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STATE REPRESENTATIVE
CHAIRMAN, ASSEMBLY COMMITTEE ON FINANCIAL INSTITUTIONS

Assembly Committee on Judiciary
Public Hearing, 14 May 2015
Assembly Bill 68
Representative David Craig, 83rd Assembly District

Chairman Ott and Committee Members,

Thank you for hearing testimony on Assembly Bill 68.

Assembly Bill 68 is a much-needed reform of the John Doe statute in Wisconsin law. As state legislators, it is incumbent upon us to ensure that our laws provide an adequate and necessary balance between the constitutional rights of individuals and the appropriate prosecutorial power needed to carry out criminal investigations. Wisconsin is unique in that it allows for the normal criminal proceeding, a grand jury investigative proceeding as well as a John Doe investigative proceeding.

The John Doe proceeding has been the law in Wisconsin since the time it was a territory. The purpose of the John Doe proceeding is to give prosecutors and judges certain powers in criminal investigations to determine whether an alleged crime has been committed. It gives an incredible amount of discretionary power to a presiding judge and to the prosecutor.

The John Doe proceeding under current law is open ended with next to no due process protections, which is why we are proposing the following reforms: increase judicial oversight of the process, protect the constitutional rights of individuals, and ensure accountability to the people of the state of Wisconsin. On the practical level, this involves procedural and substantive reform: increasing the judicial oversight and public accountability of the John Doe process, and determining the scope of crimes which can be investigated through a John Doe proceeding.

In regards to judicial oversight, our bill establishes a process by which a majority of the ten judicial administrative district chief judges can approve requests to extend the scope and length of a John Doe proceeding. The length of a proceeding is limited to six months, unless the majority of chief judges approve extensions in six month increments. We do not limit the number of extensions. If a prosecutor is using a John Doe to investigate a case of battery and uncovers evidence of a homicide, the prosecutor can go to the chief judges to expand the scope of the investigation to homicide. We believe this is a reasonable balance between giving prosecutors the tools they need to investigate serious crimes while also providing oversight for the presiding judge and prosecutor within the existing structure of our judicial system in Wisconsin.

As I mentioned earlier, our bill provides a level of public accountability that is currently entirely missing from the John Doe law. I think there is no question that a presiding judge of a John Doe proceeding should be a full time judge who is accountable to the electorate, not a reserve judge. In addition, this bill says that a basic summary of the cost of a John Doe must be available to the public under Wisconsin's Open Records law. Further, the votes of the ten chief judges—the vote only—must also be available to the public. This does not include details of the John Doe proceeding on which they voted.

One of the most important procedural changes we make, in my opinion, is to restore free speech rights to witnesses and targets of a John Doe proceeding. Recently, Judge Frank Easterbrook of the 7th Circuit U.S. Court of Appeals referred to a secrecy order issued under Wisconsin's John Doe law as “screamingly unconstitutional.” A quick look at the secrecy rules under a federal grand jury investigation reveals that secrecy order cannot extend to witnesses and targets—this is an issue the U.S. Supreme Court has been very clear on. Our bill mirrors the federal grand jury secrecy orders and clears up the potential of our John Doe law being found unconstitutional.

When looking at the scope of crimes that may be investigated through a John Doe proceeding, we spoke at length with a number of individuals who have used John Doe proceedings, in addition to many other experts on the law. What we found is that a John Doe proceeding is used by prosecutors to compel testimony when witness testimony is the only way to investigate an alleged crime and when witnesses are not forthcoming with testimony. With that in mind, we believe it is important to retain this powerful prosecutorial tool for those crimes which the legislature has decided are the most egregious and most serious, namely, the crimes in the criminal code which are classified as A through D. The penalty for a Class A Felony is up to life imprisonment. The maximum penalty for a Class D Felony is a \$100,000 fine and up to 25 years in prison. In addition, we have added crimes which are classified as Class E through Class I felonies which are of a particularly sensitive nature which might, therefore, require compelled testimony, such as battery or threat to a witness, abuse of individuals at risk, or crimes against children.

