2007 DRAFTING REQUEST

Bill

Received: **02/13/2008**

Received By: **chanaman**

Wanted: **As time permits**

Identical to LRB:

For: **Lena Taylor (608) 266-5810**

By/Representing: **Ron Sklansky**

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Carbon copy (CC:) to: **ron.sklansky@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

John Doe proceedings; judicial discretion option

Instructions:

See Attached

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From Rob Skrandy

"As will become clear, the circuit judge in this case applied his common sense and reasonably concluded that conducting a John Doe hearing would be a waste of time. Nonetheless, we ... reverse, because the circuit judge reached this reasonable conclusion by assessing credibility and choosing between competing inferences. The John Doe statute.....does not permit this sort of analysis...."

Wis. Court of Appeals, State ex rel Williams v. Fiedler, 2005 WI App 91, ¶ 2.

John Doe Statute Fix-it-Kit

Submitted by Judge Andrew Bissonnette

February 13th, 2008

"We have no hesitancy in declaring that the John Doe proceeding inherently fails to account for the public interest...."

Wis. Court of Appeals , State v. Schober, 167 Wis.2d 371, (1992)

Preface

There has been a great deal of press recently about the alleged misuse of the John Doe Statute by prison inmates against correctional staff. The resulting efforts by the DOC, prison union, and state legislature has been the introduction of AB 695 and SB 432.

The undersigned judge sits in Dodge County and has had many such John Doe petitions filed in his court.[1] In fact, I have conducted three hearings on such petitions within the past year or so, and filed two complaints against correctional staff, setting off the political agitation bringing us up to this moment. Therefore if there is anything that I can do to help solve this mess, I will do it. I appeared before the Assembly Committee on the Judiciary and Ethics on Thursday, January 31st, but time did not allow me to give oral testimony. I did file my written testimony in favor of AB 695 with the Committee.

I have been led to believe that AB 695 may not be politically viable and that the John Doe fix will need to come in a different form. Only the legislature can determine if that is true or not, but if it is, I write this in an effort to help equip those policy makers with the necessary tools to assess the various options and to make forward progress on this important issue.

---

[1] We have four prisons in Dodge County and consequently we see many inmate petitions of all kinds.

Survey of current statutes and caselaw interpretation.

I strongly urge anyone reading this document to take the time necessary to read this section. While it may take you 15 or 20 minutes, it represents a distillation of many hours of reading and analyzing the cases. More importantly, it will give the reader a rock solid feeling for the legal landscape upon which you tread. Knowing the landscape and the landmarks thereon will enable policy makers to both recognize the problems of the existing statute and to move more confidently towards their prompt solution.

One of the possible remedies is to utilize Wis. Stat. § 968.02(3), a closely related statute to the John Doe statute. The discussion below will acquaint the reader with both the similarities and the differences between those two statutes. The caselaw also provides a solid history of how lawmakers have relied upon the courts, since statehood, to provide oversight in the important determination of whether a criminal case should be filed. Lastly, the caselaw clearly portrays the inherent problems of the existing John Doe statute.

968.02 Issuance and filing of complaints.

(1) Except as otherwise provided in this section, 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. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint.

.....

(3) 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.

968.26 John Doe proceeding.

If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge **shall** examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. 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. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

STATE v. WASHINGTON
Wis. Supreme Court, 83 Wis.2d 808 (1978)

This case was the first real exhaustive review and analysis of the John Doe law and its constitutionality. In a wide-ranging and thoughtful opinion, then–Associate Justice Shirley Abrahamson declared the statute to be constitutional and explained how it worked. In doing so, she laid out black letter principles of law which still stand regarding the role and powers of the John Doe judge.

Hazel Washington argued that the John Doe statute created an unconstitutional shift of executive powers to the judiciary, ie. the powers to investigate crime and to issue criminal charges. Washington and the state had vastly different perceptions of the role of the judge in a John Doe proceeding. Justice Abrahamson took us on a historical tour that led all the way back to the Wisconsin Territorial Statute of 1839. That statute was the precursor of our current John Doe law, but allowed judges even greater responsibility for making charging decisions. In fact, district attorneys would not have any authority to issue a criminal complaints in Wisconsin for yet another one hundred years.

Justice Abrahamson noted that, "the original statute was not intended to create a primarily investigative proceeding. Rather, it set forth the procedure governing the determination of probable cause for the issuance of warrants generally, a function served after the 1949 revision of the statute." See page 819. Although the state likened the John Doe judge's power to that of a judge reviewing a warrant application, Justice Abrahamson noted some important differences.

> The John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers..... Under § 968.26, Stats., the John Doe judge "may, and at the request of the district attorney shall, subpoena and examine witnesses to ascertain whether a crime has been committed and by whom committed." The statute confers upon the John Doe judge the power to determine the extent of the examination, as well as the power to determine whether the examination will be secret. The John Doe investigation is essentially limited to the subject matter of the complaint upon which the John Doe is commenced. The John Doe judge has no authority to ferret out crime wherever he or she thinks it might exist. Page 822

Justice Abrahamson also noted the importance of the John Doe as a prosecutorial tool when used by a district attorney;

> By invoking the formal John Doe investigative proceeding, law enforcement officers are able to obtain the benefit of powers not otherwise available to them, *i.e.*, the power to subpoena witnesses, to take testimony under oath, and to compel the testimony of a reluctant witness. Pages 822-23

Although it was usual for the district attorney to initiate and conduct proceedings, the Court noted that sec. 968.26 did not require the DA's involvement, nor does it clearly set forth the DA's duties. Going further, Justice Abrahamson noted that the judge must act impartially and ultimately concluded that the John Doe judge served an essentially judicial function. Significantly, this case acknowledged the role that judges had played, either primarily or in an oversight role, in reviewing and issuing criminal charges since 1839.

