CHUCK WICHGERS

STATE REPRESENTATIVE • 83rd ASSEMBLY DISTRICT

Assembly Committee on Judiciary
January 12, 2022
Assembly Bill 842
State Representative Chuck Wichgers, 83rd Assembly District

Chairman Tusler and Committee Members,

Thank you for hearing my testimony today on Assembly Bill 842.

On November 21, 2021, Waukesha, Wisconsin was getting ready to start the holiday season with its annual Christmas parade. The joy of season turned to terror and trauma when a repeat criminal intentionally drove his SUV into the parade killing six people and injuring over 60.

As Waukesha responded, so the nation and the world. President Biden and Pope Francis extended condolences to those affected by the attack. The healing from this attack has only begun and making sure that something like this never happens again is part of that process.

This legislation is being introduced to address the lax treatment of violent criminals in our laws.

The perpetrator of the Waukesha massacre should never have been out of jail.

This bill specifies that an individual who is on probation for committing certain violent crimes may not be discharged early from probation, and an individual who is serving a sentence in prison for committing certain violent crimes does not qualify for programs that allow early release to parole or extended supervision.

In plain language, our proposal expands the list of offenses excluded from statutory programs granting early parole, extended supervision, or discharge from probation. These programs were implemented to offer many lower-risk convicts an opportunity to earn back their freedom by demonstrating that they are no longer a danger to the public.

However, many violent offenses remained eligible for these early release programs, including child trafficking and abuse, bank robbery, arson, and armed burglary. This bill adds these crimes to the list of offenses ineligible for early release to include all violent felonies and violent misdemeanors.

Governor Evers even admitted the aforementioned individual should not have been out of jail. This bill is one tool that Wisconsin can put in its public safety toolbox to ensure that the tragedy in Waukesha will never be repeated in our state. I urge your support of this bill.

Thank you for your consideration of my testimony.

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Testimony before the Assembly Committee on Judiciary
Senator André Jacque
January 12, 2022

Dear Chair Tusler and Members of the Assembly Committee on Judiciary,

Thank you for holding a hearing on Assembly Bill 842, a proposal that establishes consequences for violent and repeat offenders.

Law enforcement officers throughout the state have expressed concern about lax judicial policies that allow known violent criminals to return quickly to their communities without appropriate consequences. In Milwaukee, for instance, Police Department data shows there were 102 offenders arrested in 2016 who, collectively, had been arrested 945 times for a total of 2,658 crimes over the previous decade. These habitual offenders repeatedly take advantage of judicial indifference to continue their criminal careers.

Assembly Bill 842 expands the list of offenses excluded from statutory programs granting early parole, extended supervision, or discharge from probation. These programs were implemented to offer many lower-risk convicts an opportunity to earn back their freedom by demonstrating that they are no longer a danger to the public. However, many violent offenses remained eligible for these early release programs, including child trafficking and abuse, bank robbery, arson, and armed burglary. Assembly Bill 842 excludes these crimes by expanding the list of offenses ineligible for early release to include all violent felonies and violent misdemeanors.

Thank you for your consideration of Assembly Bill 842.

Wisconsin State Lodge
Fraternal Order of Police

PO Box 206 West Bend, WI 53095

Ryan Windorff
President

Shane Wrucke
Secretary

January 12, 2022

Wisconsin Fraternal Order of Police Testimony in Support of Assembly Bills 827, 829, 838, 839, 840, 841, and 842

Assembly Committee on Judiciary

Thank you, Representative Tusler and fellow committee members for the opportunity to provide testimony in support of Assembly Bills 827, 829, 838, 839, 840, 841 and 842. My name is Ryan Windorff, and I am the President of the Wisconsin State Lodge of the Fraternal Order of Police.

