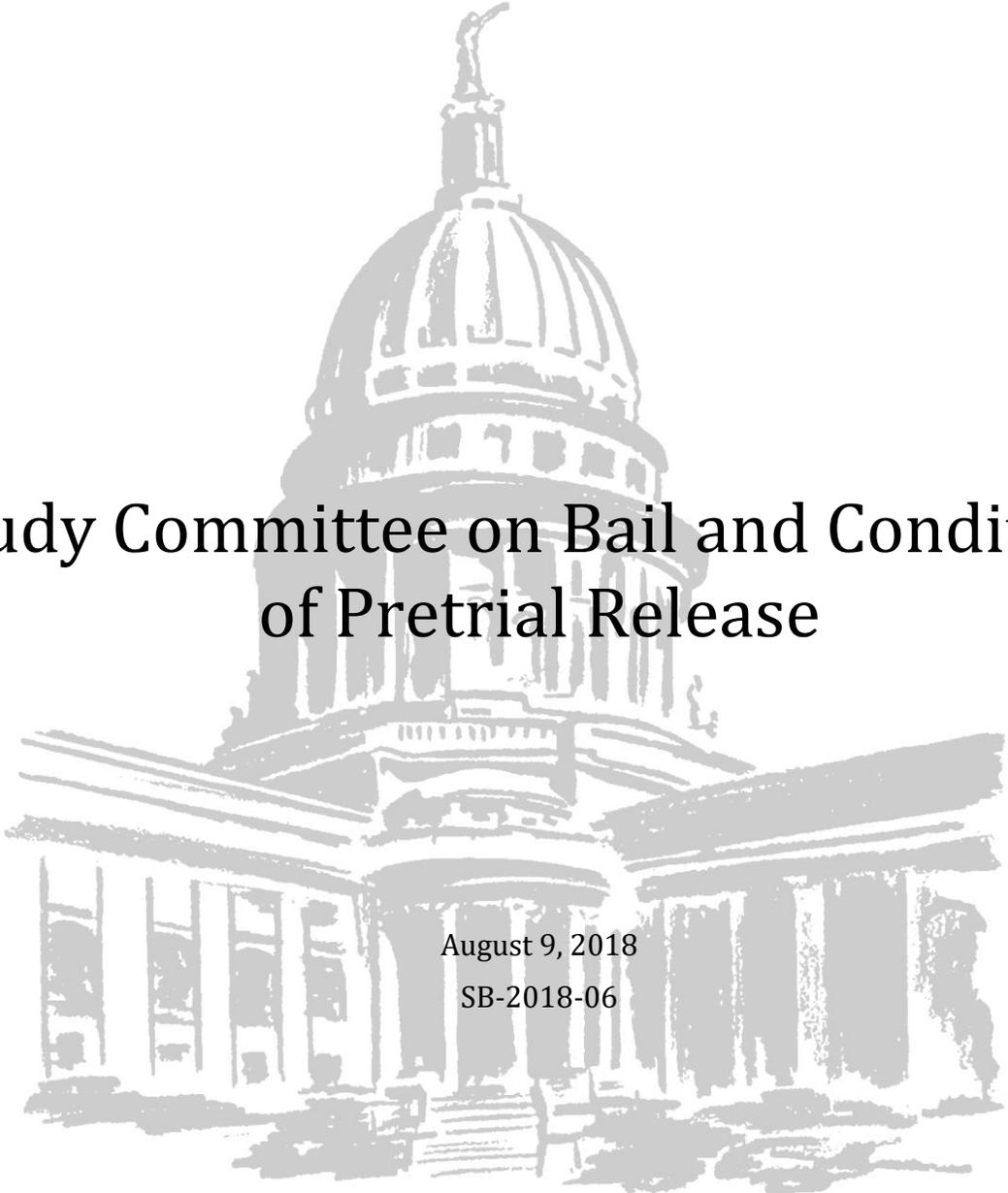


# Legislative Council Staff Brief



## Study Committee on Bail and Conditions of Pretrial Release

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# INTRODUCTION

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The Wisconsin Legislative Council Study Committee on Bail and Conditions of Pretrial Release is directed to: (1) review Wisconsin's pretrial release system, including considerations for courts in imposing monetary bail and for denying pretrial release; (2) review relevant Wisconsin constitutional and statutory provisions and best practices implemented by Wisconsin counties and other states, including use of risk assessment tools for informing pretrial detention decisions; and (3) recommend legislation regarding bail and pretrial release that enhances public safety, respects constitutional rights of the accused, considers costs to local governments, and incorporates evidence-based strategies.

This Staff Brief offers general background information for committee members regarding terms, constitutional provisions, and statutory provisions relevant to bail and pretrial release.

- **Part I** provides a brief introduction to the concept of bail and defines certain terms related to bail and pretrial release used in the Wisconsin statutes.
- **Part II** provides a brief summary of the constitutional framework for bail and pretrial release in Wisconsin.
- **Part III** provides a brief summary of the statutory framework for bail and pretrial release in Wisconsin.

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# PART I – RELEVANT TERMS

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## INTRODUCTION

The concept of allowing an arrested person to be released by providing security to assure appearance at trial, often referred to as “bail,” has been part of the United States’ criminal justice system since the country’s founding.<sup>1</sup> The Eighth Amendment to the U.S. Constitution, ratified in 1791, references the concept of bail in its prohibition against “excessive bail.” The Judiciary Act of 1789 also provided a statutory right to bail in federal cases, with the exception of offenses punishable by death, stating:

And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted by the supreme court, circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.

