Van H. Wanggaard
Wisconsin State Senator

TESTIMONY ON SENATE JOINT RESOLUTION 82

Thank you committee members for today's hearing on Senate Joint Resolution 82, which amends our state constitution so that judges can consider a multitude of factors when setting bail.

While preparing for today's hearing, I went back and read my testimony for 2017 Assembly Joint Resolution 93. Yes, you heard that correctly - Twenty Seventeen. Representative Duchow and I first proposed this change 5 years ago. I then reviewed the materials from the 2018 Legislative Council Study committee on bail and pre-trial release, of which I was chair, and Representative Duchow was a member.

I make a point of mentioning this because this is not something that is a knee-jerk reaction to a specific incident. Many people may think this proposal is because of the Waukesha parade tragedy, or the attempted murder of the off-duty law enforcement officer last week in Milwaukee. While low bail was clearly a factor in those incidents, they were not and are not the reason for SJR 82. The fact is Wisconsin's bail system has been in need of change for a long time.

Most people are shocked to learn that under Article I, Section 8, Clause 2 of Wisconsin's Constitution a bail amount, referred to as a "monetary condition of release," may only be in the amount that ensures a defendant appears for trial. Under Wisconsin's Constitution, the seriousness of the offense, the potential danger to public safety, and criminal history is not permitted to be considered when setting monetary bail. If a person has roots in the community, a job, a family, a home, etc. they're more likely to be released on a low cash bail, or frequently, just their word.

For years, we've seen the detrimental impacts of this law. You don't have to go far to find the impact. You can look at last week and the shooting of the police officer. You can look at last year, with the 6 people killed in the Waukesha parade. You can see it in the Fox 6 report on December 19, 2021 which found that of the 117 people charged with homicide in Milwaukee County last year, 25 of them were out on bail that ranged from a high of $10,000 down to a zero dollar signature bond. That's just Milwaukee County. If people looked at other counties, you would likely see similar issues.

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Based on feedback from legislators and interested parties, we have offered Senate Substitute Amendment 1, which you should have received this morning. This amendment focuses on Clause 2 of Article 1, Section 8. It gives judges broader discretion in setting conditions of release and requires judges to set bail, or a "monetary condition," based on a number of factors.

As we'll undoubtedly hear today, bail is a legally and constitutionally complicated subject. Therefore, changes should be carefully considered and evaluated. After 5 years, this proposal has been through the ringer, and in my opinion, threads the needle between protecting the public and victims, and preserving the presumption of release prior to conviction. Senate Joint Resolution 82 and the public we serve to protect, deserve your support.

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Senate Committee on Judiciary and Public Safety
Public Hearing, SJR 82
January 20, 2022

Thank you Chairman and members of the Committee for this opportunity to testify on SJR 82, relating to eligibility and conditions for release prior to conviction of persons accused of certain crimes and considerations for imposing bail. I would also like to thank Sen. Wanggaard for his leadership in crafting this proposal.

As legislators, citizens look to us to keep our communities safe and protect fundamental rights. We want to be safe in our homes and as we walk down the street, and we want to ensure the government does not have unchecked power against an individual. With this paradigm in mind, we have introduced SJR 82.

Two sessions ago, constituents in my district raised concerns regarding a sexual predator living nearby. Although the defendant confessed to molesting his grandchildren and was later convicted, the court set bail at just $75,000 while he awaited his hearing. The defendant posted the full amount. Residents of the neighborhood were reasonably concerned for the safety of the community, particularly because there was a school bus stop in close proximity to his home.

In doing some research, we discovered that considerations for setting bail is an issue judges and court commissioners struggle with every day. Currently, Article 1, Section 8 of the Wisconsin Constitution guarantees eligibility for release under conditions designed to "assure their appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses." Furthermore, the courts have interpreted "serious bodily harm" to mean "death or risk of death."

Thus, short of "death or risk of death," the danger a defendant may pose to public safety is not a consideration in determining whether to impose bail under our state Constitution. In the example I gave a moment ago, the court could not consider the defendant's proximity to the school bus stop, because – contrary to common sense – child molestation is not considered "serious bodily harm."

Since Sen. Wanggaard and I began advocating for a constitutional amendment in 2017, communities and families around Wisconsin have been devastated by other decisions surrounding bail. Just in Milwaukee in 2021, about 1 in 5 homicide suspects were out on bail for felonies. More than half of the pending cases were for violent crimes. Milwaukee ended 2021 with a record-breaking 205 homicides.