We are seeing a crime wave across this nation, the likes we have not seen before, and we believe one of the most significant problems is the lack of accountability for those committing these crimes. When there are no consequences for breaking the law, more people will break the law and crime will continue to increase. Among this increase in crime has been a notable proliferation of organized, and increasingly brazen, thefts. Theft might not seem like a crime that would require special attention from this body, however the impacts to the public, business owners, and the economy are staggering. According to the National Retail Federation, losses from theft have increased nearly 60% since 2015 and losses are calculated at nearly $62 billion annually. Law enforcement is responding the best we can to these increases, but we are limited by current law that detail the severity of these offenses.

AB827 would close a loophole in determining the penalty for a theft and allow for the value of property to be aggregated when multiple thefts are committed by five or more people at the same time. AB829 would provide a mandatory minimum sentence of incarceration for those convicted of a third offense of retail theft within 10 years of two previous convictions. We believe that this change would allow law enforcement and prosecutors to better address the current trends we are seeing and hold offenders accountable.

I know through experience that changes in law such as this can and do have an effect on crime. When this legislature changed the threshold for felony theft from $2,500 to $500 in 2011, I was working as a patrol officer in a community that had a large retail and entertainment district. Prior to this change, it was not uncommon to respond to retail thefts where individuals would brazenly fill a shopping cart with expensive products (which were miraculously valued at just under $2,500) and simply walk out the door. There were many "frequent flyers" who did this on a weekly or even daily basis. Previously we were simply able to issue them a municipal citation (as due to the number of offenses that occurred, the local district attorneys office did not have the resources to prosecute them as misdemeanors) and send them on their way until we met again. When this law changed, word quickly spread that when these large thefts occurred, offenders would not just be cited and released but would be arrested, jailed, and charged with a felony. This resulted in a marked reduction in large scale retail thefts, simply by providing law enforcement and prosecutors the tools they needed to address it.

Wisconsin State Lodge
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President

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Secretary

The concept of monetary conditions of release, or "cash bail", can be traced back to the infancy of our modern criminal justice system. The need to ensure the appearance of criminal defendants for proceedings and to protect the public from additional harm is an integral part of a civilized society. In recent years, we have seen this important safety mechanism eroded by a faction of rogue prosecutors in a failed social experiment they call "bail reform" and "criminal justice reform". A nationwide crime surge and recent tragic events, including right here in Wisconsin, have highlighted the fallacy of these policies, and brought it to the public's attention. Our communities are seeing the real-life consequences of what happens when elected officials embrace pro-criminal, revolving door policies and make decisions that put the interests of violent offenders ahead of public safety. As law enforcement officers, we know all too well the pain and suffering that the victims of a revolving door criminal justice system endure. We are on the front lines each and every day, not just risking our safety and our lives to apprehend these repeat offenders, but to console and help pick up the pieces of the victims who are lucky enough to survive.

Many officers, myself included, can tell you that they have personally arrested individuals for violent crimes who were released from custody, literally before the reports were even completed. We have listened to the pleas of victims asking us why we cannot protect them from their attackers who are back on the street. I have personally arrested defendants for crimes who were already out on bond who, when bail is set for their new case that included the new charges in addition to a bail jumping charge, were given an even lower bond than their initial one. This does not occur in every county, but criminals know no jurisdictional boundaries and citizens across the state suffer the consequences of these decisions no matter where they occur. These inconsistencies and failures of some officials require intervention from the legislature, and that is why we are here.

AB838 and AB840 would establish minimum bail amounts for individuals who have previous convictions for a felony, violent misdemeanor, or bail jumping. If someone has proven through past behavior that they have a propensity for violence or that they cannot abide by the conditions of a bond imposed by the court, it only makes sense that they should be required to have a minimum vested interest in attending court dates and integrating into society.

AB839 would require the Department of Justice to gather data about the bonds that are being set by our courts and publish a report. Currently there is not centralized repository of this data, and we don't know the true scope of the problem. This data would provide transparency and accountability in our criminal justice system and allow the people to see in black and white how their elected judicial officials are ensuring that justice is served and their communities are protected.