Both the practice of releasing an arrested person after he or she provides security to assure appearance at trial and the use of the term “bail” are long-standing. However, the term “bail” is subject to different meanings. The term is sometimes used to refer to the court process for determining whether a person charged with a crime may be granted pretrial release. At other times, “bail” is used to refer to the release granted prior to trial and any conditions imposed on that release. Finally, the term “bail” is sometimes used to refer specifically to money paid to secure pretrial release.

## TERMS

Wisconsin law contains definitions related to pretrial release and security given to assure appearance at trial. The definitions, particularly for the term “bail,” may differ from definitions used in other jurisdictions or in other contexts. The following section provides relevant terms defined in the Wisconsin statutes.

### **Bail**

Wisconsin law includes two definitions for “bail,” each relating specifically to money posted to secure release and not to pretrial release more generally.

First, for purposes of the criminal procedure chapters of the Wisconsin statutes (chs. 967 to 979), “bail” is defined to mean “the amount of money set by the court which is required to be

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<sup>1</sup> The concept of bail significantly predates the founding of the United States, and the origins of American bail law stem from English law. The history of bail is beyond the scope of this Staff Brief. For a discussion of this history, see the following publications: <https://cdpsdocs.state.co.us/ccij/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI 2010.pdf> and <https://fas.org/sgp/crs/misc/R40221.pdf>.

obligated and secured as provided by law for the release of a person in custody so that the person's appearance may be required and that the person will comply with such conditions as are set forth in the bail bond." [s. 967.02 (1d), Stats.]

Second, for specific purposes of the bail chapter of the Wisconsin statutes (ch. 969), the term "bail" is defined to mean "monetary conditions of release." [s. 969.001 (1), Stats.]

### **Bail Jumping**

Wisconsin law makes it a crime for a person to violate **any** condition of his or her bond, and not simply to fail to appear in court. The crime of "bail jumping" is a violation of s. 946.49, Stats., which provides the following:

Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:

(a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

A conviction of bail jumping on a misdemeanor offense is punishable by a fine of \$10,000 or less, imprisonment of nine months or less, or both. A conviction of bail jumping on a felony offense is punishable by a fine of \$10,000 or less, imprisonment of six years or less, or both. [ss. 939.50 (3) (h) and 939.51 (3) (a), Stats.]

