



WISCONSIN LEGISLATURE

P.O. Box 7882 • Madison, WI 53707-7882

Senate Bills 765, 766, 767

Public Testimony

Senate Committee on Judiciary and Public Safety

February 6, 2020

Thank you, Chairman Wanggaard and members of the committee for holding this hearing on Senate Bills 765, 766, 767

It is no secret that the criminal justice process can be incredibly taxing on witnesses. These three bills make the process of testifying a little smoother as well as helps to protect the witness from potential harm.

Senate Bill 765 would add the 'safety or the risk that the witness may be unavailable to testify' to the list of criteria to be considered by the judge when decided whether to allow a witness to testify through videoconference.

Senate Bill 766 specifies that if an individual is at 'risk of being intimidated and therefore is at risk of not fully cooperating at trial', their testimony may be taken by deposition. Anyone accused of a crime, as well as their counsel, still have the right to be present at the deposition.

Senate Bill 767 would add intimidating a victim of a crime of domestic abuse to those offenses that warrant an increased penalty from a Class A misdemeanor to a Class G felony.

Prosecutors and law enforcement have highlighted the growing problem of witness intimidation in Wisconsin. Milwaukee, in particular, has been hard hit, with a recent Journal-Sentinel investigation identifying that 23% of charged homicide cases were impacted by documented instances of witnesses failing to appear in court to testify. Despite Milwaukee being a national leader in proactive actions to prevent witness intimidation, it remains a problem in the city and throughout the state.

Increasing protections for crime victims and witnesses is important, particularly in cases of domestic abuse. We should be making it harder for criminals to continue terrorizing our communities, not easier. This legislation moves us in the right direction.

Thank you for your time and I'd be happy to take any questions at this time.

Representative Dan Knodl

Senator Alberta Darling



Wisconsin State Public Defender

17 S. Fairchild St. - 5th Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wisspd.org

Kelli S. Thompson
State Public Defender

Jon Padgham
Deputy State
Public Defender

Senate Committee on Judiciary & Public Safety

Thursday, February 6, 2020

Senate Bills 745, 749, 752-754, 765-767

Chairman Wanggaard and members,

Thank you for the opportunity to testify on Senate Bills 745, 749, 752-754, and 765-767, known as the "Tougher on Crime" package. We are providing written comments on all of the proposals but will speak to those that most directly impact the State Public Defender (SPD) and its clients.

The SPD provides constitutionally mandated representation for financially eligible clients in Wisconsin who are charged with or face a criminal or civil proceeding that could result in the deprivation of their liberty. Relevant to this package of bills, we provide representation for both adults and juveniles accused of having committed a criminal offense as well as in revocation proceedings.

Following are our specific comments on each piece of legislation.

Senate Bill 745 (Felon in possession of a firearm charging process)

AB 808 changes the process for amending or dismissing charges involving felon in possession of a firearm and limits access to deferred prosecution programs.

The total effect of the bill will be to limit the ability for the criminal justice system to consider the individual circumstances of these cases. Especially in combination with a bill like AB 805 requiring a revocation recommendation based on new criminal allegations, it is not difficult to envision a scenario where an individual is charged and, though a prosecutor may seek to dismiss the charges later, a judge does not allow it and a person is revoked based on a lower standard of proof.

Senate Bill 749 (Mandatory minimum on 3rd offense retail theft)

AB 807 creates a 180 day mandatory minimum sentence for third or more offense retail theft.

As noted earlier in our written testimony, there is little evidence to suggest mandatory minimum sentences serve as an effective deterrent against criminal activity. Presumptive minimum sentence offers a minimum guideline but allows for a sentence beneath that minimum if the reasons for doing so are placed on the record at sentencing.

In addition, by not allowing the court to place an individual on probation, empirical studies have shown that we are likely to increase their future risk for criminal activity. That evidence shows that by placing a person who is considered low to medium risk to reoffend with a higher risk population in jail or prison, that individual is at higher risk to reoffend in the future.

Finally, it is important to highlight that as drafted, this bill would apply a minimum sentence for third offense retail theft regardless of the value of merchandise taken in the qualifying offense. To use a

hypothetical, a 17 year old who is caught taking a loaf of bread on three separate occasions would be charged as an adult and could not be sentenced to less than 180 days.

Senate Bill 752 (Mandatory revocation recommendation)

AB 805 requires the Department of Corrections to recommend revocation of an individual's community supervision if they are charged with a new crime.

The primary concern is the potentially unconstitutional burden shift for extended periods of incarceration. If an individual on extended supervision is charged with a new crime and, as a result of this bill, the new crime is handled as an administrative revocation rather than a new circuit court case, the practical standard of conviction will have become "probable cause" rather than "beyond a reasonable doubt." The only burden that will have taken place for the administrative law judge to revoke supervision will have been the probable cause standard a prosecutor must meet to issue charges.

