



2009 ASSEMBLY BILL 78

February 24, 2009 - Introduced by Representatives HINTZ, SPANBAUER, TOWNSEND, BALLWEG, SHILLING, VAN ROY, KAUFERT, BERCEAU, ZIEGELBAUER, GARTHWAITE, JORGENSEN, SINICKI, FRISKE, BIES and NERISON, cosponsored by Senators KREITLOW, ERPENBACH, TAYLOR, VINEHOUT, SCHULTZ, HANSEN, LEHMAN, HOLPERIN, KAPANKE and HOPPER. Referred to Committee on Judiciary and Ethics.

1 **AN ACT** *to renumber and amend* 968.26; *to amend* 911.01 (4) (b), 972.08 (2)
2 and 978.045 (1r) (intro.); and *to create* 895.46 (9), 968.26 (1) and 968.26 (2) (b)
3 and (d) of the statutes; **relating to:** judicial discretion in certain John Doe
4 proceedings and the provision of attorney representation of state employees at
5 John Doe proceedings.

Analysis by the Legislative Reference Bureau

Under current law, under a John Doe proceeding, a person who believes a crime has been committed may complain to a judge. Then the judge must ascertain if a crime has been committed. The scope of examination is within the judge's discretion. If the judge determines that a crime has probably been committed, she or he will issue a warrant for the arrest of the accused.

Under this bill, if a district attorney who believes a crime has been committed complains to a judge, the judge must convene a John Doe proceeding as described above except that the judge does not issue a warrant for the arrest of the accused because the district attorney has that ability as under current law. If a person other than a district attorney who believes a crime has been committed complains to a judge, the judge must refer the complaint to the district attorney. If the district attorney refuses to issue a charge, the judge must convene a proceeding if the judge determines that the proceeding is necessary to determine if a crime has been committed. The judge has discretion over the scope of the examination, and the judge may issue a criminal complaint if the judge finds sufficient evidence to warrant

ASSEMBLY BILL 78

prosecution. In determining whether to convene a proceeding, this bill specifies that a judge may consider law enforcement investigative reports, records and case files of the district attorney, and any other written records that the judge finds relevant. In determining whether to issue a complaint, this bill specifies that the judge must consider law enforcement investigative reports, records and case files of the district attorney, and any other written records that the judge finds relevant.

This bill also adds statutory cross-references to three John Doe references to aid individuals in finding the John Doe statute.

Under current law, if an action is brought against a state officer or employee for acts committed while carrying out his or her state duties, and the court finds that the defendant was acting within the scope of his or her employment, the state pays the damages and costs, and provides legal representation or pays the defendant's attorney fees and litigation costs.

This bill provides these protections and benefits to a state officer or employee who is the subject of a John Doe proceeding if the charge is for an act done within the person's official capacity, within the scope of the person's employment, and the attorney general determined that the person was acting in good faith. In addition, these protections and benefits apply regardless of the attorney general's determination of good faith if the person is found not guilty in a criminal action commenced as the result of the John Doe proceeding. The bill provides that the protections and benefits provided include the payment of attorney fees, costs, and fines arising out of the criminal action.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 895.46 (9) of the statutes is created to read:
2 895.46 (9) The protection afforded by this section applies to a proceeding under
3 s. 968.26 in which a state officer or state employee is a subject to charges for acting
4 within his or her official capacity, if that officer or employee is found to be acting
5 within the scope of his or her employment, and if the attorney general determines
6 that the state officer or state employee acted in good faith. Regardless of the
7 determination made by the attorney general, the protection afforded by this section
8 applies if the state officer or employee is not found guilty in the criminal action
9 commenced as a result of the proceeding under s. 968.26. This protection includes

ASSEMBLY BILL 78

1 the payment of reasonable attorney fees in defending the criminal action and costs
2 or fines arising out of the criminal action.

3 **SECTION 2.** 911.01 (4) (b) of the statutes is amended to read:

4 911.01 (4) (b) *Grand jury; John Doe proceedings.* Proceedings before grand
5 juries or a John Doe proceeding under s. 968.26.

6 **SECTION 3.** 968.26 of the statutes is renumbered 968.26 (2) (a) and amended
7 to read:

8 968.26 (2) (a) If a person who is not a district attorney complains to a judge that
9 he or she has reason to believe that a crime has been committed within ~~his or her~~ the
10 judge's jurisdiction, the judge shall refer the complaint to the district attorney.