Here are a few examples of defendants released on low bail:

Of course, we're familiar with Darrell Brooks, charged with six counts of homicide and numerous other felonies in connection with the Waukesha holiday parade attack. He was out on just $1,000 bail, having been charged in connection with driving over a woman with his vehicle.

Dan O'Donnell, in a piece titled "The Trail of Blood that Disproves Chisholm's Lies," published at MacIverinstitute.com, on December 10, 2021 gives several more examples, including the case of Chad Marcinkiewicz. Marcinkiewicz was arrested on suspicion of stabbing a man to death while out on $5,000 bail for a previous stabbing last August that left a man seriously injured. An electronic monitoring device was unavailable, and bail was increased to $5,500. Court records show that the morning of the homicide, Marcinkiewicz was in court for a preliminary hearing on charges of recklessly endangering safety in connection with the August stabbing.

Last week, an off-duty Milwaukee detective was shot while attempting to prevent a carjacking in the Third Ward. There were three suspects involved. One is suspected of shooting the detective. Another was out on a $500 signature bond. A third suspect was out on $1,000 bail in a case involving a car chase and resisting arrest, having injured an officer.

The Wisconsin Constitution does contain a provision that permits the Legislature to create a procedure that allows individuals accused of certain crimes to be detained prior to trial, but this provision contains numerous restrictions that, in practice, have made the pretrial detention procedure not useable. In fact, my office has been told that since its adoption in the early 1980's, this pretrial detention procedure is so unworkable and impractical that it has never been used. Instead, cash bail is often used as a mechanism to ensure these individuals remain detained, even though this use of cash bail is not permitted under the state Constitution.

SJR 82, as amended by Senate Substitute Amendment 1, suggests a common-sense way to balance public safety and fundamental rights. First, it would change "serious bodily harm" to "serious harm as defined by the legislature by law." Second, it would require the court to make findings based on the "totality of the circumstances," including the seriousness of the charged offense, convictions for past violent crimes, probability that the accused will fail to appear in court, the need to protect the community from serious harm as defined by the legislature, preventing witness intimidation, and potential affirmative defenses that the accused might have.

It is my hope that the Committee will support SJR 82, as amended by Senate Substitute Amendment 1, to give judges and court commissioners the ability to consider other important factors when setting bail.

Thank you again for the opportunity to testify. I am happy to answer any questions.

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Senate Committee on Judiciary & Public Safety
Senate Joint Resolution 82
Thursday, January 20, 2022

Good morning Chair Wanggaard and members,

Thank you for having this hearing on Senate Joint Resolution (SJR) 82, which proposes changes to the Wisconsin Constitution related to eligibility and conditions for release prior to conviction. The State Public Defender (SPD) is concerned that these changes will result in a significant increase in the number of people detained pretrial who are presumed innocent and do not pose a serious risk to the community.

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.

As presented, SJR 82 makes three changes that run counter to the 5th and 8th amendments to the United States Constitution.

First, the resolution would add language to Article I of the Wisconsin Constitution requiring that judges consider four new factors in determining the amount of monetary bail imposed. These factors--the seriousness of the offense charged, the previous criminal record of the accused, and the need to protect members of the community from serious harm or prevent the intimidation of witnesses--are appropriate when setting conditions of release, but are not appropriate considerations in determining how much money an accused person must post to be released pretrial. Adding these considerations to the Constitution creates the likelihood that judges will set bail that violates the "excessive bail" prohibition under the 8th Amendment to the U.S. Constitution.

The second change to Article I suggested by the resolution, amending "serious bodily harm" to "serious harm" creates an ambiguity that is unworkable. The vague term "serious harm" would seem to encompass emotional, economic, or non-criminal behavior which, while perhaps not welcome, is not reason enough to deprive someone of their liberty. Given this overly broad standard, it is likely that far more people will be detained pretrial than under our current standards.

Finally, the proposed change for Article 1, Section 8(2) creates a due process concern under the 5th Amendment of the U.S. Constitution. By removing the requirement that a court make a finding about "a reasonable basis to believe that the conditions are necessary to assure appearance in court," the Wisconsin Constitution would remove the due process requirement guaranteed by the U.S. Constitution when determining bail. The proposed amendment only requires considerations of factors; it does not require any findings before a court imposes a cash bail.