UNNAMED PETITIONERS v. CONNORS,
Wis. Supreme Court, 136 Wis.2d 118 (1987)

Interesting historical decision by the Wisconsin Supreme Court. Chief Justice Nat Heffernan writing for the majority. The issue was whether § 968.02(3), above, allowed an unconstitutional encroachment by the judiciary onto the executive branch's power to issue criminal charges. Quoting from the case:

> In the case before us, the statute would allow the circuit judge to permit the filing of a complaint after the district attorney, in the exercise of his discretion, determined that no criminal charge should issue. Under the statute, the judge can commence the action after completely substituting her judgment for that of the prosecutor. The statute provides no guidelines for the action except for the legal standard of "probable cause." Page 122
>
> Wisconsin decisional law has repeatedly held that the discretion to charge or not to charge, and the discretion of how to charge, rests solely with the district attorney. Page 128

Because the Chief Justice thought the statute was so clear on its face, he decided not to examine its legislative history, a decision he came to rue only two years later. Justice Abrahamson, wrote a concurring opinion in which she took issue with the majority's determination that the prerogative to prosecute was some kind of inherent constitutional power of the executive.

> The majority opinion could be read to say that § 968.02(3) fails because it divests the district attorney of some kind of inherent executive powers. I disagree with such a reading. This court has stated that "the position of district attorney, though constitutional, was not one of inherent powers, but was answerable to specific directions of the legislature."...."there is no basis for holding that his duties in representing the state are not subordinate to legislative discretion as to the cases in which he shall proceed. Page 149

Justice Steinmetz authored a vigorous dissent in which he likened § 968.02(3) to the John Doe statute and noted that the Court had already passed favorably on that statute in the Washington case (above). His position will become the majority opinion in just two years

STATE v. UNNAMED DEFENDANT,
Wis. Supreme Court 150 Wis.2d 352 (1989)

On the strength of the Connors case, above, the defense in this case argued that the John Doe statute also represented an unconstitutional delegation of prosecutorial power to the courts. Writing again for the majority, Chief Justice Heffernan does an about face, not only reaffirming the constitutionality of the John Doe statute, but also overruling the precedent in Connors and declaring § 968.02(3) to also be constitutional as well.[2]

---

[2] The Chief Justice's reversal of himself in such short order prompted him to quote several prior jurists who found themselves in a similar situation. These quotes are worth the price of admission. An example: " An aphorism of Mr. Justice Frankfurter provides me refuge: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late." At page 368.

Why the difference? This time the Court did its homework and again took a historical look at prosecutorial powers in Wisconsin. The Chief Justice noted that the precursor of our John Doe statute was already in place in Wisconsin well before statehood. Page 362-63. The Wisconsin Territorial Statute of 1839 included much of what we see in the John Doe Statute today.[3]

Not only that, but Wisconsin law provided that only magistrates (judges) could issue criminal complaints from 1839 until 1945. From 1945 until 1969, Wisconsin statutes first allowed for a shared exercise of the charging power between judges and district attorneys. Not until 1969 did the legislature first create §68.02(1), expressing a preference for district attorneys to do the charging. At the same time, the legislature left the historical vestige in place, by creating (3), to continue providing judicial oversight to issue charges where necessary. See discussion at pages 362-63. Essentially Chief Justice Heffernan declared that if the courts having the power to issue criminal charges was good enough for the framers of our state constitution in 1848, it is good enough for us now as well. Page 362-63.

The Chief Justice also gave us a nice "compare and contrast" of sections 968.02(3) and 968.26:

> We note that in contrast to § 968.26 (the John Doe criminal proceeding), § 968.02(3) (which was the subject of *Connors*) provides for more judicial discretion in the charging function. Section 968.02(3) is operative in specific circumstances: in absence of the district attorney or after a refusal of district attorney to initiate prosecution. Moreover, § 968.02(3) allows judges greater discretion: the John Doe judge "shall" charge upon finding probable cause, whereas a judge under § 968.02(3) "may permit" the filing of a complaint. Page 366

The current debate on the proper approach to revising the John Doe statute centers on striking the proper balance between thwarting improper use of the statute by private citizens versus keeping the process open to private citizens. Two concurring opinions in this 1989 decision give eloquent voice to each of these competing interests. Chief Justice Heffernan, in a concurring opinion to his own majority opinion, expressed his concern about how selfish private interests could trump the public interest in applying these statutes:

> As the author of the majority opinion, I agree with it and join it; but I cannot but feel a sense of unease over the validation of secs. 968.02(3) and 968.26, Stats., when viewed from a public policy aspect. I therefore write additionally in concurrence. The criminal law reform undertaken by the Criminal Rules Committee of the Judicial Council had as one of its purposes the elimination of the last vestiges of the pernicious practice of private prosecutions by persons who owe no allegiance to society as a whole.
>
> Both of the statutes validated here in make it possible for persons to trigger the prosecutorial powers of the state *in any kind of criminal action* where "probable cause" can be established. No consistent prosecutorial policy in respect to the initiation of charges can be maintained under these circumstances. **What will be charged can lie within the whim of any complainant.**

---

[3] Section 2, chapter 369 of the Territorial Statutes of Wisconsin (1839), provided:
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 offence has been committed, the court or justice shall issue a warrant reciting the substance of the accusation .

> 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. (Emphasis added.) Page 367-68

In his concurring opinion, Associate Justice Roland Day voiced the concern of those who want to see the process remain open to all citizens:

> In this period when we see interest in "victim's rights" coming to the fore, certainly having one's tormentor brought to justice should be near the top of any victim's rights program, second only to the right not to be a victim in the first place. Page 370-71.
>
> Crime victims should have recourse to the judicial branch when the executive branch fails to respond. This seems to me to be in keeping with constitutional rights. Page 372.