Added on top of this is the impact of Wisconsin's sentencing structure. Because individuals do not earn credit for time served on extended supervision, any violation during the period of supervision can result in re-incarceration for the full term. For an example, let's consider a person who was sentenced to a term of 5 years initial confinement followed by 5 years of extended supervision. Even under current law, if the person violates supervision during year 4, the person can be reincarcerated for 5 more years. Now consider that under the bill, if the person is charged with a relatively low level crime such as disorderly conduct, even prior to the criminal case proceeding, they can be revoked for the full 5 years. Effectively the person has been sentenced to a 5 year term in state prison for a crime that carries a potential penalty of a \$1000 fine and 90 days in jail.

And while the administrative law judge would still retain discretion under the bill whether or not to revoke supervision, because of a combination of the conditions of release, the administrative hearing process for a revocation proceeding, and the burdens and standards for a revocation proceeding, this bill will lead to prison sentences that are disproportionate to the alleged criminal activity.

As part of Wisconsin's continuing efforts to expand the use of research-based practices in the area of criminal justice, justice professionals (including prosecutors and staff of the Department of Corrections) are increasingly making individualized decisions and recommendations in light of the risk level and needs of the defendant. Often, appropriate and effective programs available in the community provide for greater public safety while saving taxpayer funds.

This bill may result in a significant number of new prison terms, which will neither be cost effective nor have a substantially beneficial impact on future criminal behavior.

Senate Bill 753 (Expanded list of crimes for Serious Juvenile Offender Program)

AB 806 expands the list of delinquent acts that qualify a young person to be placed in the Serious Juvenile Offender Program. By expanding the types of crimes that qualify for the Serious Juvenile Offender Program to include any crime classified as a felony if committed by an adult, there will be a significant expansion in the number of juveniles placed at Lincoln Hills. Placement at Lincoln Hills is not an effective way to reduce recidivism and is less cost effective than nearly every other alternative.

The Serious Juvenile Offender Program was created as a way to impose more serious punishment through more severe types of incarceration. The Legislature, in the legislative intent section of Chapter 938, has stated that the goals of the juvenile justice system include conducting an “individualized assessment” and to “divert juveniles from the juvenile justice system through early intervention.” To be sure, the intent recognizes the need to protect public safety as well. By treating all adult felonies as a serious juvenile offense, the individualized assessment is removed from consideration. In current law, by enumerating individual serious juvenile offenses, the legislature has recognized that some felony offenses committed by juveniles do not carry the same level of culpability when committed by a juvenile. While a juvenile charged with felony retail theft (a \$500 value threshold) can still be sentenced to Lincoln Hills based on an individualized assessment, this bill assumes that all juveniles committing that crime are serious juvenile offenders.

Research and data suggests that juveniles are not capable of the same cognitive process as adults. By treating all juveniles committing an adult felony the same, we will not effectively address the needs and root causes of the delinquent behavior.

Senate Bill 754 (Limiting earned release programs)

AB 809 limits the ability for an individual to qualify for the earned release program, the challenge incarceration program, or the special action release program if they have been sentenced based on a violation of a violent crime.

These limits will place additional burdens on an already overcrowded prison system.

The total effect of Assembly Bills 805, 806, 807, and 808 will be to significantly increase the population of Wisconsin’s jails and prisons while AB 809 will remove the few limited provisions that allow the Department of Corrections to provide release to appropriate individuals in limited circumstances. It is not unrealistic to expect that the bills will result in a need for a considerable number of new jail and prison beds, a cost not accounted for in the package.

Senate Bill 765 (Videoconferencing at a proceeding)

Assembly Bill (AB) 802 provides new criteria to allow the use of videoconferencing for participation as a witness in a court proceeding. While the language allowing its use if there is “the risk that the witness may be unavailable” appears to be broad, there is existing language in s. 885.56(1)(L) which already gives courts significant discretion in allowing this use of videoconferencing.

Senate Bill 766 (Witness deposition based on intimidation)

AB 803 allows for depositions in criminal trials if a witness is at risk of being intimidated. While Wisconsin currently allows for criminal depositions, it is only in very limited circumstances such that depositions rarely occur now. This bill would likely increase the number of depositions which would have an impact on both SPD staff time and resources as the ability to depose witnesses in those circumstances would be available to all parties in the criminal proceeding.

There is one specific concern with the language used on page 3, line 2 of the bill which allows a court to use as a factor in determining whether to allow the deposition the “nature of the defendant.” This is an undefined term of art that could exacerbate systemic racial bias in the criminal justice system and continue implicit biases already present in the criminal justice system. We had the opportunity to raise

this concern with the Senate author of the bill and look forward to future discussions on possible alternative language.

