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GRAND JURY AND JOHN DOE PROCEEDINGS IN WISCONSIN

Prosecutors in Wisconsin have a unique investigatory tool at their disposal: the John Doe proceeding, which is similar to the grand jury proceeding in other states but includes some features not available in a typical grand jury proceeding. Both grand jury and John Doe proceedings are independent inquiries into whether a criminal complaint should be issued in response to allegations of wrongdoing. Wisconsin law does provide a more traditional grand jury proceeding, but the John Doe proceeding provides several perceived benefits to investigators that are not available using grand juries. This brief will compare the two proceedings and highlight some of the key differences that make John Doe proceedings unique.

GRAND JURY AND JOHN DOE PROCEEDINGS

Grand jury proceedings and John Doe proceedings exist to determine probable cause to issue criminal charges in response to allegations of criminal conduct. The Wisconsin Supreme Court defined probable cause in *State v. Lawler* (221 Wis. 423, 430 (1963)) as “the existence of such facts and circumstances as would excite an honest belief in a reasonable mind, acting on all the facts and circumstances within the knowledge of the magistrate, that the charge made by the application for the warrant is true.”

Roughly half of the states in the United States empanel grand juries to determine if probable cause exists, while the remaining states hold preliminary hearings to make the determination. Preliminary hearings, however, lack many of the prosecutorial benefits shared by grand jury and John Doe proceedings. Preliminary hearings usually

involve attorneys engaging in adversarial questioning and cross-examination, while grand juries and John Does are generally nonadversarial and permit limited attorney representation and argument. Like most court proceedings, preliminary hearings are open to the public, while grand juries and John Does can proceed in secret. In Wisconsin, a preliminary hearing is required prior to indictment, including indictment by grand jury or John Doe, although the defendant may waive the hearing.

Supporters of a grand jury or John Doe proceeding to determine probable cause argue that such a proceeding serves the dual purposes of facilitating difficult or complicated criminal investigations while protecting citizens from reckless or baseless arrests and prosecutions by providing a formal statutory framework for leveling criminal charges.

Grand Jury Proceedings

The grand jury is the traditional form of preindictment, investigative proceeding that has been used in American and English common law for centuries. Upon an allegation of criminal conduct, a group of citizens is assembled, and a prosecutor presents evidence that the criminal conduct in question took place. If the evidence convinces the grand jury that probable cause exists, the grand jury will vote to indict the defendant and criminal charges will be leveled.

In Wisconsin, if a prosecutor seeks a grand jury, the jury is assembled by a circuit court clerk at the request of a circuit court judge. The prosecutor then works with the judge to select a grand jury by questioning no fewer than 75, and no more than 150, randomly selected potential jurors. After at

least 17 jurors have been selected for service, the prosecutor will present to that jury his or her evidence that a crime took place.

Sometimes preindictment investigations are kept secret. The Wisconsin Supreme Court listed a number of justifications for secret preindictment proceedings in *State v. O'Connor* (77 Wis. 2d 261 (1977)), including a desire to keep unarrested defendants from fleeing before charges are issued, to prevent defendants from collecting perjured testimony or tampering with evidence, to render witnesses freer in their responses to sensitive questions, and to prevent testimony that may be mistaken or untrue from becoming public record. A grand jury proceeding provides this secrecy by making the minutes and transcripts confidential unless a judge orders that the records be made public.

John Doe Proceedings

The John Doe proceeding is similar to a grand jury in many ways. Like a grand jury proceeding, it is a criminal investigation that takes place in a courtroom, rather than at a crime scene or in a police interrogation room. Witnesses are called and evidence is presented in both types of proceedings, and both proceedings seek an indictment. John Doe proceedings, however, also include some key features not available in a traditional grand jury setting.

The John Doe proceeding is fundamentally different from a grand jury in several ways. Most obviously, a judge replaces the jury in a John Doe proceeding, which eliminates the grand juror pool of 75–150 people and the selection of at least 17 suitable jurors. Proponents of John Doe proceedings argue that, because no jury is needed, John Doe proceedings move considerably faster and operate much more efficiently than comparable proceedings before grand juries.

