JULIAN BRADLEY
WISCONSIN STATE SENATOR

Senate Bill 427: bail for criminal defendants who have a previous conviction for bail jumping and Department of Justice collection and reporting of certain criminal case data.
Senate Committee on Judiciary and Public Safety
Wednesday, September 27, 2023

Thank you, Chairman Wanggaard and Judiciary Committee members, for hearing our bill today. I'm here on behalf of victims of crimes committed by criminals who were out on low or no cash bail.

The tragedy that took place on November 21, 2021 when Darrell Brooks drove a van through the Waukesha Christmas parade, killing six and injuring others, is a solemn reminder of the consequences of letting repeat violent offenders out on low bail. Darrell Brooks posted his inexcusably low bail amount of just $1,000 only two days prior. That low amount was imposed by Milwaukee County District Attorney John Chisholm and demonstrates an incredible failure by his office.

Unfortunately, this story is not an isolated incident. Far too many repeat offenders and bail jumpers are being released on low or no cash bail only for them to commit another crime. This is happening because soft-on-crime district attorney and judges aren't prioritizing public safety. Instead, they're putting their soft-on-crime agenda first and letting violent criminals back on the streets on low or no cash bail where they are free to victimize law-abiding citizens.

To address these instances of low or no bail, this bill provides guidelines for defendants who have been previously convicted of crimes. The bill imposes a $5,000 cash bail minimum for a defendant who has been previously convicted of bail jumping and a $10,000 cash bail minimum for a defendant who has been previously convicted of a violent crime. These individuals have shown a complete disregard for our laws. These minimum bail requirements will help keep violent criminals and repeat offenders off our streets. This intention of this bill is to put public safety ahead of violent repeat offenders.

SB 427 also significantly improves transparency around the bail process by requiring that the DOJ collect several data points and uses that information to publish an annual report in an interactive format. This ensures that the public knows what bail amount, if any, a judge or court official sentences an individual to. This increased transparency will enable the public to see which court officials are putting their judicial ideology ahead of public safety.

Passage of this bill will increase transparency and accountability while keeping violent criminals off our streets. I urge this committee and all of my colleagues in the Senate and Assembly to support this common sense legislation that puts public safety first.

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Testimony in Support of Senate Bill 427

Thank you members of the Committee on Judiciary and Public Safety for meeting today to hear public testimony on Senate Bill 427, which would provide transparency on our judicial system in addition to creating minimum bail thresholds – ensuring dangerous criminals stay behinds bars.

Our constitutional republic has succeeded because of checks and balances. Our forefathers learned from their experiences and developed a government that was accountable to voters in addition to the co-equal branches. Checks and balances are a structural part of our government and are necessary. Additionally, ensuring our co-equal branches of government are transparent and honest reassures citizens they are indeed working on the public's behalf.

The public demands our legislative and executive branches are transparent – and for good reason. However, our judiciary is often not treated in the same way despite having vast constitutional powers. The judicial system can often be confusing to navigate for the average citizen without any previous knowledge or a law degree.

Senate Bill 427 would require the Department of Justice to collect multiple data points on each criminal case – reporting them annually and publishing them on a website for the public. The most notable being whether a court official releases a defendant without bail.

We have seen time and time again our judges and court officials set bail for criminals at unacceptably low levels – resulting in criminals victimizing our communities again. Senate Bill 427 would address this by applying minimum standards for cash bail. Defendants who were previously convicted of bail jumping would receive a $5,000 cash bail requirement while a $10,000 requirement for those previously convicted of a violent crime. This reassures the public that criminals, with the most likelihood to reoffend, will have guaranteed minimums for bail.

The public has a right to know how our judicial system works in a way that is understandable and digestible. As I mentioned before, our branches of government are designed to be transparent with checks and balances – this bill will improve both. Senate Bill 427 provides transparency and accountability to our court officials while ensuring dangerous low bail requirements are a thing of the past.

