ROB HUTTON

STATE SENATOR | 5th DISTRICT

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February 6, 2025

TO: Senate Committee on Judiciary and Public Safety

FR: Senator Rob Hutton

RE: Senate Bill 25 — Court-issued criminal complaints in officer-involved deaths

Thank you for holding a hearing on Senate Bill 25. This bill limits baseless, open-ended investigations meant to harass police officers who were involved in an incident of justifiable self-defense unless new evidence is presented.

Current law provides for an archaic "John Doe" process that can be used to open investigations into an individual. A John Doe proceeding may be convened either by a district attorney or by a complaint to a judge by a third party in cases where the district attorney declined to issue charges. This process is being used with more frequency against police officers.

Any person or group can file such a complaint with a court and request the initiation of a John Doe process. This process has been used by political activists to harass former Wauwatosa Police Officer Joseph Mensah, despite him being cleared of any wrongdoing after multiple investigations.

It was also used against Madison Police Officer Matthew Kenny. A similar petition was filed with the Dane County Circuit Court requesting he be charged for the 2015 shooting of Tony Robinson. The Dane County District Attorney had previously ruled that Officer Kenny's use of deadly force was justified and he would not face charges.

This provision of state law is being abused to usurp the decision of an elected district attorney to not file criminal charges after finding the officer clearly acted in self-defense. Activists have discovered that the John Doe process itself can be the punishment they seek against innocent law enforcement officers.

The threat of never-ending legal action is having a significant impact on law enforcement morale, recruitment and retention, a fact that became clear to me after many conversations with law enforcement leaders and officers on ride-alongs who told me this is the reason they were considering leaving the profession.

This bill would prevent courts from opening new investigations when the district attorney refused to file charges on the grounds of self-defense, unless new or unused evidence is presented that the officer was not acting in self-defense.

Again, thank you for your time and consideration of this bill. I respectfully ask for your support.

The Wheeler Report
Covering the Wisconsin Legislature since 1972

Tuesday, January 21, 2025

HUTTON/MOSES FOCUSED ON PROTECTING POLICE FROM 'BASELESS' INVESTIGATIONS

Sen. Rob Hutton and Rep. Clint Moses are circulating a proposal to limit "baseless investigations meant to harass police officers who were involved in an incident of justifiable self-defense."

In an interview with The Wheeler Report, Sen. Hutton said he will be introducing legislation to change the "John Doe" process to protect law enforcement from ongoing investigations meant to harass officers after they have been cleared of wrongdoing by the district attorney. Hutton said he believes these "never-ending" lawsuits are being used by people to harass law enforcement and the impact is significant. He said, "There is this provision [John Doe filings] in our law that allows for any citizen to, I would argue, intentionally go after somebody they have a grievance with through our judicial system, even when there is no credible evidence for the charges that they are seeking; for a case that has already been closed and ruled on. That can just happen for any reason, for perpetuity...Officers I have spent time with in multiple communities really shared with me the idea that they are really considering changing their occupation out of law enforcement simply because every day they realize that any action that they take, even those that are fully justified, can be ruled on at one point in time and ruled that they are acting justified in the situation, but that any individual, for whatever reason, can seek to have those cases reopened time and time again. That was a huge concern for those folks in law enforcement that are doing what we've called them to do every day but also realize any situation at any point in time can lead them down a legal pathway. There's certainly justification for law enforcement that does not act appropriately or outside their constitutional limits, but those who act appropriately and come to our defense can literally deal with litigation forever...They are being put under a situation where them and their family realize that they will be fighting these charges, that they've already been deemed innocent from, and not only are they living with the realities of fighting those charges, but they're also funding and having to pay for that expense...I have talked with officers who have been in the law enforcement occupation for five and 10 and 15 years who are proactively looking to change occupations, to get out of law enforcement because they can't live with the realities that this liability exists."