Back to the future: 1991 legislative activity on John Doe

As I was wrapping up my research, I discovered that back in 1991, there was a proposal to amend the John Doe statute by having the judge consider prosecutive merit. See **LRB-2492**. There is even a draft stating factors the court could consider, such as the amount of admissible evidence available in support of the charge; the extent of the harm caused by the crime; the disproportion of the authorized punishment versus the nature of the crime alleged; possible improper motives of the complainant; cooperation of the accused in the conviction of others; and availability and likelihood of prosecution by another jurisdiction. This was **1991 SB 161**. The microfiche copies are kind of hard to read, but either that bill was amended, or it failed and another bill was pushed thru. **1991 Act 88** was passed, changing one word in the John Doe statute. Upon a judge finding probable cause after a John Doe hearing, "the complaint ~~shall~~ may be reduced to writing".[4] Therefore it appears that courts are no longer compelled to issue complaints, but are still allowed to do so, upon a finding of mere probable cause. However, all of the other problems with the John Doe statute identified in this paper still apply (the required hearings, the required witnesses, the prohibitions against weighing the evidence and considering credibility, etc.).

STATE v. SCHOBER, 167 Wis.2d 371 (Ct.App. 1992)

In this Court of Appeals case, the criminal complaint had been issued by another judge as the result of a John Doe hearing. A special prosecutor was appointed to prosecute the criminal case, but ultimately determined that the case lacked prosecutive merit. Therefore the prosecutor moved to dismiss. The judge in the criminal case refused to dismiss, based on the fact that his colleague had already determined that the case had merit in issuing the original complaint.

[4] No appellate case since 1991 has specifically discussed the significance of this change.

The Court of Appeals reversed here, first discussing the difference between a court and a judge, noting that the John Doe statute refers to judge and not court.[5] More importantly, the trial court was working under a misapprehension of the significance of a finding of probable cause in a John Doe case. The Court of Appeals noted as follows:

> The underlying theme of this reasoning would seem to be the belief that the John Doe judge actually weighs the credibility of the witnesses at the outset, choosing between conflicting facts and inferences. The end result is that when the John Doe judge decides to order the complaint to be issued, that judge has ordained prosecution to verdict to be in the public interest. Page 381.
>
> If this was the reasoning of the trial court, ... the trial court was wrong. Wisconsin case law is replete with instances where the appellate courts have ruled that judges hearing probable cause determinations may not weigh inculpatory evidence against evidence supporting the defendant, may not delve into the credibility of witnesses, and may not choose between conflicting facts and inferences Page 381
>
> **We have no hesitancy in declaring that the John Doe proceeding inherently fails to account for the public interest** beyond the requirement of probable cause. If a contrary reading was meant by the trial court, we reject it. (Emphasis added.) Page 382

STATE v. CUMMINGS,
Wis. Supreme Court, 199 Wis.2d 721 (1996)

Writing for the majority, Justice Steinmetz addressed the question of whether a district attorney had authority to file a criminal complaint during the pendency of a John Doe against the same defendant. The question was answered thusly:

> We find that the existence of a John Doe proceeding does not affect the ability of a prosecutor to charge a defendant with any crime, even if the charge includes a crime that was the basis for the initiation of the John Doe. Page 743
>
> .....
>
> In fact, we see no reason why a district attorney could not independently file a complaint based solely upon evidence obtained through a John Doe proceeding, even if it was the district attorney who initiated the John Doe. Page 744-45

The significance of this point is that in my suggested revision, I eliminate any reference at all to the judge issuing a complaint in a John Doe filed by the district attorney. The district attorney clearly has authority to do that, and in those cases where the DA is involved, the DA should exercise that responsibility.

---

[5] "The result of a John Doe proceeding is not an order by a circuit court that the judicial branch of government has determined to try the case to the bitter end. First of all, the John Doe tribunal is not acting as a "court," but as a "judge." . There is an express distinction between a judge and a court. . An order issued by a judge in a John Doe proceeding is not a judgment or order of a circuit court. This is no doubt why the John Doe tribunal is referred to as a "magistrate" rather than the "court." Thus, the trial court's initial premise that it would be overruling another circuit court is incorrect." Page 379

STATE EX REL. REIMANN v. CIRCUIT CT. FOR DANE,
Wis. Supreme Court, 214 Wis.2d 605 (1997)

Another seminal case John Doe caselaw development. Justice Steinmetz writing again for the majority in the Supreme Court. Reimann had petitioned a trial judge for a John Doe proceeding and the judge denied it without conducting any hearing. Reimann sought and here obtained a supervisory writ here compelling the judge to conduct such a hearing.

The discussion in the Supreme Court had to do with what such a petitioner must establish before a trial judge in order to be entitled to a hearing. The answer was "not much" (not actually a quote from the case).

> ¶ 9. The obligation Wis. Stat. § 968.26 places on circuit court judges is clear and unambiguous.....
> .....
> ¶ 11. .....The operative clause of Wis. Stat. § 968.26 provides: "If a person complains to a judge *that he or she has reason to believe that a crime has been committed* . . ." (emphasis added). As we view this language, there is one prerequisite to triggering the judge's duty to examine the complainant — that the complainant first establish that he or she has "reason to believe" that a crime has been committed.