The anticipated effect of this language is that Wisconsin will see an increase in the number of people who are presumed innocent, and unnecessarily incarcerated while they await trial. This is also bound to result in lengthy, and costly litigation.

In addition, this proposal runs counter to what many other states are looking at when considering the future role of bail and monetary conditions in the criminal justice system.

The State Public Defender (SPD) is a member of the Statewide Criminal Justice Coordinating Council (CJCC), a group formed by the Governor and co-chaired by the Attorney General and Department of Corrections Secretary. One of the most significant initiatives of the CJCC has been to work on the implementation of Evidence-Based Decision Making in the criminal justice system; the role of monetary bail versus a "preventive detention" model has been given high priority. At a joint meeting of the Assembly Corrections and Senate Judiciary committees in October 2017, the CJCC provided background on its work in this area.

A better model to consider is a preventive detention system that significantly disincentivizes the role that money plays in this system by instead primarily determining pretrial release on a case-by-case basis through the use of a risk assessment tool combined with judicial discretion. Persons are either determined to be of sufficient risk to be held in custody pretrial or are released with non-monetary conditions pending future court proceedings. This is an improvement over the current process, which allows people with access to money, though potentially high-risk, to be released before trial, while people who are low-risk, but who are unable to post even modest amounts of cash bail, often remain in custody.

Currently, 22 states and the federal courts use a preventive detention system rather than monetary bail. These systems have shown success in both protecting public safety (fewer crimes committed by persons released pretrial) and in reducing incarceration costs (fewer low-risk individuals in custody). A risk-based system that removes money as the primary determinant for pretrial release is both more fair and more protective of public safety than the current system in Wisconsin.

In addition, there are empirical studies that demonstrate that the length of time someone is held pretrial has a measurable impact on future criminal activity. This is based on the principle that detaining both low and high-risk offenders in the same facility increases the likelihood of the low-risk offender engaging in future criminal behavior. When a low-risk defendant is held more than 2-3 days, they are 40% more likely to commit another crime after obtaining pretrial release. Being held 8-14 days pretrial increases the likelihood 51% that a low-risk defendant will commit another crime within two years after the completion of their case.

A recent overview of preventive detention in the United States prepared by the National Center for State Courts' Pretrial Justice Center can be found at: https://www.ncsc.org/__data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf

Finally, as of Wednesday, it appears that the companion of SJR 82, Assembly Joint Resolution 107, has a pending substitute amendment. While the amendment has not been introduced on SJR 82, we wanted to offer brief comments on the chance that the amendment is offered following this public hearing. The language in the amendment allows cash bail to be set based on several factors, including a previous conviction for a violent crime as defined by the legislature. The ability to define violent crime by statute and have it affect the constitutional right to the presumption of innocence and pretrial release raises a number of concerns. To give one example, current law (Wis. Stat. s. 969.035) defines violent crime for the purpose of pretrial release to include tampering with household products (Wis. Stat. s. 941.327). Over the years, the number of new felony and violent crimes has grown each legislative session. This history suggests that over time, crimes will continue to be defined as violent which, under the substitute amendment language, would mean that the person could be held on cash bail simply because of a previous conviction that may have no bearing on why they are currently before a court. This raises a similar set of constitutional concerns as with SJR 82 as introduced.

Thank you for the opportunity to testify on Senate Joint Resolution 82. We urge the committee to strongly consider whether the resolution is the answer to a perceived problem or whether a more comprehensive discussion by all criminal justice system partners should be held before amending the Constitution. As the U.S. Supreme Court has explained, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)).

JULIAN BRADLEY
WISCONSIN STATE SENATOR

Senate Committee on Judiciary and Public Safety
Thursday, January 20, 2022

Senate Bills 856, 857, & 858

Chairman Wanggaard and fellow committee members, thank you for taking the time to hear testimony on Senate Bills 856, 857, and 858.

Wisconsin has a bail problem. This fact was highlighted after Darrell Brooks Jr. massacred women and children at the Waukesha Christmas Parade. Brooks, after having been convicted of multiple felonies, violent crimes, and bail jumping, was released on a $1,000 bail at the hands of the Milwaukee County criminal justice system.

My package of bills begins to fix the problem of judges and district attorneys giving out lax bail, just as they did for Darrell Brooks.

Senate Bill 856 requires a minimum bond of at least $10,000 for defendants who have previously committed a felony or violent misdemeanor.