In closing, we believe this bill strikes that important balance between prosecutorial necessity and constitutional rights and I ask for your support of AB 68.

Thank you and I would be happy to answer any questions you may have our bill.



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Representative Jim Ott
Chairman, Assembly Committee on Judiciary
P.O. Box 8953
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Dear Chairman Ott,

Thank you for having a hearing on Assembly Bill 68. While we are aware of the larger context surrounding the issues this legislation affects, there is a specific subset of reasons for which the State Public Defender supports efforts to change the current John Doe process.

From the standpoint of our agency, the current John Doe investigatory process contains both positive and negative elements. One of the benefits of the current John Doe process is to allow for inmate complaints to be investigated without significant impacts on those accused of wrongdoing in the complaint prior to an investigation and, potentially, formal allegations being brought. In addition, we recognize the John Doe process can be a useful tool for prosecutors. These are valuable tools offered in the current John Doe statute and ones that are preserved in Assembly Bill 68.

From another standpoint, the current John Doe process has had negative impacts on SPD staff who have occasionally been themselves a target of a John Doe investigation. Current secrecy provisions in s. 968.26 do not allow us or those subjects to elaborate further on specific instances, but here are a few general comments on the negative impacts.

1. Disclosure of witness interviews not otherwise subject to disclosure
 - a. In general, the requirement that attorneys turn over to the state "statements" of witnesses does not include an attorney's, investigator's, or client service specialist's notes regarding conversations with witnesses.
 - b. If an attorney, investigator, or client services specialist is the target of a John Doe investigation, that person has no way of knowing whether the witness has been required to testify as to those conversations.
2. State can initiate John Doe proceeding and file a motion in another court to disqualify the attorney based on the John Doe proceeding.
 - a. The attorney has no way of knowing whether the John Doe investigation relates to a particular case, and, if so, which one. Because the attorney doesn't know whether he or she is even the target of the John Doe proceeding, the attorney doesn't know if he or she should agree to the disqualification.

- b. Because the state can move to disqualify an attorney by simply stating that the attorney is in some way involved in a John Doe proceeding, a court must decide whether to disqualify an attorney based on nothing more than the existence of a John Doe.
 - c. This potentially interferes with a defendant's right to counsel of his or own choosing.
3. The lack of a time requirement for completing a John Doe proceeding could mean that an attorney, investigator, or client services specialist would be unable to work with clients for an extended period of time.
 - a. The State could bring motions to disqualify an attorney in multiple cases based on ongoing John Doe investigation.
 - b. The attorney's office might not even know which of the staff members is the target of the John Doe proceeding.

There are specific items in Assembly Bill 68 which SPD believes will make beneficial changes in the narrow context of impact on SPD staff. First, placing time limits which are extendable upon judicial review will encourage expeditious investigations. This will help to limit the timeframe a staff members may be the subject of an investigation.

This issue also supports the bill changes regarding secrecy provisions. Under the current law, an attorney who is the subject of a John Doe investigation may not be aware of either the scope of the investigation or even if the investigation has concluded without the filing of formal charges. The open-ended investigation impacts the ability of that attorney to provide ongoing representation to a client or, in a worst case scenario, the ability to continue representing clients at all. This in turn has a fiscal impact on the state by needing to appoint cases handled by that attorney to private bar attorneys.

Every day the SPD sees the collateral impacts of criminal investigations and charges on our clients' future ability to obtain employment, housing, and higher education even if the charge is subsequently dropped or the client is found not guilty. There is value in preserving aspects of the current John Doe law, but there are also experiential based reasons to place some practical limitations on the scope and impact of these investigations.

We thank the authors, Senator Tiffany and Representative Craig, for seeking the State Public Defender's input on this legislation.

Sincerely,



Adam Plotkin
Legislative Liaison
Office of the State Public Defender

Cc: Members, Assembly Committee on Judiciary
Representative Dave Craig
Senator Tom Tiffany