Rob Hutton

STATE REPRESENTATIVE • 13TH ASSEMBLY DISTRICT

November 30, 2017

To: The Assembly Committee on Criminal Justice and Public Safety
From: Rep. Rob Hutton
Re: Assembly Bill 642

Testimony of Rep. Rob Hutton in Support of Assembly Bill 642

Chairman Spiros, thank you to you and the Assembly Committee on Criminal Justice and Public Safety for hearing AB 642 today.

Criminal justice reform is currently a big issue nationally, including states like Wisconsin. Many of the initiatives we see today are offender centric with proposals aimed at more education, training, and re-entry opportunities. While some of these ideas have merit, these reforms should not supersede our priority on keeping communities safe and punishing those that seek to harm and negatively impact those communities.

AB 642 seeks to help the criminal justice system align the focus on two top priorities: protecting innocent citizens and properly punishing those that chose to victimize those citizens. This legislation expands the definition of violent crime for the purposes of denying pretrial release, more commonly known as bail, for repeat violent offenders. The expanded definition includes crimes that without a doubt are violent in nature including taking hostages, kidnapping, arson, second degree sexual assault, carjacking and more. Further, it allows the court to revoke bail for a person and hold them in custody should they commit any crime while on bail for a charge of a serious crime.

We have discussed this legislation with several stakeholders from different sections of the criminal justice system, some of which you will hear from today. They have all agreed that expanding this definition and the ability to revoke bail for any crime is appropriate. Through continued education on this subject we have learned that the process too, needs revamping and will be discussing an amendment or separate legislation to increase its effectiveness. These changes include removing discretion from judges in the case of new crimes committed while on bail and making the process simpler for DA's to make this request.

The protection of our victims and communities should be our first priority when it comes to criminal justice. Giving DA's and judges the ability to remove repeat violent offenders from our communities is a step in the direction of providing balance to our criminal justice system and promoting an environment of safety in which wounds can heal and communities can grow.

Thank you again for the opportunity to testify. I look forward to answering any questions you may have.

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STATE SENATOR

Leah Vukmir

Assembly Committee on Criminal Justice and Public Safety

Thursday, November 30, 2017

Assembly Bill 642

Chairman Spiros and committee members, I would like to express my sincere gratitude for giving Representative Hutton's and my bill a hearing. Assembly Bill 642 aims to address some problems in our current bail system.

Currently, a judge can only deny bail for a small number of first-offense felonies and several second-offense violent crimes. This bill expands that list of violent crimes for which a judge can deny bail for a second offense. It also allows a judge to revoke the release of a defendant if they are out on bail for a serious crime and have been alleged to commit any new crime. Under current law, bail can only be revoked if the alleged new crime is a serious crime.

In 2016, bail-jumping was charged 32,607 times. That means last year, 32,607 new crimes were committed by individuals out in society awaiting trial for a previous crime. Almost 14,000 of these charges were felonies. This bill gives district attorneys and judges an additional tool to protect the public from these law breakers while they are awaiting trial.

While we can't assume people are guilty until they're actually proven guilty, the protection of our neighborhoods needs to be a high priority. From 2015 to 2017, Wisconsin saw an increase of almost 5,000 counts of bail-jumping filed. That is an alarming statistic.

Representative Hutton and I understand the importance of due process, but we need to give judges and district attorney's the tools necessary to protect our communities. This bill provides them with the reasonable ability to be able to remove individuals awaiting trial for a serious crime from society if they continue to commit additional crimes.

Thank you, and please let me know if you have any further questions. I encourage your support for this bill.

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Assembly Committee on Criminal Justice & Public Safety
Thursday, November 30, 2017
Assembly Bill 642

Good morning Chairman Spiros and members,

Thank you for having this hearing and allowing us to speak on Assembly Bill 642 which makes changes to the current pretrial release statute in Wisconsin.

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. At a joint meeting of the Assembly Corrections and Senate Judiciary committees in October, the CJCC provided background on its work in this area. At the outset of these efforts, a multi-disciplinary team working at both the state and county levels identified areas of focus. An item given high priority was pretrial release and the role of monetary bail versus a true preventive-detention model.