The Wisconsin Supreme Court has held that the judge in a John Doe proceeding has a great deal of latitude and discretion in his or her handling of the case. The judge's role in a grand jury is often merely supervisory, but a

judge in a John Doe proceeding plays a larger role as both the supervisor and the decision maker. Wisconsin courts have held that judges in John Doe proceedings can issue subpoenas, take possession of subpoenaed records, issue search warrants, adjudicate probable cause, and adjourn the proceedings. Conversely, the role of lawyers in John Doe proceedings is quite small. Counsel can represent witnesses but cannot examine his or her witness client, cross-examine other witnesses, or make any kind of argument to the judge.

The John Doe proceeding may also be initiated differently than a grand jury, though both begin with a complaint alleging criminal conduct. In a John Doe proceeding, if a prosecutor makes a complaint, a circuit court judge must subpoena and question witnesses identified and presented by the prosecutor before making a decision on whether to indict. Unlike a grand jury, a John Doe proceeding can be initiated by a citizen complaint. In that scenario, the complaint will be referred to a prosecutor who will then decide whether to pursue the issue. If the prosecutor declines to pursue the complaint, a circuit court judge may review the materials presented to the prosecutor and determine whether to file charges at the judge's discretion.

Like a grand jury proceeding, a John Doe proceeding can also involve secrecy, but the secrecy ordered in a John Doe proceeding can go much further than in a grand jury proceeding. An order in either type of proceeding may require secrecy from judges, lawyers, and court staff. But in a John Doe proceeding, even witness testimony may be ordered to remain secret, while grand jury witnesses cannot be ordered to keep confidential their own testimony.

HISTORY AND FUTURE OF GRAND JURY AND JOHN DOE PROCEEDINGS IN WISCONSIN

Grand jury proceedings are an ancient legal tradition that can be traced back to the early English common law. The first generally accepted example of a grand jury, known as

the Assize of Clarendon, was an act by Henry II in 1166. Wisconsin's John Doe proceedings are, of course, much more recent than the grand jury process, but the John Doe statute evolved from that legal tradition.

Common Law and Territorial Law

It was not uncommon under the early English common law for a magistrate to issue criminal charges and arrest warrants based on the mere suggestion or suspicion of wrongdoing. As concern for individual rights and due process of law began to take shape, the grand jury process became increasingly popular as a check on prosecutorial and judicial abuses. The idea came to the United States with the English colonists, and following independence it was specifically identified in the Fifth Amendment to the U.S. Constitution, which states that no person shall face charges for a serious crime "unless on presentment or indictment of a grand jury."

Because early Americans were familiar with the grand jury, a preindictment investigatory proceeding was made part of the territorial laws that governed the Wisconsin Territory. The Wisconsin Territorial Statutes of 1839 contained the following provision:

Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine on oath the complainant and any witnesses produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed, the court or justice shall issue a warrant.

When Wisconsin achieved statehood, the territorial statute was incorporated into Wisconsin law as 1849 Wisconsin Statutes Chapter 145.

Wisconsin's John Doe proceeding is also quite old, but it was not formally added to the statutes until 1949. Prior to its appearance in the statutes, the John Doe proceeding was a judicial doctrine built from the language of

the preindictment statute. The first recorded case in which a court instituted what we now call the John Doe proceeding was *State ex rel. Long and another v. Keyes* (75 Wis. 288 (1889)). The respondents in the case, at least one of whom was unknown, challenged the judge's jurisdiction and authority to subpoena and question witnesses and to decide whether a criminal offense had occurred. The Wisconsin Supreme Court held that the judge had not "proceeded in said examination outside or beyond his powers and jurisdiction" and affirmed the legitimacy of John Doe proceedings.

Sixty years later, John Doe proceedings were formally added to the statutes. The appendix to 1949 Senate Bill 474, which became 1949 Chapter 631 and codified John Doe proceedings, contains the following note:

The John Doe procedure which has been established by the courts has been written into 354.025 [now 968.26] to make the remedy more readily available and better understood.

With that, Wisconsin had both a grand jury proceeding and a statutory John Doe proceeding.

