defendant**

Mr. Schmitt is 58 years of age. He is married to Dona Schmitt who is listed on campaign registration statements as the campaign treasurer from January 31, 2012 to December 21, 2014.<sup>8</sup> Mr. Schmitt is employed as the mayor of the City of Green Bay. Budget records from the City of Green Bay reflect that his base salary for 2016 is \$82,535.

Of course, the defendant has no criminal record.

Mr. Schmitt is due significant consideration for his cooperation with the investigation.

Acting through his attorneys and persons associated with his campaign, Mr. Schmitt was highly cooperative. I was supplied with all records I requested and was told that if I wanted more, I should ask for them. When I interviewed persons associated with the campaign, I was impressed with their candor and forthrightness. Unlike other investigations of this nature, I did not form the impression that the witnesses were unduly influenced by Mr. Schmitt or others on his behalf. Neither did I form the impression they were "circling the wagons" to protect him.

In fact, Mr. Schmitt and his campaign officials voluntarily provided the information necessary to file criminal charges. Stated another way, in the absence of that voluntary cooperation, no criminal charges of any kind could have been filed. It is possible he cooperated thinking nothing would come of this investigation,<sup>9</sup> but the fact remains that he and his campaign committee did provide key evidence when they did not have to.

### **2. Severity of the Offenses**

The offenses are non-violent, but they are nonetheless grave, especially for a public official whose stock in trade should be the trust invested in him by the public.

The offenses detailed in the complaint took place in a very specific factual context. In early 2015 at the start of the campaign, candidate Jim Schmitt was publicly attacked by political opponents. Relying upon campaign finance reports that had been a matter of public record for - in some cases - years, they alleged that Mr. Schmitt accepted contributions in excess of statutory limits. They also alleged that Mr. Schmitt had accepted contributions from corporations in violation of campaign finance laws. In

<sup>8</sup> In her interview, Ms. Schmitt stated that the registration statement mistakenly identifies her as the treasurer and that it was never her intent to be the treasurer. Nevertheless, she is named as treasurer on registration statements.

<sup>9</sup> Indeed, as a matter of fact, nothing much usually does come of investigations into campaign finance violations. If a proper basis exists for a complaint to be filed (and for many reasons often it does not), non-criminal forfeitures are usually charged. Criminal charges are very rare.

response to this political attack, Mr. Schmitt publicly stated he would make all necessary corrections.<sup>10</sup> He then filed a series of campaign finance reports, including amendments to prior reports.

Those early 2015 filings form the heart of the criminal complaint. While Mr. Schmitt ran afoul of campaign finance law between 2011 and 2014, those transgressions would have resulted in – consistent with the usual method of handling campaign finance violations discussed below – civil forfeitures at most.<sup>11</sup> It was the manner in which he chose to address certain of those violations which elevated rather unremarkable campaign finance violations into a criminal matter. That is, rather than do the harder work of making it right through legal means, he chose to lie about who contributed to his campaign and how much they contributed.

That Mr. Schmitt would choose to lie about who his contributors were and about how much they gave – rather than make the corrections to reports (including the return or forfeiture of some improper contributions) – is clearly the most troubling aspect of his conduct, far out shadowing every other aspect of this investigation. Although Mr. Schmitt has publicly characterized his actions as “mistakes,” they were certainly much more than that. In this regard, the most striking violation involves “William Kress, Jr.,” alleged in Count 1 (Complaint Section G). When faced with the fact of the \$200 excess contribution by William Kress, Mr. Schmitt invented a non-existent person, “William Kress, Jr.,” and attributed the excess contribution to him. Likewise, when faced with the \$1,000 excess contribution of Robert Toonen (Complaint Section C), he simply filed an amended report changing the name of the contributor to “Dave Toonen.” With respect to the \$1,000 excess contribution of William “Red” Lewis, Mr. Schmitt himself called and arranged to report Mr. Lewis’ contribution in the name of Lewis’ daughter, Rebecca, knowing he had received nothing from her. In different ways and in different degrees, this theme of misconduct recurs in all sections of the criminal complaint.