In general, the current pretrial release structure in Wisconsin allows people with access to money, though potentially high-risk, to be released before trial, while people who are low-risk but are often held in custody because they cannot post even modest amounts of cash bail. While in general practice the current system is consistently applied statewide, it is the fundamental premise of a monetary bail system that is the issue.

A preventive-detention model removes the role that money plays in this system by instead determining pretrial release, on a case-by-case basis, by 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.

The federal judicial system and District of Columbia both operate on a preventive-detention model and were some of the first in the nation to do so. More recently, Governor Chris Christie placed an emphasis on this area and on January 1, 2017, New Jersey began operating a preventive-detention pretrial release system. At this point, 22 states have 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).

While AB 642 didn't create the monetary bail system, it is also not necessarily the long-term solution that the criminal justice system is moving towards. The bill's provisions may exacerbate the disparate access to release by including more crimes which may be assigned high cash bail that those with means, though they may be high-risk, will still be able to obtain release and those without means will not. A risk-based system that removes money as the primary determinant for pretrial release is both more fair and will better protect public safety than the current system in Wisconsin.

I have attached to our testimony a copy of a recent brief overview of preventive detention in the United States prepared by the National Center for State Courts' Pretrial Justice Center.

PJCC
Pretrial Justice Center for Courts

Preventive Detention

Pretrial Justice Brief 9* September 2017

Preventive Detention as a Pretrial Reform

Public safety goals are not met when high-risk defendants are released because they can pay the monetary bail set as a condition of release, while poor, low-risk defendants remain in jail because they are unable to pay their monetary bail.[1] As states move away from using monetary bail as the primary condition for pretrial release and toward risk-based pretrial release decision-making, the use of preventive detention under clearly defined circumstances has become an element of pretrial justice reform.[2] Two key tenets of pretrial reform are the presumption of release under the least restrictive conditions and the use of an evidence-based risk assessment to inform those release conditions.[3] In a risk-based system, some defendants will be found to pose too great a risk to public safety under any set of release conditions. Preventive detention of these defendants with strong due process requirements can offer courts a legal and evidence-based way to protect the community during the pretrial period.

In *United States v. Salerno,*[4] the U.S. Supreme Court upheld the 1984 Bail Reform Act's[5] use of "dangerousness" as an appropriate factor when considering pretrial release, holding that the government's interest in protecting society from violent criminals outweighed an individual's right to release. However, the Court emphasized the limited circumstances under which a defendant can be denied liberty pending trial and laid out procedural safeguards that courts must provide. At the heart of these safeguards is an adversarial hearing in which the government must show by clear and convincing evidence that no conditions of release would reasonably assure the safety of the public or an individual person.[6]

Twenty-two states and the District of Columbia now authorize preventive detention for specified serious criminal charges through constitutional provisions, statutes, or both.[7] The District of Columbia was the first jurisdiction outside the federal system to institute preventive detention, while New Jersey and New Mexico are the most recent states to do so.[8]

Cautionary Considerations

Civil rights advocates and researchers raise concerns that the use of preventive detention without proper protections can result in unlawful restrictions on individual liberty and thwart the legal doctrine that defendants are presumed innocent until proven guilty.[9] They argue that better release decisions do not necessarily result from preventive detention procedures, noting that many jurisdictions that have authorized preventive detention continue to use high money bonds to keep defendants detained.[10] In addition, most statutes authorize preventive detention based on the seriousness of the crime charged, which runs counter to principles of individualized review of defendant's circumstances and can set up a rebuttable presumption (i.e., an assumption of fact unless contested and proven otherwise) for detention that the defendant must challenge.[11] Many state statutes and constitutional provisions also do not articulate sufficient constitutional safeguards and guidance for implementation.[12] For example, in 2013 the National Conference of State

*This Brief was prepared by Susan Keilitz and Sara Sapia of the National Center for State Courts' Pretrial Justice Center for Courts (www.ncsc.org/pjcc). The Pretrial Justice Center provides information and tools, offers education and technical assistance, facilitates cross-state learning and collaboration, and promotes the use of evidence-based pretrial practices for courts across the country. It works closely with the Conference of Chief Justices, the Conference of State Court Administrators, and other national court organizations to implement pretrial justice reform. The Center is supported by the Public Welfare Foundation (PWF). Points of view or opinions expressed in this Brief are those of the author and do not necessarily represent the official position of the NCSC or PWF.