Senate Bill 858 requires a minimum bond of at least $5,000 for defendants who have previously been convicted of bail jumping.

Operating within the confines of the State Constitution, these minimums are a reasonable amount of bail. When a repeat offender has a history of criminal misconduct or bail jumping, they have shown they have little incentive to stay on the straight and narrow and return to court when released on bail, just like Darrell Brooks.

Brooks' bail was originally set to $10,000 despite his history of violent crimes and bail jumping. His bail was lowered to a level even Milwaukee County District Attorney John Chisolm called inappropriately low. But Brooks' situation is just one example of low bail – there are many others throughout Wisconsin.

We have a moral obligation to ensure this failure never happens again. Senate Bills 856 and 858 are a step towards rebuilding public trust in Wisconsin's criminal justice system.

Lastly, Senate Bill 857 ensures accountability in the process by creating a bond transparency report. This bill requires the Director of State Courts to submit a report to the Department of Justice detailing every crime charged, the conditions of release, who the presiding judge was, and the name of the prosecuting attorney assigned to the case.

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Some say this information is technically already accessible. However, the average Wisconsinite doesn't have the resources or ability to sort through every condition of bail set by a judge. Communities deserve the full picture when evaluating how their judges and DAs are performing.

According to Lanny Glingberg, a UW-Madison School of Law professor, "In terms of the data, there's CCAP, and it's a fairly crude instrument — at least the public-facing side of the website — for doing research. It's not built for that." That's exactly why we need a searchable website — to better understand the issue.

In time, Wisconsin's constitution should be amended to prevent violent criminals from walking free days after committing a crime. Senator Wanggaard, I applaud your efforts to correct the systemic failure in our bail system. Until then, these three bills are the minimum our constituents expect from us.

Thank you, and I'm happy to answer any questions.

Wisconsin State Lodge
Fraternal Order of Police

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Ryan Windorff
President

Shane Wrucke
Secretary

January 20, 2022

Wisconsin Fraternal Order of Police Testimony in Support of Senate Bills 856, 857 and 858

Senate Committee on Judiciary and Public Safety

Thank you, Senator Wanggaard and fellow committee members for the opportunity to provide testimony in support of Senate Bills 856, 857 and 858. 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.

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.

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SB 856 and SB 858 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.

SB 857 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.

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

STATE BAR OF WISCONSIN

Leaders in the Law. Advocates for Justice.®

To: Members, Senate Judiciary & Public Safety Committee
From: President Cheryl Daniels, State Bar of Wisconsin
Date: January 20, 2022
Subject: Bail Reform Legislation

Thank you for the opportunity to provide this written testimony. While taking no position today, the State Bar of Wisconsin, through its Board of Governors, expresses concern with the direction some of the proposals being considered are taking. It is our intent to continue to monitor and evaluate these and any other proposals related to the use of cash bail.

The State Bar of Wisconsin has over 25,000 attorney members that represent all areas and practices of law. Our organization is unique in that we represent all facets of the criminal justice system from district attorneys, public defenders, criminal defense attorneys and judges. The process of bail and the criminal justice system as a whole is incredibly complex.

Many State Bar members have served and participated in numerous study committees created by the court, the Department of Justice, and the 2018 Legislative Joint Council Study Committee on Bail and Conditions of Pretrial Release. According to a 2018 report by the National Conference of State Legislatures, 44 states enacted 182 pretrial laws in 2017. Wisconsin is not alone in working to reform the bail process and a number of counties that participated in a pilot using evidence-based tools found fiscal and court efficiencies.

After evaluating many studies and reviewing possible solutions, our Board of Governors has concluded that continuing to use cash bail alone as the basis for public safety is contrary to the State Bar's philosophy. Rather, courts should use validated risk-assessment tools or "evidence-based decision making" to determine the appropriate mechanism to both guarantee a return for court proceedings and protect the public from further harm.

Those involved in the bail process are making determinations based on many factors and evidence-based tools assist in that process. The State Bar of Wisconsin recognizes the need for a clear pre-trial process that protects public safety and ensures that dangerous individuals are detained or monitored until they face trial, but it believes that the best approach to bail reform is one that moves away from the routine use of cash bail for defendants who are deemed to be low-risk.

Our hope is that the legislature looks for a long-term solution for bail reform. The 2018 Study Committee supported a number of reforms that would have dramatically improved the pretrial process and additional consideration of that committee's good work should be reviewed.

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