### **Bond**

Wisconsin law uses the term "bond" for a person's commitment to comply with conditions when the individual pledges money or property to secure pretrial release (secured bond), and also when the individual does not (unsecured bond).

The statutes define "bond" for purposes of the criminal procedure chapters as "an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein." [s. 967.02 (1h), Stats.] The terms "cash bond," "signature bond," and "recognizance bond" are sometimes used to refer to types of secured and unsecured bonds, but are not defined in the Wisconsin statutes.

### **Surety**

Wisconsin law uses the term "surety" in reference to a person who pledges money or property so that another individual may be granted pretrial release, but does not create a definition for the term. Black's Law Dictionary defines "surety" as "a person who is primarily liable for the payment of another's debt or the performance of another's obligation. Although surety is similar to an insurer, one important difference is that a surety often receives no compensation for assuming liability. A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable." [Black's Law Dictionary, Eighth Ed. (2004).]

Though it does not define “surety,” Wisconsin law does impose limitations and requirements on an individual serving as “surety.” The statutes require that “every surety” under ch. 969, Stats., *Bail and Conditions of Release*, must be “a natural person” and a “resident of the state.”<sup>2</sup> The statute also prohibits existence of a commercial bail bonds industry in Wisconsin by stating that “no surety under this chapter may be compensated for acting as such a surety.” [s. 969.12 (1) and (2), Stats.; see also *Kahn v. McCormack*, 99 Wis. 2d 382, 299 N.W.2d 279 (Ct. App. 1980).]

### **Uniform Misdemeanor Bail Schedule**

The Wisconsin statutes provide that the judicial conference “shall develop guidelines for cash bail for persons accused of misdemeanors which the Supreme Court shall adopt by rule.” [s. 969.065, Stats.] To comply with the statute, the Wisconsin Judicial Conference developed the Uniform Misdemeanor Bail Schedule and the Wisconsin Supreme Court adopted the schedule by rule.

Though Wisconsin law does not use the term “uniform misdemeanor bail schedule,” the bail schedule fulfills the statutory requirement regarding guidelines for misdemeanor cash bail. The Uniform Misdemeanor Bail Schedule is used to determine cash bond amounts for release from custody of certain individuals arrested for a misdemeanor.

The Preamble to the Uniform Misdemeanor Bail Schedule states that individuals arrested for a misdemeanor “shall be released from custody without a cash bond,” unless the individual meets certain criteria. These criteria include lack of proper identification, previous failure to appear in court, or representing a danger to oneself, another person, or property, among other items. [2018 Misdemeanor Bail Schedule, pp. 80-81.]<sup>3</sup>

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<sup>2</sup> The statute does provide a limited exception to these requirements for a surety under s. 345.61, Stats., *Guaranteed traffic arrest bonds*.

<sup>3</sup> The State of Wisconsin Uniform Misdemeanor Bail Schedule may be accessed at: <https://www.wicourts.gov/publications/fees/docs/bondsched18.pdf>.



# PART II – CONSTITUTIONAL FRAMEWORK FOR BAIL AND PRETRIAL RELEASE

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## U.S. CONSTITUTION

The Eighth Amendment to the U.S. Constitution prohibits excessive bail. The first clause of the amendment states that: “Excessive bail shall not be required.” [Eighth Amendment, U.S. Const.]

In one seminal case interpreting the prohibition against excessive bail, the Supreme Court articulated the principle that bail is excessive in violation of the Eighth Amendment when it is set higher than “an amount reasonably calculated to” assure the presence of the accused to stand trial. [*Stack v. Boyle*, 342 U.S. 1, 4-5 (1951).] In that case, the Court, which was reviewing bail that had been uniformly set for 12 different petitioners at \$50,000 each, observed that “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.” [*Id.* at 5.]