AB841 would prohibit prosecutors from placing an individual charged with illegal possession of a firearm in a deferred prosecution program or dismissing or amending the charge without approval from the court if they have a previous conviction for a violent felony. With the staggering increases in violent crime, often including firearms and often involving those who are prohibited from possessing firearms, we need to ensure that the laws enacted to protect our communities by this legislature are being enforced. The solution to the gun problem is not new gun laws, it is the vigorous enforcement of the ones we already have.

Finally, AB842 would prohibit the early discharge from probation or early release from prison of individuals serving sentences for certain violent crimes. Early release from probation or incarceration was designed for offenders who committed less serious offenses who have demonstrated their willingness and ability to successfully integrate into the community. Prohibiting violent offenders from taking advantage of these privileges will make our communities safer and send a strong message that Wisconsin has zero tolerance for those who victimize others.

Thank you again for the opportunity to testify in support of this bill, and I am happy to answer any questions you may have.

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Assembly Committee on Judiciary
Wednesday, January 12, 2022
Assembly Bills 829, 838, 840-842

Good morning Chair Tusler and members,

Thank you for the opportunity to provide information on the bills scheduled for a hearing today. The State Public Defender (SPD) provides representation for approximately 120,000 clients per year in criminal cases starting with the initial appearance to set bail through the entirety of the circuit and appellate court processes. Bills such as those on the agenda today affect the constitutional rights of clients and court procedures.

Assembly Bill 829 (Mandatory minimum on 3rd offense retail theft)

AB 829 creates a 180 day mandatory minimum sentence for third or more offense retail theft.

There is little evidence to suggest mandatory minimum sentences serve as an effective deterrent against criminal activity. A 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 placing a person who is considered low to medium risk to reoffend with a higher risk population in jail or prison, increases that individual's 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 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.

Removing discretion at sentencing for retail theft at any value will result in an increase in the number of individuals sentenced to jail or prison. The laudable goal of community safety has not benefited from a desired deterrent effect or increased confinement through mandatory minimum sentences. To the contrary, such measures will increase the number of people with limits on their future housing, employment, and educational prospects because of the collateral consequences of conviction.

Assembly Bills 838 (minimum bail based on previous conviction)

AB 838 sets a minimum bail amount of $10,000 for an individual who has a prior felony or violent misdemeanor conviction.

It is a fundamental principle that individuals accused of committing a crime are presumed innocent until proven guilty. As the U.S. Supreme Court has noted, "[i]n our society social liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). In determining whether to impose pretrial conditions of release under current law, a court first considers whether an individual is likely to appear at future court hearings. A monetary condition of release, bail, may be imposed only if the court finds that there is a reasonable basis to believe it is necessary to ensure the individual's appearance in court. The court may also impose any reasonable non-monetary condition of release to ensure a defendant's appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. Courts also have the ability to deny pretrial release from custody to persons accused of certain violent crimes.

The Wisconsin Constitution allows the use of cash bail based on the sole factor of ensuring that an individual will appear for future court hearings. The amount of cash bail is a "reasonable condition" of pretrial release as determined in each individual case by a judge or court commissioner. As presented, AB 838 is both contrary to evidence based policy and constitutional due process protections.

As noted, the constitution empowers judges or court commissioners the exclusive authority to determine the amount of cash bail that may be set. It does not empower the enactment of laws that set a minimum cash bail amount. Attempting to legislate a minimum cash bail strains the separation of powers between the legislative and judicial branches of government. In addition, for many indigent defendants, $10,000 is an unreasonable amount of bail which raises a second line of constitutional challenges to AB 838.

Aside from constitutional questions, AB 838 does not comport with evidence-based policy. In fact, it exacerbates the fallacy of cash bail as a proxy for future court appearance or community safety (though community safety is not a constitutionally permitted reason to set cash bail amounts.) Cash bail often results in poor people charged with non-violent crimes staying in custody pre-trial while people with access to resources who are charged with violent crimes are able to post cash bail and be released.