Rep. Moses told The Wheeler Report he wants to get this bill done early because it believes it's important to law enforcement, important to public safety, and he doesn't want it to get stuck in the "log jam" that happens at the end of the session. Moses explained he believes this bill needs to be passed and he hopes that the changes made from the previous session will help to make it bipartisan and to get the Governor to sign the bill. He offered that in another month the Governor will be introducing his budget and then all most people will be working on will be the budget. He doesn't want the bill to get stuck behind the budget or stuck at the end of session where the legislature simply "runs out of time" to get it done.

The John Doe proceedings (Wis Stat. 968.26) were intended to be used to determine whether there is probable cause to issue criminal charges. They are similar to grand-jury proceedings but are different in several ways. Instead of a jury, a John Doe case proceeding uses a judge. The Wisconsin Supreme Court held that the judge in a John Doe proceeding has latitude and discretion in his or her handling of the case.

While a judge generally has a 'supervisory' role in a regular case, in a John Doe case the judge plays a larger role, conversely, lawyers play a smaller role in John Doe proceedings. Counsel may represent witnesses but cannot examine his or her witness client, cross-examine other witnesses, or make any kind of argument to the judge. The John Doe laws were changed by 2009 Wisconsin Act 24 "to address concerns over perceived abuses by Wisconsin prison inmates, who alleged criminal treatment by corrections staff, thereby evading the normal prison administrative review of prisoner complaints." (Legislative Reference Bureau Brief 15-7, March 2015). The law was amended again by 2015 Wisconsin Act 64 (2015-SB-043, LC Act Memo) which narrowed the criminal violations eligible to be investigated by a John Doe proceeding as well as the secrecy surrounding a John Doe proceeding.

Last session, Hutton introduced SB-517 and Moses introduced AB-544. The Senate proposal passed both houses and was sent to Governor Evers who vetoed it. The Senate overrode the veto 21-10, but the Assembly did not override the veto. When asked if the proposal would be the same as last session Hutton said, "There were some discussions back and forth with his administration, as well as with the folks in judiciary...That bill really applied to anyone who might bring charges forward on any individual...but this bill is going to be tweaked, a little bit streamlined to just specifically apply to law enforcement."

Testimony offered last session by the Wisconsin State Lodge Fraternal Order of Police states, "Because of the provision in the law which allows any person to petition the circuit court to bring charges, law enforcement officers or anyone else who defends themselves are subject to never-ending scrutiny in the form of legal proceedings that require them to continue to defend themselves and their actions, preventing them from focusing on healing with any level of certainty. For law enforcement officers still employed in the profession, these continued legal proceedings often bring new periods of administrative suspension which takes an officer off of the street in a time when departments across the state are struggling to fill their shifts at the minimum staffing levels."

According to the Legislative Reference Bureau analysis for the bill being proposed - *Under current law, a district attorney has the discretion as to whether or not to issue a complaint to charge a person with a crime. Current law also provides that, if a district attorney refuses to issue a complaint against a person, a judge may conduct a hearing to determine if there is probable cause to believe that the person committed a crime and, if so, issue a complaint. Under this bill, when there is an officer-involved death, which is a death that results directly from an action or an omission of a law enforcement officer, and the district attorney determined there was no basis to prosecute the officer, a court may not issue a complaint against the involved officer unless there is new or unused evidence presented.*

While there is no statutory definition, the legal rights associated with self-defense and defense of others for law enforcement officers and the general public are defined in 939.48; WI 904.01 defines "reliable evidence." There is no John Doe procedure at the DOJ level, statutes only allow circuit court judges to hold these types of hearings. DOJ is only involved when they are requested to act as a special prosecutor. This bill does not prevent someone from being sued civilly, it only prevents statutes related to filing criminal charges. With officer-involved deaths, one potential crime to be charged with is homicide, since there is no statute of limitations on homicide, these petitions can potentially be filed indefinitely. When petitions are filed, it is the personal responsibility of the officer to defend themselves, they must hire their own attorney, get time off of work, and can face the process without professional or financial assistance.