The Supreme Court went on to establish that the "allegation must be supported by objective, factual assertions before a circuit court judge is required to conduct an examination of the complainant." ¶15. They explained that a petition alleging only conclusory allegations and opinions would be deemed insufficient. This requirement, said the Court, "allows the judge to screen for and weed out groundless and frivolous petitions without requiring further proceedings that may be injurious to the accused." ¶20. Note, however, that this standard only would be effective to weed out conclusory allegations, and not allegations alleging specific facts. There is no indication or explanation of how a petition would be determined to be "groundless or frivolous" beyond the specificity of its allegations. In fact, the Court specifically held that a petitioner need not show probable cause before a hearing must be held.[6]

The significance of this case is obviously that there is a very low threshold for petitioners before the judge is compelled to conduct a hearing, and there is clearly no allowance for the judge to consider credibility, to weigh the evidence, or anything of that sort. A person intent on misusing the statute can easily make up specific factual allegations out of whole cloth and such a petition would survive the Reimann standard.

IN MATTER OF JOHN DOE PROCEEDING
Wis. Supreme Court, 2003 WI 30

Dane County DA Brian Blanchard initiated John Doe proceedings to investigate whether certain legislators were allegedly using their offices for illegal campaign activity. A series of issues

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[6] Quoting from ¶ 25: We do not equate this "reason to believe" standard of Wis. Stat. § 968.26 with the probable cause required to support a criminal complaint. There is no requirement that a finding of probable cause be made before a John Doe proceeding is commenced. To the contrary, the statute prescribes that a determination of probable cause is to be made after subpoena and examination of the witnesses.

resulted and were brought to the Court of Appeals. That court certified several questions, including the following issue, to the Wisconsin Supreme Court: Does the Court of Appeals have jurisdiction to issue a supervisory writ to a John Doe judge? The Supreme Court answered this question in the affirmative.

The Supreme Court's analysis determined that a John Doe judge is not sitting as a court of record, but rather as a tribunal. Although such conduct is not reviewable by direct appeal, it is subject to a supervisory writ.

> ¶ 23. .....Therefore, an order issued by a judge in a John Doe proceeding is not a judgment or order of a circuit court. Thus, it is well settled that a John Doe judge's actions are not directly appealable to the court of appeals because an order issued by a John Doe judge is not an order of a "circuit court" or a "court of record."
>
> .....
>
> ¶ 41. .....However, we have concluded that such actions are subject to review pursuant to a petition for supervisory writ. With respect to the court of appeals' concern that the final determination in a John Doe proceeding is not subject to direct appeal, we note that all that can issue from a John Doe proceeding is a complaint. The validity of such a complaint will be scrutinized in the circuit court. For example, probable cause to bind over for arraignment and trial may be tested in a preliminary examination in the circuit court.. In this sense, then, the final determination of a John Doe proceeding is subject to review.

Therefore, while the ultimate decisions of the John Doe judge are not directly reviewable, the Court of Appeals may issue supervisory writs compelling the John Doe judge to do such things as to conduct a John Doe hearing (Reimann and the Fiedler case, below), or to subpoena all of the complainant's witnesses in a John Doe (the Hipp case, below). In other words, trial judges are not free to simply turn a blind eye to the existing statute, as poorly worded as it may be.

STATE EX REL. KALAL v. CIRCUIT COURT
Wis. Supreme Court , 2004 WI 58 .

Here a Madison attorney petitioned a circuit judge under **§ 968.02(3)** to issue a criminal complaint against her former employer for having stolen money that was intended for her pension plan. The trial judge conducted a hearing, and, finding probable cause, issued the complaint.

As we have seen from this statute, above, the judge only has power to act under it if the District Attorney has refused or is unavailable to issue charges. Attorney Kalal argued in the subsequent criminal case that in fact the Dane County DA had never refused to issue charges. The issue in the case: How does one establish whether a DA has refused to issue charges?

The Court took a very common sense approach in answering that question.

> As with other elements of courtroom proof, a refusal under this statute may be proven directly or circumstantially, by inferences reasonably drawn from words and conduct. Thus, a refusal can be open and explicit, as in a statement to that effect, or it can be indirect and inferred, as in a long silence or period of inaction that, under the totality of circumstances, gives rise to a reasonable inference that the district attorney intends not to act. ¶ 55.

In the approach that I am recommending, the court must first refer any John Doe petitions to the District Attorney and give the DA a chance to investigate and to charge. The court would only have authority to act in the face of a refusal by the DA to charge. This case is therefore significant in that it provides a working definition of "refusal" by a DA to issue charges.

There are some other gems to be gleaned from this case as well. Justice Diane Sykes writing for the majority, summarized this statute in a nutshell:

> ¶ 6. By its terms, Wis. Stat. § 968.02(3) requires the circuit judge to make two determinations prior to authorizing the issuance of a complaint: 1) that "the district attorney *refuses* or *is unavailable* to issue a complaint;" and 2) that "there is probable cause to believe that the person to be charged has committed an offense." The statute contemplates an exercise of discretion by the judge following these threshold determinations: the statute says the judge "may permit" the filing of a complaint. Wis. Stat. § 968.02(3).

Please note that while this statute serves much the same function as the John Doe, the judge is vested with greater discretion. No language saying the judge "shall" do anything, but rather, "may" do something. One of the options here is to redefine the John Doe process as solely a prosecutors tool, and to channel citizen complaints into § 968.02 (3). It is clear from this case that there is no review available from the judge's decision under this statute. See ¶¶ 18-20. Therefore a question for policy makers is whether they would be satisfied in having such citizen petitions handled in a process which vested ultimate discretion in the trial judge, either in conducting the hearing or in filing the complaint (or declining to do so).