Shortly after *Stack* was decided, the Supreme Court clarified that although the Eighth Amendment prohibits bail that is excessive, it does not guarantee a right to release on bail. The Court stated that the English Bill of Rights Act bail clause, from which the Eight Amendment excessive bail clause was carried over, “has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.” [*Carlson v. Landon*, 342 U.S. 524, 545-46 (1952).] The Court further noted that the Eighth Amendment does not prevent Congress “from defining the classes of cases in which bail shall be allowed in this country.” [*Id.* at 545.]

More recently, the Supreme Court refined these principles to hold that the Eighth Amendment does not prevent the government from considering interests other than ensuring the presence of the accused at trial in granting or denying bail. In *United States v. Salerno*, the Court rejected a constitutional challenge to the Bail Reform Act of 1984, which allows for detention of arrestees “charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.” [*United States v. Salerno*, 481 U.S. 739, 755 (1988).] The court distinguished its holding in *Salerno* from its holding in *Stack* by noting that, in *Stack*, the government had “admitted that its only interest [was] in preventing flight,” so bail could be set at “a sum designed to ensure that goal, and no more.” However, the Court concluded that “nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight.” [*Salerno*, 481 at 754.] Accordingly, the Court held it was permissible for Congress to mandate detention on the basis of a compelling interest other than prevention of flight. [*Id.*, 754-55].

## WISCONSIN CONSTITUTION

The Wisconsin Constitution contains the same excessive bail prohibition as the U.S. Constitution, stating that: “Excessive bail shall not be required.” [Art. 1, sec. 6, Wis. Const.] However, unlike the U.S. Constitution, the Wisconsin Constitution provides a right to release under reasonable conditions in most cases, and specifically limits the reasons for which monetary bail can be required. Wisconsin Constitution, Article I, Section 8 (2), provides the following:

All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. 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. The legislature may authorize, by law, courts to revoke a person’s release for a violation of a condition of release.

The Wisconsin Supreme Court observed that Wis. Const. art. I, s. 8 (2), prevents a court from considering any factor other than assuring the arrestee’s appearance in court when setting the amount of bail. The court noted that “this language unambiguously provides that the *only* factor a court can consider when setting monetary conditions of bail is whether the amount is necessary to assure appearance in court. That reading is one which the courts of this state have long endorsed.” [*State v. Iglesias*, 185 Wis. 2d 117, 139, 517 N.W.2d 175, 182 (1994).]

Further, unlike the U.S. Constitution, the Wisconsin Constitution contains additional provisions specifying the limited circumstances under which state law may authorize courts to deny pretrial release and the maximum period during which courts may deny such release. Wisconsin Constitution Article I, Section 8 (3), provides the following:

The legislature may by law authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to the hearing required under this subsection to a person who is accused of committing a murder punishable by life imprisonment or a sexual assault punishable by a maximum imprisonment of 20 years, or who is accused of committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another and who has a previous conviction for committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another. The legislature may authorize by law, but may not require, circuit courts to continue to deny release to those accused persons for an additional period not to exceed 60 days following the hearing required under this subsection, if there is a requirement that there be a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the felony and a requirement that there will be a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses. Any law enacted under this subsection shall be specific, limited and reasonable. In determining the 10-day and 60-day periods, the court shall omit any period of time found by the court to result from a

delay caused by the defendant or a continuance granted which was initiated by the defendant.

To restate, the language specifies that courts, pursuant to authorizing statutes enacted by the Legislature, may deny pretrial release to: (1) arrestees accused of a homicide offense that carry life sentences; (2) arrestees accused of sexual assault crimes that carry 20-year maximum sentences; or (3) arrestees accused of felonies involving or threatening “serious bodily harm” **and** who have a previous conviction for a felony of this type.

The language further requires a court to make particular findings to continue denying pretrial release following a hearing. The required findings are that: (1) there is clear and convincing evidence the arrestee committed the felony; and (2) available release conditions will not protect the public against “serious bodily harm” or will not prevent intimidation of witnesses.