CLINT P. MOSES

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February 6th, 2025
Senate Committee on Judiciary and Public Safety
Testimony on Senate Bill 25

Thank you Chairman Wanggaard and members of the Senate Committee on Judiciary and Public Safety for considering Senate Bill (SB) 25. SB 25 is designed to protect our law enforcement officers from being subjected to repetitive and unnecessary legal proceedings in situations where they have acted in self-defense.

The current state statute has, in recent years, been exploited to unfairly target two of our state's law enforcement officers. Officer Mensah used self-defense to protect himself while on the job in a situation in 2015. After the investigations, the court confirmed he acted in self-defense. In 2021, Milwaukee County Circuit Court Judge Glenn Yamahiro found probable cause to investigate Waukesha County Sheriff's Deputy Joseph Mensah and assigned two special prosecutors to do so. This nearly yearlong investigation, which mirrored the findings of four prior inquiries by various agencies, concluded with no charges filed, reaffirming Officer Mensah's actions as self-defense. It's concerning that such investigations, which echo previous exonerations, can be perpetuated, consuming significant time and resources.

Moreover, a similar situation unfolded with Madison Police Officer Matthew Kenny, who faced a petition for charges related to an incident seven years prior, despite the Dane County District Attorney already ruling the action as justified self-defense.

This bill will prevent courts from conducting repetitive hearings on cases where the district attorney has declined to issue a complaint because the police officer was acting in self-defense when there is no new evidence presented. This bill seeks to uphold the decisions made by elected district attorneys and protect our law enforcement officers from being subjected to redundant and damaging investigations after their actions have been legally justified. The intent of this bill is to alleviate our law enforcement offers from costly and reputation-assailing repeat investigations when their innocence has already been found.

This legislation has widespread support from stakeholders across the justice and civil rights spectrums. I extend my gratitude to the committee for reviewing SB 25 and urge timely action on this pivotal legislation.

Wisconsin State Lodge
Fraternal Order of Police

PO Box 206 West Bend, WI 53095

Ryan Windorff President | **Mark Sette** Vice President | **Ryan Miller** Secretary | **Randy Winkler** Treasurer | **Travis Vickney** Second Vice President | **Shane Wrucke** Sergeant at Arms

Don Kapla Immediate Past President | **Jerry Johnson** National Trustee

February 6, 2025

Wisconsin Fraternal Order of Police Testimony in Support of Senate Bill 25

Senate Committee on Judiciary and Public Safety

Senator Wanggaard, Senator James, and Honorable Members of the Committee, my name is Ryan Windorff, and I am the President of the Wisconsin Fraternal Order of Police. The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with over 377,000 members in more than 2,200 lodges. The Wisconsin State Lodge proudly represents more than 3,600 members in 33 lodges throughout the state. We are the voice of those who dedicate their lives to protecting and serving our communities. We are committed to improving the working conditions of law enforcement officers and the safety of those we serve through education, legislation, information, community involvement, and employee representation.

Thank you for the opportunity to present testimony in support of Senate Bill 25, a vital legislative proposal aimed at enhancing procedural fairness regarding officer-involved deaths in Wisconsin. This bill addresses how officer-involved deaths are handled within our legal framework. Notably, it introduces an essential stipulation that a court may not issue a complaint against an involved officer unless new or unused evidence is presented, following a determination by the district attorney that no basis exists for prosecution. This measure is crucial for ensuring officers are guaranteed due process and protection against baseless allegations.

Law enforcement officers have both the right and the duty to use force, including deadly force, when necessary to protect themselves and others from imminent harm. Officers often encounter dangerous situations where they are compelled to make split-second decisions that could have life-altering consequences. They are trained to assess threats rapidly and respond appropriately under high-stress circumstances, prioritizing the safety of the public and themselves. Despite these job requirements, the use of force by law enforcement that results in death is rare. According to data from the Wisconsin Department of Justice[1], from 2021 to 2024, there was an average of 16.5 use-of-force incidents per year that resulted in death. Not surprising to those who are familiar with the training and professionalism of our law enforcement officers in Wisconsin, all of these use of force incidents were deemed to be legally justified.