I want to thank the group of legislators who also recognized this as a worthy issue and decided to co-sponsor this legislation. There is a famous quote that says, "The price of liberty is eternal vigilance." This legislation will allow Wisconsin to expand upon the long tradition of transparency through the work of vigilant citizens in our constitutional republic. Committee members, please join me in supporting Senate Bill 427. I would be happy to respond to any questions or concerns about the legislation.

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Senate Committee on Judiciary & Public Safety
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Senate Bill 427

Chairman Wanggaard & Committee Members,

Thank you for the opportunity to provide information on Senate Bill (SB) 427. 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 SB 427 affect the constitutional rights of clients and court procedures.

One provision of SB 427 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 or whether they have been accused of a violent crime as defined by law. 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 factor of ensuring that an individual will appear for future court hearings or if an individual is accused of a violent crime. 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, SB 427 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 SB 427.

Aside from constitutional questions, SB 427 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. 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.

Another provision of SB 427 sets a minimum bail amount of $5,000 for an individual who was previously convicted of bail jumping. In addition to the concerns mentioned above, there are issues related to 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, SB 427 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.

The cumulative effect of Senate Bill 427 will be to significantly increase the population of Wisconsin's jails and prisons. It is not unrealistic to expect that the bill will result in a need for a considerable number of new jail and prison beds, a cost not accounted for in the bill.

Thank you again for the opportunity to provide information on Senate Bill 427. If you have additional questions, please do not hesitate to contact us at 608-264-8572 or plotkina@opd.wi.gov.

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Chair Wanggaard, Vice-Chair Jacque, and Honorable Members of the Senate Committee on Judiciary and Public Safety:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide written testimony in opposition to Senate Bill 309 and Senate Bill 427.

We cannot continue to double down on harmful policies that have pushed our correctional system to a breaking point and failed to actually improve safety and material conditions in Wisconsin communities. As a reminder, we have over 21,000 people incarcerated in state prisons, about 12,000 in county jails, and nearly 63,000 people on probation, parole, and extended supervision.

Devastatingly, Wisconsin has the highest Black incarceration rate in the country. Data shows that 1 in 36 Black Wisconsinites are currently incarcerated, meaning Black people are nearly 12 times more likely to be incarcerated than white people.[1] According to a study by the Wisconsin Court System, Native American men are 28% more likely to be sentenced to prison than their white counterparts.[2] Wisconsin also has a higher percentage of people incarcerated for crimes committed as youth than any state in the country except Louisiana.[3]

We all want to live in safe and healthy communities, and legislation impacting the criminal legal system should be focused on the most effective approaches to achieving that goal. SB-309 and SB-427 would take us several steps in the wrong direction.

Senate Bill 309

This bill would require the Department of Corrections to recommend revoking a person's probation, parole, or extended supervision for just being charged with–and not convicted of–a crime. The bill also adds additional barriers to record expungement if a person has a previous conviction (including a conviction that has been expunged), if they have pending criminal charges, or if a person violated a rule or condition of probation.

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[1] Clare Amari, *Wisconsin imprisons 1 in 36 Black adults. No state has a higher rate.*, Wisconsin Watch (Oct. 13, 2021), https://wisconsinwatch.org/2021/10/wisconsin-imprisons-1-in-36-black-adults-no-state-has-a-higher-rate/.

[2] DRAFT: *Race and Prison Sentencing in Wisconsin: Initial Outcomes of Felony Convictions, 2009-2018* (Jan. 2020), https://s3.documentcloud.org/documents/20478391/race-prison-sentence-felony-report-draft_2020_02_05.pdf.

[3] Alexander Shur, *Wisconsin has 2nd highest percentage of prisoners locked up for crimes committed as youth,* Wisconsin State Journal (May 23, 2023), https://madison.com/news/state-regional/government-politics/wisconsin-has-2nd-highest-percentage-of-prisoners-locked-up-for-crimes-committed-as-youth/article_4a6c1600-f5b7-11ed-9186-ffd641c2443d.html.