# PART III – STATUTORY FRAMEWORK FOR BAIL AND PRETRIAL RELEASE

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The decision to arrest or release an individual is generally within the discretion of law enforcement, subject to certain situations when arrest is mandatory. Alternatives to arrest include allowing the suspect to post a cash bond, according to a bond schedule for misdemeanor and traffic charges, or releasing the individual with notice to appear in court on a specified date.

A person who is arrested must be taken within a reasonable time before a judge<sup>4</sup> in the county in which the offense was alleged to have been committed. [s. 970.01 (1), Stats.] At the initial appearance, the judge must provide the defendant with certain information, such as the charge against the defendant, the defendant’s right to an attorney, and the defendant’s right to a preliminary examination if charged with a felony. In addition, s. 970.02 (2), Stats., requires the judge to “admit the defendant to bail in accordance with ch. 969.”

Beyond the statutory directive that an initial appearance must occur within “a reasonable time” after arrest, the statutes do not prescribe a time within which a person must receive a bail hearing. Under the Fourth Amendment to the U.S. Constitution, a person who is arrested without a warrant is entitled to a prompt judicial determination of probable cause. The U.S. and Wisconsin Supreme Courts have held that this promptness requirement is generally satisfied if the probable cause determination occurs within 48 hours of arrest. [*County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *State v. Koch*, 175 Wis. 2d 684, 696 (1993).] Although the requirement to review probable cause within 48 hours is different than the requirement to conduct an initial appearance within “a reasonable time,” it is not uncommon for courts to hold bail hearings within 48 hours. The timeframe for holding a bail hearing, however, is often established by local court rule.

A defendant who is unable to post the cash bail originally ordered remains in custody until bail is lowered or until the case is resolved. The procedures and the timeline for review of bail also vary among different counties, although all courts provide the ability for a defendant to seek review.

## **Eligibility for Pretrial Release**

Wisconsin statutes specify that most arrestees must be eligible for pretrial release, and specify the reasons for which pretrial release conditions may be imposed. Section 969.01 (1), Stats., restates the Wisconsin Constitution’s directive that, with certain exceptions, “all persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses,” and that monetary conditions of release, i.e., bail, “may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to

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<sup>4</sup> Initial appearances are sometimes conducted by court commissioners. Court commissioners may exercise or perform certain statutorily specified powers and duties of judges. [ss. 757.69 and 967.07, Stats.] In some counties, a defendant may have a circuit court commissioner’s bail determination immediately reviewed by a circuit court judge.

believe that bail is necessary to assure appearance in court.” To this directive, the statutory language further instructs that “in determining whether any conditions of release are appropriate, the judge shall first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance.” [s. 969.01 (1), Stats.]

*Considerations in Setting Conditions of Release*

Section 969.01 (4), Stats., requires that any bail that is imposed “be only in the amount necessary to assure the appearance of the defendant.” However, conditions other than money bail may be imposed to protect members of the community from serious bodily harm<sup>5</sup> or prevent intimidation of witnesses. The statute enumerates “proper considerations” for a judge to weigh before setting a bail amount or imposing release conditions on a defendant. Proper considerations in determining whether to release the defendant without bail, fixing a reasonable amount of bail or imposing other reasonable conditions of release are:

- The ability of the arrested person to give bail.
- The nature, number, and gravity of the offenses and the potential penalty the defendant faces.
- Whether the alleged acts were violent in nature.
- The defendant’s prior record of criminal convictions and delinquency adjudications, if any.
- The character, health, residence, and reputation of the defendant.
- The character and strength of the evidence which has been presented to the judge.
- Whether the defendant is currently on probation, extended supervision, or parole.
- Whether the defendant is already on bail or subject to other release conditions in other pending cases.
- Whether the defendant has been bound over for trial after a preliminary examination.
- Whether the defendant has in the past forfeited bail or violated a condition of release or was a fugitive from justice at the time of arrest.
- The policy against unnecessary detention of the defendant’s [sic] pending trial.

[s. 969.01 (4), Stats.]