It is essential to highlight that Wisconsin already has a comprehensive and transparent review process for incidents involving officer-involved deaths, as outlined in state statute 175.47. This statute mandates that every law enforcement agency must establish a written policy regarding the investigation of officer-involved deaths that includes an independent investigation and the requirement that investigators provide a complete report of their findings to the district attorney in an expedited manner, ensuring that the community is informed about the

[1] https://www.doj.state.wi.us/dles/bjia/ufad-data-explorer

outcome of the investigations. The elected district attorney in the county where the incident occurred is tasked with reviewing the use of force incidents to ascertain whether such force meets the criteria of privileged self-defense or the defense of others allowable by law. The district attorney must carefully review the facts and circumstances of the use of force to determine if the officer's actions were justified. If the district attorney decides that there was no requisite justification for using force, they can issue a complaint to charge the officer with a crime.

Current law also provides that if a district attorney refuses to issue a complaint, any person may petition a Circuit Court Judge to conduct a hearing to determine if there is probable cause to believe that the person committed a crime and, if so, issue a complaint. These hearings are conducted ex parte, where only one side presents evidence, and there is no right to cross-examination. The person who is the subject of the proposed prosecution does not have the right to participate in any way or to obtain reconsideration of the ultimate decision reached.

This seldom-used law was employed in 2021 amid an anti-police movement that infected our state and country. After receiving such a petition, Milwaukee County Circuit Court Judge Glenn Yamahiro found probable cause to believe that former Wauwatosa Police Officer and current Waukesha County Sheriff's Deputy Joseph Menash committed a homicide when he shot and killed Jay Anderson after a 2016 encounter where Anderson ignored commands and reached for a gun during an interaction with Officer Mensah. The shooting was investigated by the Milwaukee Police Department and reviewed by Milwaukee County District Attorney John Chisolm, the latter of whom found that Officer Mensah was privileged to use self-defense and would not face charges. Officer Mensah was similarly cleared of any wrongdoing by an internal investigation by the Wauwatosa Police Department, an investigation by the United States Attorney's Office, and an independent investigation conducted by former United States Attorney Steve Biskupic.

Judge Yamahiro assigned two special prosecutors who, after almost a year of investigation, found that charges would not be filed against Officer Mensah because, like the previous investigations, Officer Mensah was acting in self-defense. While Officer Mensah was eventually cleared, again, for the years-old incident, it brought untold stress to his personal and professional life with negative publicity and the financial strain of hiring an attorney to defend him in the criminal proceedings. However, Officer Mensah cannot put this incident behind him because there is no statute of limitation on homicide. Since he was never charged, nothing stops anyone from re-petitioning the court to hold an indefinite number of these proceedings.

In March 2022, shortly after this obscure tactic was used against Officer Mensah, a similar petition was filed with the Dane County Circuit Court against Madison Police Officer Matthew Kenny, requesting he be charged for the 2015 shooting of Tony Robinson. Dane County District Attorney Ismael Ozanne had previously ruled that Officer Kenny's use of deadly force was justified, and he would not face charges. After months of legal proceedings, Dane County Circuit Court Judge Stephen Ehlke dismissed the petition.

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We recognize that the loss of any life is tragic, and the loss of life from the use of force by a law enforcement officer, even if justified, can be difficult for the family and friends of the person lost to accept. These victims' families have rights, and this legislature has recognized those rights by prescribing specific requirements for investigating and reviewing these incidents, as I previously discussed. But these nights do not usurp a law enforcement officer's right to defend themselves or others when done appropriately within the confines of the law. These are not cases ignored or not addressed by the criminal justice system; a tremendous amount of resources are invested in their review to ensure that actions are justified and proper. If they are deemed unlawful, our criminal justice system has and does prosecute officers who violate the law and the rights of others. But if they are deemed lawful, the lives of those officers should not be able to be permanently disrupted by those who are not happy with the result.