Lowering the Constitutional Burden for Conviction
Taking away discretion from DOC agents and automatically initiating an administrative revocation to send a person to prison for being charged with a crime raises constitutional concerns. The practical burden of proof required for a period of incarceration on a new charge would essentially become "probable cause" (the standard for issuing the charge itself) rather than "beyond a reasonable doubt."

Two Billion Dollar Price Tag
According to the Fiscal Estimate completed by the Department of Corrections, SB-309 would cost a fortune:

- **Over $1.7 million annually** for increased revocation cases adjudicated by the Department of Administration's Division of Hearings and Appeals;
- **$1.3 to $1.67 billion** for the construction of two new prisons to accommodate the significant increase in the incarcerated population;
- **Over $72.7 million** in increased operations costs during the first year of enactment
- **Over $209 million** in increased operations costs during the second year of enactment

Rather than trapping people in a revolving door of incarceration and supervision, people on parole, probation, or extended supervision should be given the support and opportunities they need to thrive in their community.

Senate Bill 427
In addition to the data collection requirements contained in SB-427, this bill would make draconian changes to state law relating to the cash bail system that ignore both the realities behind Wisconsin's bail jumping prosecutions and the legal, economic, and human impact of cash bail. Under the bill, if a defendant has a previous conviction for bail jumping, they may only be released by executing a secured bond or paying at least $5,000 cash bail. This minimum bail amount would apply regardless of the nature of the pendant charge, the age of the previous bail jumping conviction, or whether the previous bail jumping conviction was a misdemeanor or a felony. If a defendant is accused of a "violent crime" and has a previous conviction for a violent crime, they may only be released by executing a secured bond or paying at least $10,000 cash bail.

The Realities of Bail Jumping Charges in Wisconsin
Over the past few decades, criminal bail jumping charges have skyrocketed in Wisconsin– often "top[ping] the list of the state's most common charges."[4] It is important to note that conduct resulting in a criminal bail jumping charge does not need to be a crime itself. Missing an appointment with a caseworker, breaking a curfew, not updating an address, missing a drug test, or relapsing could all result in a bail jumping charge if they relate to a non-monetary bail condition. Sometimes Wisconsinites are charged and convicted of multiple counts of bail jumping even if they were not convicted of the original charge.

[4] Natalie Yahr, *Walk the line: How bail jumping became Wisconsin's 'most-charged crime*,' Cap Times (Feb. 26, 2020), https://captimes.com/news/local/neighborhoods/walk-the-line-how-bail-jumping-became-wisconsins-most-charged-crime/article_8349851a-f8cd-5fc3-a659-7fc5c1885e25.html.

As data from a legal and quantitative analysis published in 2018 suggests, "an underlying purpose for filing bail jumping charges may be to create leverage against defendants to induce them to plead to their original charge rather than to punish them for violating their bond conditions."[5] The Wisconsin Justice Initiative and the Mastantuono Coffee & Thomas law firm published data on the staggering prevalence of bail jumping charges issued by several counties in 2021.[6] The table below summarizes some of this data:

County	Percent of Misdemeanor Cases that Include Bail-Jumping Charges	Percent of Felony Cases that Include Bail-Jumping Charges
Adams	18%	36%
Ashland	21%	42%
Barron	26%	33%
Bayfield	10%	30%
Brown	23%	44%
Buffalo	6%	11%
Burnett	9%	33%
Calumet	20%	46%
Chippewa	33%	59%
Clark	17%	37%
Columbia	28%	40%
Crawford	31%	34%
Dane	11%	35%
Dodge	20%	39%
Door	21%	46%
Douglas	8%	21%
Dunn	30%	46%

[5] Amy Johnson, *The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis,* 2018 WIS. L. REV. 619 (2018), https://repository.law.wisc.edu/s/uwlaw/media/40009.
[6] Wisconsin Justice Initiative Blog (2022), https://www.wjiinc.org/blog/category/bail-jumping-project.