11 (c) In a proceeding convened under par. (b), the judge shall subpoena and
12 examine the complainant under oath the complainant and any witnesses produced
13 by him or her and may, and at the request of the district attorney shall, subpoena and
14 examine other witnesses that the judge determines to be necessary and appropriate
15 to ascertain whether a crime has been committed and by whom committed. The
16 judge shall consider the credibility of testimony in support of and opposed to the
17 person's complaint.

18 **(3)** The extent to which the judge may proceed in the an examination under sub.
19 (1) or (2) is within the judge's discretion. The examination may be adjourned and may
20 be secret. Any witness examined under this section may have counsel present at the
21 examination but the counsel shall not be allowed to examine his or her client,
22 cross-examine other witnesses, or argue before the judge. ~~If it appears probable from~~
23 ~~the testimony given that a crime has been committed and who committed it, the~~
24 ~~complaint may be reduced to writing and signed and verified; and thereupon a~~
25 ~~warrant shall issue for the arrest of the accused.~~ Subject to s. 971.23, if the

ASSEMBLY BILL 78**SECTION 3**

1 proceeding is secret, the record of the proceeding and the testimony taken shall not
2 be open to inspection by anyone except the district attorney unless it is used by the
3 prosecution at the preliminary hearing or the trial of the accused and then only to
4 the extent that it is so used. A court, on the motion of a district attorney, may compel
5 a person to testify or produce evidence under s. 972.08 (1). The person is immune
6 from prosecution as provided in s. 972.08 (1), subject to the restrictions under s.
7 972.085.

8 **SECTION 4.** 968.26 (1) of the statutes is created to read:

9 968.26 (1) If a district attorney requests a judge to convene a proceeding to
10 determine whether a crime has been committed in the court's jurisdiction, the judge
11 shall convene a proceeding described under sub. (3) and shall subpoena and examine
12 any witnesses the district attorney identifies.

13 **SECTION 5.** 968.26 (2) (b) and (d) of the statutes are created to read:

14 968.26 (2) (b) If a district attorney receives a referral under par. (a), the district
15 attorney shall, within 90 days of receiving the referral, issue charges or refuse to
16 issue charges. If the district attorney refuses to issue charges, the district attorney
17 shall forward to the judge in whose jurisdiction the crime has allegedly been
18 committed all law enforcement investigative reports on the matter, his or her records
19 and case files on the matter, and a written explanation why he or she refused to issue
20 charges. The judge shall convene a proceeding as described under sub. (3) if he or
21 she determines that a proceeding is necessary to determine if a crime has been
22 committed. When determining if a proceeding is necessary, the judge may consider
23 the law enforcement investigative reports, the records and case files of the district
24 attorney, and any other written records that the judge finds relevant.

ASSEMBLY BILL 78

1 (d) In a proceeding convened under par. (b), the judge may issue a criminal
2 complaint if the judge finds sufficient credible evidence to warrant a prosecution of
3 the complaint. The judge shall consider, in addition to any testimony under par. (c),
4 the law enforcement investigative reports, the records and case files of the district
5 attorney, and any other written reports that the judge finds relevant.

6 **SECTION 6.** 972.08 (2) of the statutes is amended to read:

7 972.08 (2) Whenever a witness attending in any court trial or appearing before
8 any grand jury or John Doe investigation under s. 968.26 fails or refuses without just
9 cause to comply with an order of the court under this section to give testimony in
10 response to a question or with respect to any matter, the court, upon such failure or
11 refusal, or when such failure or refusal is duly brought to its attention, may
12 summarily order the witness's confinement at a suitable place until such time as the
13 witness is willing to give such testimony or until such trial, grand jury term, or John
14 Doe investigation under s. 968.26 is concluded but in no case exceeding one year. No
15 person confined under this section shall be admitted to bail pending the
16 determination of an appeal taken by the person from the order of confinement.

17 **SECTION 7.** 978.045 (1r) (intro.) of the statutes is amended to read:

18 978.045 (1r) (intro.) Any judge of a court of record, by an order entered in the
19 record stating the cause for it, may appoint an attorney as a special prosecutor to
20 perform, for the time being, or for the trial of the accused person, the duties of the
21 district attorney. An attorney appointed under this subsection shall have all of the
22 powers of the district attorney. The judge may appoint an attorney as a special
23 prosecutor at the request of a district attorney to assist the district attorney in the
24 prosecution of persons charged with a crime, in grand jury proceedings or John Doe
25 proceedings under s. 968.26, in proceedings under ch. 980, or in investigations. The

ASSEMBLY BILL 78

1 judge may appoint an attorney as a special prosecutor if any of the following
2 conditions exists:

3 **SECTION 8. Initial applicability.**

4 (1) This act first applies to complaints made on the effective date of this
5 subsection.

6 (END)