Even when law enforcement officers are not physically harmed in a use-of-force incident, the emotional toll on those involved is often overlooked. Officers take an oath to defend the Constitution and safeguard their communities, yet they bear the heavy burden of making split-second decisions in the face of danger. When an officer employs force that results in serious injury or death, they are typically placed on administrative leave while an investigation is conducted, a process that may stretch from months to years, including the time required for a district attorney's review. This extended absence can lead to further isolation and intensify the trauma experienced by the officer. I have encountered many officers involved in use-of-force incidents who have faced significant emotional challenges, including anxiety, depression, and post-traumatic stress disorder. Tragically, some have found it necessary to leave law enforcement due to these mental health issues, and some have even taken their own lives as a result of their suffering.

After the criminal investigation and review process is completed, if the review determines that the use of force was legally justified, the employing agency does a separate investigation to determine if the officer abided by the department's policies and procedures. In some cases, such as Officer Mensah's case, the United States Attorney's Office does yet another investigation to determine if the officer violated the person's civil rights. These are all checks and balances already in place to ensure that officers who use force are justified in doing so and are acting within the confines of the law.

Because of the provision in the law that allows any person to petition the circuit court to bring charges, law enforcement officers who defend themselves or others are subject to never-ending scrutiny in the form of legal proceedings that require them to continue to defend themselves and their actions, preventing them from focusing on healing with any level of certainty. For law enforcement officers still employed in the profession, these continued legal proceedings often bring new periods of administrative suspension, which takes an officer off the street at a time when departments across the state are struggling to fill their shifts at the minimum staffing levels.

Under this bill, if the district attorney refuses to issue a complaint because the officer was privileged to use force for self-defense or the defense of others, the court may not conduct a hearing or issue a complaint unless it is presented with new or unused evidence that the officer's actions were not privileged. No officer should have to go through what Officers Mensah and Kenny went through. When I began my career in law enforcement, my most significant concern was getting seriously injured or killed and not being able to come home to my family. I trained countless hours on professional communication, defense and arrest tactics, and situational awareness to ensure I was as tactically sound as possible to protect my community and come home at the end of my shift. Now, the most significant concern of mine and many other officers in our state is being publicly maligned, fired, sued, or criminally charged for doing my job, even though I follow my training, policies, and procedures of my agency and the law. Many officers are deciding that this risk is no longer worth it and choosing to leave law enforcement, contributing to our already discouraging retention issues in our profession.

Senate Bill 25 strikes a much-needed balance by allowing for accountability while ensuring that officers' actions are weighed against the context of their duties. It recognizes the inherent risks of police work and acknowledges that officers must be able to perform their jobs without fear of unfounded legal repercussions. This bill will correct the exploitation of this legal provision and ensure that due process is not infringed for those put in already difficult situations. It will further prevent years of wasted resources and languishing investigations on incidents that have already been thoroughly investigated through a process prescribed by law.

In conclusion, the Wisconsin Fraternal Order of Police supports Senate Bill 25 because it aligns with our commitment to upholding the rule of law and ensuring equitable treatment for our officers and the community members they serve. We respectfully urge this committee to recognize the importance of this legislation and move it forward for the benefit of our law enforcement community and the wider public.

Thank you for your time and consideration. I am available to answer any questions the committee may have.

Statement to the Senate Committee on Judiciary and Public Safety
411 South State Capitol
February 6, 2025

Introduction: To Senator Wanggaard (Chair), Senator James (Vice-Chair) and members, I am Greg Jones, President of the Dane County NAACP, a ne 1st Vice President of the Wisconsin NAACP. Our mission is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. In this respect, the NAACP opposes Senate Bill 25.