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<sup>10</sup> In a January 1, 2015 press release, Mr. Schmitt wrote about the alleged campaign reporting violations which were the subject of the political attack against him, “[I]f there were errors made, they were made with no malicious intent whatsoever, and they will be promptly dealt with, as all past errors have been.”

<sup>11</sup> Excess contributions across multiple calendar years are not uncommon in my experience. They routinely result from a mistaken belief that contribution limits apply to a calendar year, not a four year election cycle. Unless the offender is a “repeater,” disgorgement is the usual remedy. Likewise, corporate contributions are rather common. As in this case, they usually come from local small businesses and while some penalty is usually in order, even if merely disgorgement, criminal charges are not usually commenced.

Lying to thwart a political attack may have represented the easiest and the quickest response, but political expediency does not excuse the intentional falsehoods Mr. Schmitt will admit before the court. If his conduct was a "mistake," then it was a mistake in judgment, one that in no way mitigates the intentional deceit practiced by a candidate vying for the public trust.

### **3. Protection of the Community**

Presumably, the court seldom considers how best to protect the community in ~~campaign finance cases, criminal or otherwise.~~ Indeed, I am advised by the District Attorney's Office that a review of its case management system indicates no case has ever been filed under ch. 11 of the Wisconsin Statutes in Brown County. Even in the populous County of Milwaukee, filings alleging any kind of violation of ch. 11 are rare. Accordingly, I include a brief review about how ch. 11 complaints are usually handled by election officials and prosecutors.

#### **a. Resolution and adjustment of campaign finance violations.**

Many (probably most) ch. 11 violations are not pursued with the filing of a court proceeding.<sup>12</sup> Here, as throughout the State, many ch. 11 violations are resolved by requiring the candidate to conform to the law without filing charges. Consequently, when candidates fail to file a required campaign finance report, the municipal clerk frequently will contact the candidate and gain compliance that way. Likewise, campaign finance contribution violations (*e.g.*, acceptance of excess contributions) are frequently met with a demand to comply with the law (*i.e.*, a demand to return the excess contribution).<sup>13</sup>

When "charges" are brought, ch. 11 allows two different "types" of proceedings for the same campaign finance violation. A violation can be a civil forfeiture (having the legal force and effect of a parking ticket) and – at the very same time – a crime. Compare Wisconsin Statutes §§ 11.60 and 11.61. The difference is proof of intent. Consequently, a prosecutor may identify a violation under ch. 11 and pursue either a civil forfeiture or a crime. Such a statutory scheme obviously contemplates the exercise of discretion by prosecutors. Moreover, historically, the former Government

<sup>12</sup> I am advised by the Brown County District Attorney's Office that a review of its case management system indicates no case has ever been filed under ch. 11 of the Wisconsin Statutes, the campaign finance laws, in Brown County.

<sup>13</sup> The acceptance of excess contributions across calendar years is not uncommon. Many candidates do not fully understand that the limitation on contributions applies across the entire campaign period, not merely a calendar year.



Accountability Board administered the law by using forfeitures as the "first-resort" for violations, reserving criminal charges for repeat offenders or very serious violations.

While criminal charges are pursued for only the most serious misconduct, this is not the endpoint of discretion. A prosecutor must also decide upon the level of the criminal charge, viz., misdemeanor or felony.

In summary, ch. 11 violations are addressed with an ascending scale of responses from election officials and prosecutors. In most cases, at the lowest end of the scale, ~~violations are simply handled by requiring compliance with the law.~~ In some cases, perhaps because of repeat violations, candidates are assessed forfeitures (even though the same conduct might well be charged as a crime). In the most serious of cases, criminal charges are pursued. Felony charges are at the highest end of the scale and are reserved for the gravest of criminal violations.