There is yet one more nugget in the Kalal case, and that has to do with prosecutorial ethics and prosecutive merit. The level of probable cause referenced in either § 968.02(3) or § 968.26 is merely the lowest of thresholds for considering a criminal prosecution. Ethically, a district attorney may not prosecute a case unless the DA believes that she can prove the charge beyond a reasonable doubt. Again quoting Justice Sykes:

> ¶ 31. We have in prior cases referred to American Bar Association Criminal Justice Standard 3.9 pertaining to the exercise of charging discretion, identifying two circumstances in which prosecutorial charging discretion may be abused: "[t]his standard makes it abundantly clear that . . . it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction. It is also an abuse of discretion for a prosecutor to bring charges on counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ...A district attorney generally should not bring a charge unless he or she believes the evidence can sustain a finding of guilt beyond a reasonable doubt. Not all the guilty are convictable; moreover, convicting all the guilty may not be desirable. Full enforcement of the criminal laws "is neither possible nor desirable."

Policy makers must consider that private citizens filing John Doe petitions are under no such compunction to pursue only meritorious claims. In fact, the current John Doe law makes it just as easy for individuals to pursue totally fabricated claims for personal reasons. Therefore the solution that I am recommending requires judges to consider prosecutive merit before deciding to roll out a criminal complaint and unleashing the power of a criminal prosecution.

STATE EX REL. WILLIAMS v. FIEDLER,
Wis. Court of Appeals, 2005 WI App 91 .

This case is extremely important in terms of both identifying the artificial restrictions imposed upon a judge's employment of his common sense and legal training, as well providing a roadmap of how the statute could be improved. Essentially my proposed change is to legitimize by statute the approach taken by Judge Fiedler in this case. That is not to say that every judge in every case should refuse to conduct a hearing, but rather that the factors considered by Judge Fielder should be available for consideration by all John Doe judges.

Oscar Williams petitioned Judge Patrick Fiedler for a John Doe petition, alleging that he was beaten by one Joseph Heise outside a State Street bar at 2:30 in the morning. He further alleged that the Dane County DA had refused to file a charge against Heise. Taking his responsibility seriously, Judge Fiedler asked the DA for a copy of the police reports and any other investigative records regarding this incident. He received those reports, along with a letter from the DA. Quoting from the case:

> ¶ 11. After reviewing Williams' petition, the district attorney's letter, and the police reports, the circuit judge denied Williams' petition. The judge wrote:
>
> The court notes from its review of the City of Madison incident report that the Madison Police Department did conduct an investigation of the allegations and that the petitioner was not cooperative. According to the incident report, there are no independent witnesses to corroborate the allegations made by the petitioner. .The alleged assailant has cooperated with the police and indicated that the petitioner came at him with a knife and that the alleged assailant was acting in self-defense.. Based upon my review of the incident reports, I am satisfied that a John Doe proceeding is not necessary, as it would simply be an effort to duplicate what the City of Madison Police Department has already done. I am further satisfied that a review of these materials and of the petition leads me to conclude that the petitioner has failed to allege facts sufficient to raise a reasonable belief that a punishable, or, for that matter provable, crime has been committed. Thus, in the exercise of my discretion, I'm DENYING the petition without an examination.

The Court of Appeals here reversed, employing the language quoted at the very top of this document. A judge using his common sense and reaching a reasonable conclusion is not what the John Doe statute requires, or even permits. Judge Fiedler was reversed because he engaged in the following forbidden behaviors:

(1) he considered the police investigation reports, (¶ 23-24);
(2) he considered a letter from the district attorney;
(3) he considered the issue of credibility, ¶ 20;
(4) he weighed the evidence on each side, ¶ 20;
(5) he considered that the complainant (Williams) had refused to cooperate with the police investigation;
(6) he considered that Heise had cooperated with the police and said that Williams had attacked him with a knife and that he, Heise, was acting in self-defense;
(7) he considered, essentially, the prosecutive merit of the case ¶ 22; and
(8) he considered that the resulting hearing would have been a waste of valuable public resources, ¶ 22.

Aren't these the very types of behavior that we expect from judges? Don't we expect judges to actually employ their good judgment? Please note that I am not taking the Court of Appeals to task here, because all of the decisions cited above fairly and accurately interpret and enforce the very poorly worded statute that we have on the books. The courts can't fix this thing...only the legislature can do that. The Court of Appeals gave voice to this concern in Fiedler, saying:

> ¶ 22. **We readily acknowledge that the John Doe statute, as construed in *Reimann*, is subject to abuse. This case is a good example.** (Emphasis added.)

Before we look at the alternative remedies, let's stop in at the most recent installment in John Doe caselaw.

State ex rel.Hipp, v. Murray,
Wis. Court of Appeals, 2007 WI App 202

Adrian Hipp was an inmate who in his John Doe petition alleged that after he was arrested on his criminal case, someone went into his apartment and stole some of his personal property. He sought charges against that person in a John Doe petition filed with Milwaukee County Judge Marshall Murray. As it turns out, the alleged perpetrator of the theft from Hipp was the executor of the victim of Hipp's crime. Hipp had made fraudulent charges on the victim's accounts totaling upwards of $40,000, and the executor was trying to seize some of the property Hipp had purchased with the stolen money.

Anyway, Hipp insisted on calling 8 witnesses at the John Doe hearing, and the judge only produced a few of those. The real issue in the case was whether the petitioner in a private citizen John Doe proceeding should have access to the subpoena power of the court. Judge Murray said no, but got reversed. The Court of Appeals agreed with Hipp that, "persons filing a *John Doe* petition may compel witnesses to appear on their behalf." ¶ 8. A closer question might be whether such a petitioner has a right to call every witness he wants to, regardless of the witness ability to provide any relevant testimony in the case.