Under this bill, when there is an officer-involved death, which is a death that results directly from an action or an omission of a law enforcement officer, and the district attorney determined there was no basis to prosecute the officer, a court may not issue a complaint against the involved officer unless there is new or unused evidence presented. The proposed bill raises civil rights concerns for the following reasons:

1. **SB 25 Restricts judges' Discretion**: Judicial discretion is the power of the judiciary to make some legal decisions according to their discretion. Under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence.

2, Judicial evidence plays a pivotal role in the legal process, serving as the foundation upon which cases are built and decisions are made. It encompasses various forms of proof presented during court proceedings to establish the facts of a case. The effective use of judicial evidence is crucial for ensuring fair trials and upholding justice. The denial or rejection of evidence at any point in the process is one of the highest denials of civil rights.

3. **Separation of Powers**. Both the District Attorney and Judge are elected by the voters, independent of each other and guided by long standing principles relating to evidence, charging decisions, and justice. SB 25 introduces confusion and impractical methodologies into the process. Having the DA to share information with the courts runs counter of a fair and equitable process.

Therefore, the NAACP vehemently oppose this legislation and stand on our history of promoting the most inclusive framework for justice.

Greg Jones, President
NAACP Dane County

CIVIL RIGHTS & LIBERTIES SECTION

To: Members, Senate Judiciary Committee
From: Civil Rights & Liberties Section, State Bar of Wisconsin
Date: February 6, 2025
Re: SB 25 – John Doe/criminal complaint legislation

The State Bar of Wisconsin's Section Board on Civil Rights and Liberties unanimously opposes SB 25, legislation restricting a court's ability to issue criminal complaints and hindering the ability for victims to seek justice.

The section board believes that Wis. Stat. 968.02(3), while rarely utilized, effectively provides for judicial discretion in conducting a hearing as to whether a criminal complaint should be permitted in cases involving officer involved fatalities, and no further changes are needed.

Currently, Wis. Stat. 968.02(3) relevant section states that "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."

Section members have a longstanding tradition of supporting judicial discretion, as it allows judges the power to evaluate the individual needs of each case, while the proposed legislation would prevent judges from being independent arbiters of the law.

Additionally, members are concerned with the following as related to the proposed legislation:

1) As indicated, the legislation removes judicial discretion by preventing a court from independently deciding whether there is probable cause to permit the filing of a complaint.

2) Having the District Attorney's Office and the court work together on criminal prosecutions runs contrary to the separation of powers/conflict of interests between the judiciary and the prosecution. These offices are two distinct entities with separate roles, but the bill conflates those roles to protect the accused officer, thus providing an insurmountable roadblock for the victim to seek justice.

3) Typically, District Attorney Offices do not share their evidence and investigative process with the Courts in making their charging decisions. The proposal impermissibly creates ex parte communication concerns by requiring the District Attorney's Office to share this process with the court. Pursuant to the new proposal, the District Attorney's Office would be required to share their investigative process and disclose, exclusively to the court, all evidence that it considered in making its charging decision. This is impractical in that it would be costly and time consuming to prosecutors as well as the courts, which are already backlogged, because the court would be required to have ex parte communications with a prosecutor before a hearing to decide what, if any, new and/or unused evidence is being offered. This practice could potentially make the District Attorney's Office and judges witnesses in civil lawsuits if such meetings are not on the record.

4) The proposal may erode the rights of victim family members. In situations involving the most egregious violent act, ending someone's life, this legislation could bar family members from seeking justice independent of a district attorney's refusal to charge an officer.

STATE BAR OF WISCONSIN

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5) The court would be required to seek permission from the DA's office and verify whether the evidence it may consider is in fact new and/or unused. As there is no statute of limitations on homicide offenses there is no timeline as to when this evaluation could occur.

For these reasons, the Civil Rights & Liberties Section opposes SB 25.

For more information, please contact our Government Relations Lobbyist, Lynne Davis, ldavis@wisbar.org or 608.852.3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.