Assembly Bill 840 (minimum bail based on previous bail jumping conviction)

AB 840 sets a minimum bail amount of $5,000 for an individual who was previously convicted of bail jumping. Concerns about AB 840 are substantially similar to AB 838 with the important distinction of the frequency that bail jumping is charged and convicted.

Bail jumping can be charged anytime someone violates any condition of pre-trial release. If the underlying charge is a misdemeanor, then bail jumping is a misdemeanor. Similar for a felony. It is not uncommon for a person to be charged and convicted of multiple counts of bail jumping even if they are not convicted of the original charge.

Given that bail jumping is usually one of the top three charges issued in Wisconsin, AB 840 becomes an almost universal minimum bail amount for anyone who may have been convicted of bail jumping years earlier for violating a condition of release and is again involved in the criminal justice system.

Assembly Bill 841 (Felon in possession of a firearm charging process)

AB 841 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 Assembly Bill 174 which requires 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.

Assembly Bill 842 (Limiting earned release programs)

AB 842 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 829, 838, 840, and 841 will be to significantly increase the population of Wisconsin`s jails and prisons while AB 842 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.

Schmidt, Melissa

From: Rep.Tusler
Sent: Thursday, January 13, 2022 9:58 AM
To: Schmidt, Melissa
Subject: FW: WACDL positions on Assembly Committee on Judiciary bills being considered today

Here is another items for Judiciary.

From: Anthony Jurek <ajurek@stroudlaw.com>
Sent: Wednesday, January 12, 2022 10:46 AM
To: Heitman, Kathryn <Kathryn.Heitman@legis.wisconsin.gov>
Cc: Rep.Tusler <Rep.Tusler@legis.wisconsin.gov>; Rep.Kerkman <Rep.Kerkman@legis.wisconsin.gov>; Rep.Ramthun <Rep.Ramthun@legis.wisconsin.gov>; Rep.Thiesfeldt <Rep.Thiesfeldt@legis.wisconsin.gov>; Rep.Horlacher <Rep.Horlacher@legis.wisconsin.gov>; Rep.Sortwell <Rep.Sortwell@legis.wisconsin.gov>; Rep.Cabrera <Rep.Cabrera@legis.wisconsin.gov>; Rep.Hebl <Rep.Hebl@legis.wisconsin.gov>; Rep.Ortiz-Velez <Rep.Ortiz-Velez@legis.wisconsin.gov>; Sarah Schmeiser <sschmeiser@stroudlaw.com>
Subject: WACDL positions on Assembly Committee on Judiciary bills being considered today

Dear Ms. Heitman,

I am a member of the Wisconsin Association of Criminal Defense Lawyers' Legislative Affairs Committee, and write to you in your capacity as the Committee Clerk for the Assembly Committee on Judiciary to express WACDL's position on the following bills:

AB 827: Oppose, as it increases the penalty for potentially petty crimes in ways which can already be accomplished through conspiracy and party to a crime statutes.
AB 829: Oppose, as it increases the penalty for potentially petty crimes and disproportionately targets the poorest of Wisconsin's citizens, while removing discretion from judges and occasioning the need for more jails.
AB 838: Oppose, as it's unconstitutional and fiscally irresponsible. See particularly the Wisconsin Constitution, Art. 1, Sec. 8 (2), that "Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court." Additionally, there are not currently enough jails to house the sort of populations this bill would occasion.
AB 839: Oppose as written, but would encourage further study of bail practices and efficacy. As written, this bill merely encourages shaming judges for following the Constitution (see comment on AB 838 above). However, a robust study of bail practices and efficacy in Wisconsin, perhaps in conjunction with UW and Marquette Law Schools, would be beneficial.
AB 841: Oppose, as it removes discretion from prosecutors and judges.
AB 842: Oppose, as it removes discretion of judges and the DOC and is fiscally irresponsible by keeping inmates incarcerated and supervised for longer than the Department of Corrections believes is necessary.

If you have any questions or concerns, I welcome you to reach out to me or our Committee Chair, Sarah Schmeiser, at the same number below.

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