In these inmate John Doe petitions, I have had to exercise reasonable judgment to ferret out the real purpose of each witness being named and thus determine if the witness might actually have something to contribute versus instances where the petitioner just wants to provide an outing away from the prison for some of his friends. In my proposed fix, the judge reserves the right to determine which named witnesses reasonably need to be called. This is due to the Hipp case.[7]

[7] On November 5, 2007, the Wisconsin Supreme Court accepted the Hipp case for review

Alternatives Approaches to Fixing John Doe

This judge is only aware of one proposal currently pending in bill form, and that is AB 695 and its senate companion, SB 432. That approach blocks access to the John Doe procedure by inmates, as well as those committed as sexually violent persons. I want to lay on the table two additional proposals, one from the Wisconsin Attorney Generals Office and one from the undersigned. By recommending a simple change to the AG's proposal, we will end up having 4 proposals on the table .

ATTORNEY GENERAL'S PROPOSED JOHN DOE LEGISLATION
(Simply put: excludes citizen access to John Doe and to 968.02(3)
and retools John Doe as a prosecutor's tool)

968.26 John Doe proceeding.

(1) IN GENERAL. If a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall convene a John Doe proceeding. The attorney general may file a John Doe complaint where the attorney general has reason to believe that a district attorney, assistant district attorney, or judge has committed a crime in the jurisdiction, whereupon a John Doe proceeding shall be convened. The attorney general's complaint shall be filed with the chief judge of the judicial district where the crime is believed to have been committed who shall assign a judge to preside over the proceeding. In any proceeding initiated by the attorney general, he or she shall have all of the powers of a district attorney as set forth in this section.

(2) SUBPOENAS. The judge, at the request of the district attorney, shall subpoena witnesses. The judge shall issue subpoenas for records upon certification by the district attorney that the information likely to be obtained by the subpoena is relevant to the investigation.

(3) EXAMINATION. The district attorney shall examine the witnesses under oath to ascertain whether a crime has been committed and by whom committed. Any witnesses examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while the client is being examined. The examination may be adjourned and the extent of the examination is within the judge's discretion.

(4) SECRECY. The proceeding shall be secret unless otherwise ordered by the judge. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney or upon the subpoena of a federal grand jury unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

(5) IMMUNITY. The judge, on the motion of the district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085.

(6) CHARGES. The district attorney shall determine whether to issue a criminal complaint. Where the attorney general has determined to issue a complaint under this section, the attorney general shall have all of the powers of a district attorney to prosecute the complaint.

978.045 of the statutes is amended to read:

(1r)(i) There is reason to believe a crime has been committed by the district attorney within the district attorney's jurisdiction.

968.02(3) of the statutes is repealed.

969.01(3) is amended as follows:

(3) Bail for witness. If it appears by affidavit that the testimony of a person is material in any felony criminal or John Doe proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. If the witness is not in court, a warrant for the person's arrest may be issued and upon return thereof the court or John Doe judge may require the person to give bail as provided in s. 969.03 for the person's appearance as a witness. If the person fails to give bail, the person may be committed to the custody of the sheriff for a period not to exceed 15 days within which time the person's deposition shall be taken as provided in s. 967.04.

972.08 is amended as follows:

(1) (a) Whenever any person refuses to testify or to produce books, papers or documents when required to do so before any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court or John Doe judge on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

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

JUDGE BISSONNETTE'S PROPOSAL (in LRB form)

Let's call it the Judicial Discretion Option.

(Simply put: allows John Doe access to citizens, but increases judicial discretion to permit the types of things done by Judge Fiedler in the Fiedler case.)

968.26 John Doe proceeding.

(1) If a district attorney requests a judge to conduct a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall conduct such proceeding consistent with the provisions of (3), and shall subpoena and examine such witnesses as are identified for such purpose by the district attorney.

(2) If a person other than a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within ~~his or her~~ the court's jurisdiction, the judge shall refer such complaint to the district attorney. If the judge determines that the district attorney has received such referral and has refused to issue charges, then the judge shall convene a John Doe proceeding, subject to (3), only if the judge determines that such proceeding is necessary in order to determine if a crime has been committed. In determining whether a John Doe proceeding is necessary and whether to issue a complaint, the judge may consider the contents of law enforcement investigative reports, DOC records, and any other written records the judge finds to be helpful. In such a John Doe, the judge may subpoena and examine the complainant under oath ~~and~~ as well as any witnesses ~~produced by him or her~~ deemed necessary and appropriate by the judge ~~and may, and at the request of the district attorney shall, subpoena and examine other witnesses~~ to ascertain whether a crime has been committed and by whom committed. The judge may consider the credibility of testimony both in support of and opposed to the petition. The judge **(shall) (may only)** issue a criminal complaint if the judge finds that there is sufficient credible evidence to warrant a good faith prosecution of such complaint.

(3) 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. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. ~~If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused~~. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085

Analysis of Alternative Approaches on John Doe

Before comparing the solutions, I want to add a 4th proposal, which is simply the AG's proposal minus the repeal of Sec 968.02(3). What that proposal would do would be to retool the John Doe statute for use by prosecutors only, and channel all citizen petitioners over to § 968.02(3). As we have already seen above, that statute was created by the legislature to provide a check on district attorneys. However, it gives judges much greater discretion than the John Doe in terms of determining whether a hearing must be held. With that proposal on the table, then here is where the four proposals stack up on the scale indicated below.