A Two-Tiered System of "Justice"

Wisconsin's reliance on cash bail has perpetuated a two-tiered system of justice: one for the wealthy and one for everyone else. Imposing the mandatory bail requirements in SB-427 would exacerbate the inequities in the current pre-trial detention system and result in extraordinary costs to counties to support a ballooning jail population.

Spending even a few days in jail can have devastating, long-lasting consequences for presumptively innocent individuals and their families. The inability to pay cash bail hurts the very things that help someone charged with an offense succeed: employment, stable housing, and strong family and community connections. On top of the risk of job loss, eviction, and the impact on child custody and parental rights, people incarcerated pre-trial can find themselves under a mountain of system-imposed debt.

Wisconsin statutes give counties discretion to charge incarcerated people a fee for their incarceration. According to a report from the Institute for Research on Poverty (IRP), 16 of 22 counties that responded to the IRP survey charged incarcerated people a booking fee or daily rate for room and board.[7] In 2019, Wisconsin Watch found that at least 23 Wisconsin counties assess "pay-to-stay" fees.[8] Further, Wisconsin jails and telecommunications companies extract more money from incarcerated people and their families, with rates for phone calls as high as $14.77 for a 15-minute call in some counties.[9]

In addition to the cascading economic and social consequences, detention poses a systemic disadvantage to people unable to afford the price of freedom pretrial. Compared to similarly situated non-detained peers, people detained pretrial are more likely to plead guilty,[10] more likely to be convicted,[11] and more likely to have longer sentences[12] if incarcerated.

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[7] Will Maher, *Poverty Fact Sheet: Pay-to-Stay Jail Fees in Wisconsin*, Institute for Research on Poverty (2017-2018), https://www.irp.wisc.edu/wp/wp-content/uploads/2018/10/Factsheet15-Pay-to-Stay-Jail-Fees-in-WI.pdf.

[8] Izabela Zaluska, *Pay-to-stay, other fees, can put jail inmates hundreds or thousands in debt*, Wisconsin Watch (Sept. 15, 2019), https://wisconsinwatch.org/2019/09/pay-to-stay/.

[9] Wanda Bertram, *New data: Wisconsin jails and telecom giants profiting from high phone rates that keep families apart,* Prison Policy Initiative (Sept. 10, 2021), https://www.prisonpolicy.org/blog/2021/09/10/wisconsin-phones/.

[10] Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention,* 69 STAN. L. REV. 711 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3409&context=faculty_scholarship.

[11] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law, Economics, & Organization, 511 (2018), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Distortion-of-Justice_Stevenson.pdf.

[12] Meghan Sacks and Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59 (2014), https://journals.sagepub.com/doi/abs/10.1177/0887403412461501.

According to a 2013 study of cases in Kentucky, people held pretrial are four times more likely to receive a jail sentence and three times more likely to receive a prison sentence, even when controlling for other factors such as charge type, demographics, and criminal history.[13] Not to mention, Wisconsin is in the midst of a constitutional crisis, where defendants in poverty—disproportionately people from Black and brown communities—are routinely forced to sit in jail while awaiting the appointment of counsel in violation of the Sixth Amendment.

Studies have also found that pretrial detention can be the strongest single factor influencing a convicted defendant's likelihood of being sentenced to jail or prison.[14] As Chief Justice Rehnquist wrote for the majority in *United States v. Salerno*, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987). While the U.S. Supreme Court has held that, "the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary," the reality of cash bail in our current system means that Wisconsinites charged with a crime are not innocent until proven guilty but instead innocent until proven poor.

The ACLU of Wisconsin strongly urges committee members to vote against these proposals that would exacerbate mass incarceration and the damage it inflicts on our communities, our families, and our economy.

[13] Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes,* Laura and John Arnold Foundation (2013), https://perma.cc/CKF5-RCMN.
[14] *Id.*