2009 Wisconsin Act 24 Changes to John Doe Proceedings

John Doe proceedings were used in a variety of circumstances in Wisconsin because prior to 2009 nearly anyone could initiate them. The law was amended in 2009 to address concerns over perceived abuses by Wisconsin prison inmates, who alleged criminal treatment by corrections staff, thereby evading the normal prison administrative review of prisoner complaints and proceeding directly to circuit court. Dodge County Judge Andrew Bissonnette specifically referenced the issue of inmate misuse of a statute in a memo he submitted to the legislature in support of John Doe reforms, entitled "John Doe Statute Fix-it-Kit." The memo is available in the drafting record of 2007 Senate Bill 537, which was the first legislative attempt to address the inmate situation.

2009 Wisconsin Act 24 was ultimately adopted and signed into law, and it changed the John Doe procedure significantly by limiting who could initiate a proceeding. Prior to 2009, upon complaint by any person of alleged criminal conduct, a circuit court judge was required to examine the complainant and any witnesses the complainant produced before deciding whether to issue a criminal complaint. The amendment to the law requires a judge to proceed with a John Doe inquiry only at the request of a district attorney. Citizens may still make complaints, but after Act 24 a judge is required only to refer complaints to district attorneys, not investigate them, and any investigation that does occur in response to such complaints is discretionary rather than mandatory. The proceeding continues to be mandatory if a district attorney brings a complaint, whether on his or her initiative or in response to a citizen complaint.

Proposed Changes to John Doe Proceedings

Senators Tom Tiffany, Paul Farrow, and Van Wanggaard introduced 2015 Senate Bill 43 on February 19, 2015, and the bill was referred to the Senate Committee on Judiciary and Public Safety.

The bill would narrow the criminal violations eligible to be investigated by a John Doe proceeding. Current law permits any conduct that is prohibited by law and punishable by a fine or imprisonment or both to be investigated by a John Doe proceeding, but under the bill the list of John Doe crimes would be limited to A to D felonies in chapters 940 to 948 and 961, Wisconsin Statutes, and E to I felonies in chapters 940 to 948, Wisconsin Statutes. A John Doe proceeding could also be commenced in response to any alleged crime by state law enforcement or corrections officers while on duty.

Senate Bill 43 would also change the secrecy surrounding a John Doe proceeding. Under current law, a judge may keep a John Doe proceeding secret at his or her discretion, but Senate Bill 43 would remove

that discretion and permit secrecy only in proceedings in which the complaining district attorney can show good cause for the secrecy order. If such an order is issued under the proposed changes in the bill, the order is limited to the judge, the prosecution, law enforcement personnel, and interpreters and reporters required to translate or record the proceeding; it cannot require secrecy from witnesses or other parties.

Senate Bill 43 would impose a six-month limit on John Doe proceedings, which can be extended upon request if a majority of judicial administrative district chief judges finds good cause for the extension. The bill would further require a majority of judicial administrative district chief judges to find good cause to amend the original complaint to add additional crimes before such amendment would be permitted.

Finally, Senate Bill 43 would disclose the costs of John Doe proceedings by making them public record, prohibit temporary or permanent reserve judges from presiding over John Doe proceedings, and allow special prosecutors to be appointed to assist the district attorney only under certain conditions.

FOR MORE INFORMATION

Coffey, William F., and Alan E. Richards. "The Grand Jury in Wisconsin," *Marquette Law Review*, no. 58 (1975): 517-553. <http://scholarship.law.marquette.edu/cgi/view-content.cgi?article=2243&context=mulr>.

John Doe Statute: section 968.26, Wisconsin Statutes. <http://docs.legis.wisconsin.gov/statutes/statutes/968.pdf>.

Wisconsin Court System: <https://www.wicourts.gov/>.

Wisconsin State Law Library Grand Jury Resources: <http://wilawlibrary.gov/topics/justice/jury.php#GRANDJURY>.

Wisconsin State Legislature, 2015 Senate Bill 43. <http://docs.legis.wisconsin.gov/document/proposaltext/2015/REG/SB43.pdf>.