The top of this scale represents the maximum protection against citizen abuse of the John Doe statute, but also represents the maximum exclusion of citizens from the John Doe and/ or §968.02(3).
1st option: The AGs proposal, unmodified. Total citizen exclusion from both statutes
2nd option. AB 695/ SB432. Exclusion of inmates from the John Doe statute only.
3rd option. The AGs proposal but without repeal of 968.02(3). No citizen access to John Doe, but leave door open to 968.02(3).
4th option. Judicial Discretion model. My proposal: allow citizen access to both statutes, but make much needed repairs to the John Doe statute.
5th option. Do nothing- leave both statutes as they are.
The bottom of the scale represents maximum access for citizens to seek judicial relief from a DA's refusal to charge. The 5th option, doing nothing, also represents the maximum opportunity for abuse/ misuse of the John Doe statute by private citizens

It should be crystal clear that how the legislature balances the competing interests at stake is clearly a policy decision. Frankly, as a judge from a county with four prisons, any of the four revision alternatives would be an improvement over the current law. The first couple of proposals have the benefit of simplicity and they would resolve the current problems of the DOC. On the other hand, I understand that there may be a legitimate concern in the legislature with limiting citizen access to these procedures. Assuming for the sake of discussion that that is true, and that such concern represents a significant impediment to ultimate passage of either proposal, then I would recommend either the 3rd option or the 4th option.

The benefit of the **3rd option** is that **the AG** has done a nice job of rewriting the John Doe statute consistent with many current practices, ie., issuing subpoenas, granting immunity, access to counsel, confidentiality, etc. It also clearly allocates responsibility for the issuance of any complaint to the DA and not the judge, which is where the responsibility should lie in DA-initiated cases. Finally, with the change that I suggested above, citizens would still have access to the courts through § 968.02(3). The policy issue for legislators considering the difference between the 3rd option and the 4th option is whether they want citizens to have a right of recourse to the Court of Appeals if they feel aggrieved by a judge's decision not to conduct a hearing.

The **4th option** essentially allows judges to employ common sense and do the right thing in John Doe cases....a very refreshing change in the John Doe statute. It creates 968.26(1) for use only by district attorneys. It creates subsection (2) for use by citizens, but elevates the amount of discretion to be exercised by the judge in such cases, essentially vesting the judge with the obligation/ opportunity to consider prosecutive merit. Some may say that that should not be the prerogative of the judge, but the statutory and caselaw review above establishes that judges have long been vested with one aspect or another of the charging decision, and for a period of time far exceeding the recent involvement of DAs. Also, if we are to allow citizens access to judges for oversight on DA's charging decisions, the public interest should still be a factor taken into account.

In the judicial discretion option, subsection (3) would apply to both citizen-based and DA-based John Does. However, I have totally eliminated from (3) the provision that the judge issue a complaint upon a finding of probable cause. The involvement of judges in issuing complaints on citizen-based petitions is already dealt with in (2), and for DA-initiated petitions, it is unnecessary. We have already visited the caselaw providing that the DA can issue a complaint based upon a John Doe, and so there is no need for the judge to do so when a DA is involved.

The judicial discretion proposal also clarifies that the judge ultimately has to determine who the relevant witnesses are in citizen based petitions, to avoid the problem in Hipp. It also permits the judge to consider available law enforcement records and other records, to weight the evidence on each side, and to consider the issue of credibility. It is entirely expected that district attorneys would review law enforcement investigative reports in order to determine if there is sufficient prosecutive merit to move forward into the charging stage. If judges are going to be expected to conduct any meaningful review of that decision, it seems that the judges should be allowed to review those same records.

At the last minute, I have provided alternative language towards the bottom of sub section (2) of the judicial discretion proposal. You need to choose between "shall', and "may only" (issue a complaint). Obviously the one provision makes the filing of a complaint mandatory if certain conditions are met: the other is permissive, ie., no requirement to file even if the conditions are met. I don't mean to confuse you, but a fix-it kit should include all of the possible tools you may need.

I am willing to answer questions. I am willing to testify at legislative hearings. I am unwilling and unable to try to form coalitions between the various parties in interest or to try and develop some consensus among the legislators. You folks who work in, or with, the legislature need to do those things. I already have another job.

Finally, I should add that the 5th option, doing nothing, should be unacceptable to everyone involved. Hopefully this document will assist you in coming to a reasonable solution.

Respectfully submitted,
Andrew P. Bissonnette
Dodge County Circuit Judge

State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-4090/?
CMH:.../...

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** judicial discretion in 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 complains to a judge, the judge must convene a John Doe proceeding as described above except the judge does not issue a warrant for the arrest of the accused because the district attorney has that ability under current law. If a person other than a district attorney complains to a judge, the judge must refer the complaint to the district attorney. If the district attorney does not issue charges, 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 prosecution. In determining whether to convene a proceeding and whether to issue a complaint, this bill specifies that a judge may consider law enforcement investigative reports, Department of Corrections records, and any other written records.

This bill also adds statutory cross-references to John Doe references to allow individuals to identify where the John Doe statute is.

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:

SECTION 1. 911.01 (4) (b) of the statutes is amended to read:

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

History: Sup. Ct. Order, 59 Wis. 2d R1, R366 (1973); 1977 c. 305 s. 64; 1977 c. 345; 1979 c. 32 s. 92 (16); 1981 c. 183, 367, 390, 391; 1987 a. 208, 398; 1991 a. 40, 269; 2001 a. 61, 109; 2005 a. 434.

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

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

(c) In the proceeding, the judge may subpoena and examine the complainant under oath and subpoena and examine any witnesses ~~produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses~~ that the judge determines to be necessary and appropriate to ascertain whether a crime has been committed and by whom committed. The judge may consider the credibility of testimony in support of and opposed to the petition.

(3) The extent to which the judge may proceed in ~~the~~ an examination is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. ~~If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be~~

~~reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused.~~ Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

History: 1989 a. 122; 1991 a. 88, 223, 315.