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<sup>5</sup> In this context, “serious bodily harm” means bodily injury which causes or contributes to the death of a human being or which creates a substantial risk of death or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of any bodily member or organ or other serious bodily injury. [s. 969.001 (2), Stats.]

## Procedures Specific to Misdemeanors

Generally, a law enforcement officer may either issue a citation to a person believed to have committed a misdemeanor or may take the person into custody.<sup>6</sup> If the law enforcement officer issues a citation, the person must be released on his or her own recognizance. When determining whether to issue a citation instead of taking the person into custody, the law enforcement officer may consider whether:

- The accused has given proper identification.
- The accused is willing to sign the citation.
- The accused appears to represent a danger of harm to himself or herself, another person or property.
- The accused can show sufficient evidence of ties to the community.
- The accused has previously failed to appear or failed to respond to a citation.
- Arrest or further detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.

[s. 968.085 (2) (a) – (f), Stats.]

A chart to assist law enforcement personnel in making this determination is included in the Preamble to the Uniform Misdemeanor Bail Schedule. The chart in the Preamble includes the statutory factors listed above and suggests when release without bond or with cash bond may be appropriate. The chart has not been formally adopted by the Judicial Conference, though “The Supreme Court, in promulgating [the uniform bail schedule], concluded that law enforcement may find it helpful in applying the statutory factors concerning bond release.” [Uniform Misdemeanor Bail Schedule, Preamble (2018).]

If a person is taken into custody rather than issued a citation for a misdemeanor, it is possible the person may be released prior to receiving a bail hearing by paying the amount prescribed by the Uniform Misdemeanor Bail Schedule for the offense for which the person was arrested. This schedule prescribes standard bail amounts for specific misdemeanor offenses, such as \$200 for shoplifting or \$150 for disorderly conduct.

In addition, the schedule prescribes standard bail amounts for misdemeanors not specifically stated in the schedule. For Class A misdemeanors not specifically stated, the bail amount is \$500. For Class B misdemeanors not specifically stated, the bail amount is \$250. For Class C misdemeanors not specifically stated, the bail amount is \$100. For all other misdemeanors not specifically stated, the bail is one half the maximum fine provided by statute. [Uniform Misdemeanor Bail Schedule, p. 98 (2018).]

Bail paid in this manner is taken by a law enforcement officer. However, law enforcement officers have discretion not to allow such release. If a law enforcement officer “is of the opinion that

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<sup>6</sup> State law provides an exception to a law enforcement officer’s authority to issue a citation for a misdemeanor in lieu of taking a person into custody for certain domestic abuse cases. [s. 968.085 (8), Stats.]

the defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others,” the officer is not required to take bail and may instead continue to hold the defendant in custody. [s. 969.07, Stats.]

If a person taken into custody for a misdemeanor is denied release by law enforcement or unable to pay the amount prescribed in the Uniform Misdemeanor Bail Schedule, he or she will remain in custody until brought before a judge or a court commissioner for an initial appearance. A person who previously paid the amount prescribed in the Uniform Misdemeanor Bail Schedule will also have an initial appearance. At that appearance, the court may review the bail previously posted and also determine whether any other conditions of release are necessary.

At the initial appearance for a defendant charged with a misdemeanor, the judge may release the defendant without bail or permit the defendant to execute an unsecured appearance bond in an amount specified by the judge. [s. 969.02 (1), Stats.] In addition to or in lieu of these alternatives, the judge may do any of the following:

- Place the person in the custody of a designated person or organization agreeing to supervise him or her.
- Place restrictions on the travel, association, or place of abode of the defendant during the period of release.
- Prohibit the defendant from possessing any dangerous weapon.
- Impose any other condition deemed reasonably necessary to assure appearance as required or any nonmonetary condition deemed necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses, including a condition that the defendant return to custody after specified hours.
- Require the person to participate in mental health treatment, a batter’s intervention program, or individual counseling, if a person is charged with violating a domestic abuse or child abuse temporary restraining order or injunction. In determining whether to issue this type of order, the judge shall consider a request by the district attorney or the person who petitioned for the restraining order or injunction.