Senate Bill 767 (Domestic abuse victim intimidation penalty enhancer)

AB 804 essentially creates a penalty enhancer if the victim in a domestic abuse allegation is intimidated. As with most penalty enhancers or mandatory minimum sentences, evidence does not demonstrate that they serve as an effective deterrent.

S. 940.45 includes six other scenarios to charge intimidation of a witness as a Class G felony. In those cases, the enhancer is accompanied by an additional act such as injury or force as a reason that the action of intimidation is more serious than a Class A misdemeanor. This section of statute does not differentiate one type of crime or one type of victim from another, it treats all intimidation of a witness crimes equally based on the degree of intimidation that's employed. The subtle difference in AB 804 is that it increases the penalty based not on the action taken to intimidate, but based on the type of underlying crime. This could present the hypothetical scenario that intimidation of a witness in a domestic abuse crime is treated more severely than intimidation of a witness in a homicide even if the type of intimidation employed is similar.

We appreciate the opportunity to testify today. If you have any additional questions, please do not hesitate to contact us.



Department of Administration
Intergovernmental Relations Division

Tom Barrett
Mayor

Sharon Robinson
Director of Administration

Kimberly Montgomery
Director of Intergovernmental Relations

City of Milwaukee Testimony on SB745, SB749, SB752, SB753, SB754, SB765, SB766, SB767
and SB769 Relating to: "Tougher on Crime" Package.

Senate Committee on Judiciary and Public Safety
February 6, 2020

Thank you, Chairman Wanggaard and fellow committee members, for allowing me to speak on behalf of the City of Milwaukee this afternoon. I would like to address the "Tougher on Crime" legislative package, encompassing SB 745, SB 749, SB 752, SB 753, SB 754, SB 765, SB 766, SB 767 and SB 769. The City of Milwaukee stands opposed to the passage of this entire legislative package.

While the City of Milwaukee appreciates the Legislature's intention to address crime and domestic violence victims, this legislation would not be an effective way to continue to combat these issues. As we have seen over the last three years, nearly all crime rates have been continually declining in the City of Milwaukee. From 2017 through 2019, total violent crimes are down 14% and property crimes are down 30%. Contrary to the anecdotal evidence we have heard today, the initiatives and actions of local elected officials, community leaders and law enforcement have been working to lower the crime rates.

As we have heard in previous testimony during public hearings on this legislative package, there are constitutionality issues with some of these bills, significant fiscal costs that will arise from other bills, and the restriction of judicial and prosecutorial discretion. Senate Bill 753 would lead to a significant increase in juveniles placed in correctional facilities at a time when this legislature has still not provided funding for 2017 Act 185 ordering the closure of Lincoln Hills and establishing new county residential care centers for juvenile offenders.

Senate Bill 749 is particularly problematic. There is little evidence that mandatory minimum sentences serve as an effective deterrent against criminal activity. Additionally, this bill requires a 180 day sentence regardless of the value of the merchandise taken and does not limit the timeframe for previous qualifying retail theft convictions. Incidents of retail theft from decades earlier would be counted toward a third offense.

For all of these reasons, the City of Milwaukee is opposed to the 'Tougher on Crime' legislation. Thank you again for allowing me the opportunity to testify today. I would be happy to answer any additional questions committee members may have.

NIBRS CITYWIDE PART I CRIME

| Offense | 2017 | 2018 | 2019 | 17-19 % Change | 18-19 % Change |
|-----------------------|---------------|---------------|---------------|---------------------------|---------------------------|
| Homicide | 119 | 99 | 97 | -18% | -2% |
| Rape | 445 | 499 | 460 | 3% | -8% |
| Robbery | 2,950 | 2,326 | 1,993 | -32% | -14% |
| Aggravated Assault | 6,097 | 5,794 | 5,720 | -6% | -1% |
| Burglary | 5,719 | 4,430 | 3,678 | -36% | -17% |
| Auto Theft | 5,448 | 4,646 | 3,488 | -36% | -25% |
| Theft | 10,559 | 8,450 | 7,960 | -25% | -6% |
| Arson | 315 | 262 | 203 | -36% | -23% |
| Violent Crime | 9,611 | 8,718 | 8,270 | -14% | -5% |
| Property Crime | 22,041 | 17,788 | 15,329 | -30% | -14% |
| Total | 31,652 | 26,506 | 23,599 | -25% | -11% |

Part I crime data was obtained from the Wisconsin Department of Justice (DOJ) and reflects preliminary UCR Summary Statistics for the time period of January 1 - December 31, 2017-2019. UCR statistics are subject to change for a period of up to two years. Homicide data was obtained from the OMAP Homicide database and counts victims for the time period of January 1 - December 31, 2017-2019.