SECTION 3. 968.26 (1) of the statutes is created to read:

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

SECTION 4. 968.26 (2) (b), (d) and (e) of the statutes are created to read:

968.26 **(2)** (b) If the district attorney refuses to issue charges on the complaint referred to him or her under par. (a), the judge shall convene a proceeding if he or she determines that a proceeding is necessary to determine if a crime has been committed.

(d) The judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint.

(e) When determining whether the proceeding is necessary under par. (b) and when determining whether to issue a complaint under par. (d), the judge may consider law enforcement investigative reports, the records of the department, and any other written records that the judge finds relevant.

SECTION 5. 972.08 (2) of the statutes is amended to read:

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

History: 1979 c. 291; 1989 a. 122; 1993 a. 98, 486.

SECTION 6. 978.045 (1r) (intro.) of the statutes is amended to read:

978.045 **(1r)** (intro.) 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. 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 or John Doe proceedings under s. 968.26, 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:

History: 1989 a. 117; 1991 a. 39, 188; 1993 a. 16; 1995 a. 27; 1997 a. 27; 2005 a. 434.

SECTION 7. Initial applicability.

proceedings

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

(END)

Hanaman, Cathlene

From: Sklansky, Ron
Sent: Monday, February 18, 2008 9:04 AM
To: Hanaman, Cathlene
Subject: LRB 4090/1--John Doe proceedings

Cathlene:

Senator Taylor would like one change to LRB 4090/1. On page 3, line 17, s. 968.26 (2) (b) should read:

> After a referral under par. (a), if the district attorney refuses in writing to issue charges or takes no action within 90 days, the judge shall convene a proceeding under sub. (3) if the judge determines that a proceeding is necessary to determine if a crime has been committed.

This language clarifies that the process must move along in some fashion. I removed the phrase "and does not request under sub. (1) a judge to convene a proceeding" because it is redundant; the district attorney always has the authority to act under sub. (1) and begin the process.

Let me know if you have any questions or comments. Thanks.

Ron

State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-4090/1
CMH:cjs:jf

2007 BILL

AN ACT ***to renumber and amend*** 968.26; ***to amend*** 911.01 (4) (b), 972.08 (2) and 978.045 (1r) (intro.); and ***to create*** 968.26 (1) and 968.26 (2) (b), (d) and (e) of the statutes; **relating to:** judicial discretion in 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 does not issue charges, 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 prosecution. In determining whether to convene a proceeding and whether to issue a complaint, this bill specifies that a judge may consider law enforcement investigative reports, Department of Corrections records, and any other written records.

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

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:

SECTION 1. 911.01 (4) (b) of the statutes is amended to read:

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

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

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

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

(3) The extent to which the judge may proceed in ~~the~~ an examination under sub. (1) or (2) is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses, or argue before the judge. ~~If it appears probable from~~

~~the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused.~~ Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

SECTION 3. 968.26 (1) of the statutes is created to read:

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

SECTION 4. 968.26 (2) (b), (d) and (e) of the statutes are created to read:

968.26 **(2)** (b) ~~If~~ the district attorney refuses to issue charges, ~~and does not request under sub. (1) a judge to convene a proceeding, on the complaint referred to him or her under par. (a),~~ the judge shall convene a proceeding described under sub. (3) if the judge determines that a proceeding is necessary to determine if a crime has been committed.

(d) In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint.

(e) When determining whether the proceeding is necessary under par. (b) and when determining whether to issue a complaint under par. (d), in addition to any testimony under par. (c), the judge may consider law enforcement investigative reports, the records of the department, and any other written records that the judge finds relevant.

SECTION 5. 972.08 (2) of the statutes is amended to read:

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

SECTION 6. 978.045 (1r) (intro.) of the statutes is amended to read:

978.045 **(1r)** (intro.) 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. 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 under s. 968.26, 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:

SECTION 7. Initial applicability.

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

(END)

State of Wisconsin
2007 - 2008 LEGISLATURE

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LRB-4090/2
CMH:cjs:rs

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2007 BILL

TODAY

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AN ACT ***to renumber and amend*** 968.26; ***to amend*** 911.01 (4) (b), 972.08 (2) and 978.045 (1r) (intro.); and ***to create*** 968.26 (1) and 968.26 (2) (b), (d) and (e) of the statutes; **relating to:** judicial discretion in certain 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 in writing to issue a charge or takes no action for 90 days, 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 prosecution. In determining whether to convene a proceeding and whether to issue a complaint, this bill specifies that a judge may consider law enforcement investigative reports, ~~Department of Corrections~~ records, and any other written records.

and case files of the district attorney

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

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:

SECTION 1. 911.01 (4) (b) of the statutes is amended to read:

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

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

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

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

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~~the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused.~~ Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

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

SECTION 4. 968.26 (2) (b), (d) and (e) of the statutes are created to read:

968.26 **(2)** (b) If a district attorney receives a referral under par. (a), and the district attorney refuses in writing to issue charges or the district attorney takes no action within 90 days, the judge shall convene a proceeding described under sub. (3) if the judge determines that a proceeding is necessary to determine if a crime has been committed.

(d) In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint.

(e) When determining whether the proceeding is necessary under par. (b) and when determining whether to issue a complaint under par. (d), in addition to any testimony under par. (c), the judge may consider law enforcement investigative reports, the records of the department, and any other written records that the judge finds relevant.

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978.045 **(1r)** (intro.) 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. 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 under s. 968.26, 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:

SECTION 7. Initial applicability.

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

(END)

Basford, Sarah

From: Peterson, Eric
Sent: Monday, February 25, 2008 2:41 PM
To: LRB.Legal
Subject: Draft Review: LRB 07-4090/3 Topic: John Doe proceedings; judicial discretion option

PLEASE RUSH

Please Jacket LRB 07-4090/3 for the SENATE.