[s. 969.02 (3), Stats.]

If a judge imposes monetary bail on a defendant charged with a misdemeanor, the amount of bail imposed may not exceed the maximum fine provided for the offense. [s. 969.02 (8), Stats.]

## **Procedures Specific to Felonies**

There is no uniform felony bail schedule. Accordingly, when a defendant is arrested for a felony, conditions of release are set at the initial appearance. As with defendants charged with misdemeanors, a defendant charged with a felony may be released by the judge without bail or upon the execution of an unsecured appearance bond. In addition to or in lieu of these alternatives, the judge may also do any of the following:

- Place the person in the custody of designated person or organization agreeing to supervise the person.

- Place restrictions on the travel, association, or place of abode of the defendant during the period of release.
- Prohibit the defendant from possessing any dangerous weapon.
- Require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties.
- Impose any other condition deemed reasonably necessary to assure appearance as required or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses, including a condition requiring that the defendant return to custody after specified hours.

[s. 969.03, Stats.]

### **Pretrial Detention**

Wisconsin law provides a procedure for a court to deny any person's release from custody prior to trial if either of the following apply:

- The defendant is accused of committing first-degree intentional homicide; first-degree sexual assault; first or second-degree sexual assault of a child; engaging in repeated acts of sexual assault of the same child; or sexual assault of a child placed in substitute care.
- The person was previously convicted of committing or attempting to commit a violent crime<sup>7</sup> and is presently accused of committing a violent crime. [s. 969.035 (2), Stats.]

Generally, for a court to detain a defendant prior to trial, the district attorney must allege to the court that the defendant is eligible for denial of release and that the available conditions of release would not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses. The district attorney must also provide a copy of the present complaint charging the defendant with the commission or attempted commission of a detainable crime or a violent crime to the court. [s. 969.035 (3), Stats.]

If the court finds that the district attorney has complied with these requirements, the court may order the continued detention of a defendant currently in custody or issue a warrant commanding a defendant not in custody to be brought before the court for a pretrial detention hearing without unnecessary delay. When brought before the court, the defendant must be given a copy of the documents specified above, informed of the possible penalties for the offenses, and

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<sup>7</sup> "Violent crime" means any of the following: first-degree intentional homicide; first-degree reckless homicide; felony murder; second-degree intentional homicide; second-degree reckless homicide; homicide resulting from negligent control of vicious animal; homicide by negligent handling of dangerous weapon, explosives or fire; homicide by negligent operation of vehicle; causing great bodily harm to another with intent to cause great bodily harm to that person or another; causing great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child or to the woman pregnant with that unborn child; mayhem; first-degree sexual assault; reckless injury; tampering with household products; first-degree sexual assault of a child; second-degree sexual assault of a child; engaging in repeated acts of sexual assault of the same child; physical abuse of a child; sexual assault of a child placed in substitute care. [s. 969.035 (1), Stats.]

informed of his or her right to counsel and a preliminary examination, if applicable. [s. 969.035 (4), Stats.]

A pretrial detention hearing must be held within 10 days of a defendant being detained or brought before the court, to determine if the continued detention of a defendant is justified, and may be held in conjunction with a preliminary examination or a conditional release revocation hearing. The court must, however, make separate findings relating to the pretrial detention, preliminary examination, and conditional release revocation. [s. 969.035 (5), Stats.]

During the pretrial detention hearing, the state has the burden of proving by clear and convincing evidence either: (1) that the defendant committed one of the specified offenses for which release may be denied; or (2) that the defendant committed or attempted to commit a violent crime following a past conviction for a violent crime. The state must also prove, by clear and convincing evidence, that the available conditions of release are inadequate to protect members of the community from serious bodily harm or prevent the intimidation of witnesses.<sup>8</sup> [s. 969.035 (6) (a) and (b), Stats.]