**b. Resolution of Mr. Schmitt's case in light of the foregoing principles.**

A resolution involving misdemeanor convictions, fines and community service is consistent with the foregoing principles. Mr. Schmitt has no history of campaign finance violations, including any violations adjusted by means of compliance without the filing of any form of charges.<sup>14</sup> Nevertheless, the conduct at issue is grave and it is deserving of criminal charges, even in the absence of any prior violations. While reasonable persons will certainly differ as to whether the matter should be resolved with felony versus misdemeanor charges, I determined misdemeanor charges to be appropriate, resolving this issue in light of the fact that Mr. Schmitt and his associates voluntarily provided the information essential to the filing of any criminal charges in the first place.

**i. A fine with community service versus probation with jail.**

Mr. Schmitt has no needs that might be dealt with by the Department of Corrections on probation. Nevertheless, in a very real and practical sense, he will be on probation to the people of Green Bay. Certainly, any new transgression<sup>15</sup> will cost him his job at the next election, whenever and however that might be held.

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<sup>14</sup> This is based on statements I have received from the Brown County District Attorney's Office and the City Clerk.

<sup>15</sup> Indeed, I am mindful that even the present transaction may yet result in his removal from office.

Jail, of course, is not the presumptive disposition for a defendant with no record. In any event, monetary penalties for a politician – paid with personal and not campaign funds – can have greater significance and represent more meaningful punishment than “jail.”<sup>16</sup>

The fine should be substantial. Whether charged as a felony or misdemeanor, the maximum fine per criminal violation is \$10,000. The complaint identifies seven transactions (both charged and read-ins), although each represents multiple campaign finance violations. In addition to the criminal complaint, the affidavit supporting the subpoena for bank reports (Exhibit B) lists dozens more campaign violations. By my count, not including transactions alleged in the criminal complaint, the affidavit sets forth thirty (30) violations. The agency formerly known as the Government Accountability Board would often assess a \$100 fine for a minor campaign finance violation.

Like a jail sentence, community service will require – quite literally – Mr. Schmitt's time. Whenever Mr. Schmitt goes out in the community to perform court-ordered service he will be reminded – over a period of weeks or months and in a rather public way – of the circumstances that gave rise to his obligation.

#### ii. Collateral consequences

I note that these criminal convictions are likely to inhibit Mr. Schmitt's political career no matter what happens regarding his current position. This limitation is itself a form of punishment. If not removed from office by the voters or the city council of Green Bay, he will have to overcome the stigma of three criminal convictions to attain any office higher than his present position. Given the fact and the nature of these criminal convictions, that will be a difficult hurdle to overcome.

#### F. CONCLUSION

For the foregoing reasons, the special prosecutor respectfully recommends the following disposition in this criminal case involving three charged campaign finance crimes and an additional thirty-four (34) campaign finance violations.

As to Count 1, I recommend that the court impose a \$3,575 fine, but stay \$1,575 of that fine ordering in lieu thereof forty (40) hours of community service.

As to Count 2, I recommend the court assess a \$1,000 fine.

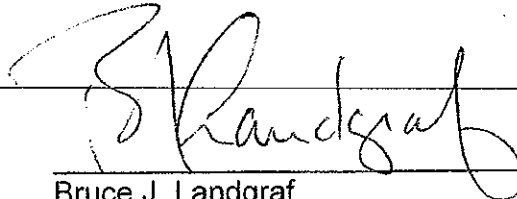
<sup>16</sup> A disposition of “jail” can (and at least in Milwaukee County does often) result in electronic monitoring for first time offenders with no other record. It has not mattered that the defendant was a high-profile political figure; at least one “Caucus Scandal” legislator, sentenced to six months of jail in a felony case, spent the entirety of that sentence at home on electronic monitoring.

As to Count 3, I recommend the court assess a \$1,000 fine.

Taken together, I recommend a \$4,000 fine and forty (40) hours of Community Service.

I also request the court to enter an order for all appropriate costs, fees and surcharges.

Dated at Milwaukee, Wisconsin this 28<sup>th</sup> day of November 2016.



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