If the court finds that the state has met its burdens, the court may deny bail to the defendant for an additional period not to exceed 60 days following the pretrial detention hearing.<sup>9</sup> A defendant detained following the pretrial detention hearing is entitled to have his or her case placed on an expedited trial calendar, and his or her trial must be given priority. Additionally, the defendant may petition the court to be released from custody, with or without conditions, at any time. [s. 969.035 (8), (10), and (11), Stats.] If the court finds that the state has failed to meet its burdens as described above, and the defendant is otherwise eligible, the defendant must be released from custody with or without conditions. [s. 969.035 (7), Stats.]

### **Grant, Reduction, Increase, or Revocation of Conditions of Release**

A court may increase or decrease the amount of bail, alter other conditions of release or the bail bond, or grant bail if it has been previously revoked, upon petition by the state or the defendant. [s. 969.08 (1), Stats.] The party petitioning the court to increase or decrease the amount of bail, alter other conditions of release or the bail bond, or grant bail if previously revoked must give reasonable notice of the petition to the other party. [s. 969.08 (3) and (4), Stats.] Violation of the conditions of release or the bail bond constitutes grounds for the court to increase the amount of bail or otherwise alter the conditions of release. If the alleged violation is the commission of a serious crime, the violation is grounds to revoke release. [s. 969.08 (2), Stats.]

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<sup>8</sup> The rules of evidence applicable in criminal trials govern the admissibility of evidence at the pretrial detention hearing. Evidence must be presented in open court with the right of confrontation, the right to call witnesses, the right of cross-examination, and the right to representation by counsel. Generally, the court may exclude witnesses until they testify, direct persons expected to be called as witnesses to be kept separate until called, and prevent persons to be called as witnesses from communicating with one another until examination is complete. Any testimony given by the defendant is not admissible on the issue of guilt in any other judicial proceedings, except for perjury proceedings and for impeachment purposes. [s. 969.035 (6) (c), (d), and (e), Stats.]

<sup>9</sup> If the time period set by the court passes and the defendant is otherwise eligible, he or she must be released from custody with or without conditions of release. In calculating the 60-day period, the court must omit any period of time found to be the result of a delay caused by the defendant. [s. 969.035 (8) and (9), Stats.]

In addition, a defendant who continues to be in custody 72 hours after the initial appearance as a result of his or her inability to meet the conditions of release is entitled, upon application, to have the conditions reviewed by the court. If the conditions are not amended and the defendant is not released, the judge must set forth on the record the reasons for requiring the conditions.

State law provides a procedure to revoke the release of a defendant and hold the defendant without setting conditions of release if the state has established by clear and convincing evidence that the defendant has committed a serious crime while on conditional release. "Serious crime" is defined, for these purposes, as one of various statutorily enumerated crimes. A court must follow this procedure if the district attorney alleges to the court and provides the court with:

- Documents alleging that the defendant is released on conditions for the alleged commission of a serious crime.
- Documents alleging that the defendant has violated the conditions of release by having committed a serious crime.
- A copy of the complaint charging the commission of the serious crime the defendant is alleged to have committed while on release.

If the court determines the state has made the requisite allegations, the court may issue a warrant for the defendant. When the defendant is brought before the court, he or she must be given a copy of the documents the district attorney is required to provide the court and given the equivalent of an initial appearance.

A combined bail revocation hearing and preliminary examination must be commenced within seven days. During this time, the defendant can be held without conditions of release. At the bail revocation hearing, the state has the burden of proving by clear and convincing evidence the violation occurred while the defendant was on conditional release. If the court finds the state has established by clear and convincing evidence that the defendant has committed a serious crime while on conditional release, the court may revoke the release of the defendant and hold the defendant for trial without setting conditions of release. A defendant revoked under these circumstances is entitled to be brought to trial on the offense for which he or she was formerly released on conditions within 60 days. [s. 969.08 (5), Stats.]