Legislatures identified 18 jurisdictions (17 states and the District of Columbia) that require a hearing to detain a defendant pending trial. However, six of these states do not specify a time frame for holding the hearing, and ten do not enumerate defendants' rights.[13]

The three jurisdictions profiled below have heeded many of these concerns in crafting legislation or court rules governing the use of preventive detention in their pretrial systems. All of them provide important procedural safeguards, including an adversarial hearing on detention within a short time after initial detention, the right to appointed counsel for preventive detention proceedings, a "clear and convincing evidence" standard for ordering preventive detention, written findings and reasons for detention, an opportunity for appeal or review of the detention order, and expedited trial for defendants who are detained pending trial.

Prevention Detention in Three Jurisdictions

District of Columbia

The District of Columbia has been a leader in pretrial justice practices, beginning in 1963 when it began a pretrial services program with a grant from the Ford Foundation.[14] In 1970 the District enacted the District of Columbia Court Reform and Criminal Procedure Act,[15] which was the first statutory authorization of pretrial detention based on a consideration of dangerousness. The District's current preventive detention statute specifies the following factors the court must consider in determining a defendant's dangerousness: violent and dangerous nature of the crime; weight of the evidence against the defendant; defendant's personal character and history (including community involvement, physical and mental health, substance abuse, financial resources); past failures to appear; criminal history; probation or parole status; and seriousness of the danger to others if the defendant is released.[16]

Defendants in the District of Columbia are entitled to a release hearing at their first appearance. If the defendant is detained at this hearing, the court must hold an adversarial hearing within three to five days to determine if there are conditions under which the defendant could be released. Defendants subject to pretrial detention have the right to appointed counsel for these proceedings. The D.C. Code includes a rebuttable presumption against pretrial release if a judicial officer finds probable cause that one or more of eight factors applies to the defendant (e.g., committed a dangerous crime or crime of violence with a deadly weapon, committed a dangerous crime pending trial or while on probation or parole).[17] To deny a defendant pretrial release, the court must find "clear and convincing evidence that no condition or combination will reasonably assure the appearance of the person as required and the safety of any other person and the community." For defendants detained pending trial, the trial must be held within 100 days unless specified circumstances support extending this time.

According to the DC Pretrial Services Agency, 16% of all cases filed in 2016 resulted in initial detention (3,269 cases out of 20,880).[18] Of those initially detained, 64% were subsequently released, most as an outcome of their preventive detention hearing. Combining initial and subsequent release rates, over 94% of defendants were released pretrial.

New Jersey

In 2014, New Jersey voters approved amending the state's constitution (1) to replace the right to bail with the right to be considered for pretrial release and (2) to allow a court to order a defendant charged with certain crimes to be detained prior to trial.[19] The amendment authorized the legislature to enact new statutory provisions governing pretrial release and preventive detention.

The new law, which went into effect January 1, 2017, moves New Jersey away from relying on monetary release conditions.[20] In its place is a risk-based system that presumes release with the least restrictive conditions for all defendants except (1) those charged with or having been convicted of specified serious crimes or (2) when the prosecutor believes there is a serious risk the defendant (a) will

not appear in court or (b) poses a danger to any person or the community.[21]

The prosecutor must file a motion for pretrial detention and the detention hearing generally must occur no later than the defendant's first appearance. Continuances are allowed in limited circumstances. Defendants have the right to counsel, which will be appointed for them if they cannot afford representation.[22] To order pretrial detention the court must find by clear and convincing evidence that "no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process."[23] In reaching its findings, which must be written and include a statement of the reasons for detention, the court may take into account a number of factors that are similar to those used in the District of Columbia.[24]

In May 2017, New Jersey's Acting Administrative Director of the Courts reported that between January 1, 2017 and March 31, 2017, pretrial detention was ordered for 12.4% of defendants (1,262 total). Fifty-five percent of those detentions were based on the court granting prosecutors' motions to deny pretrial release.[25]

New Mexico

In November 2016, New Mexico voters approved a state constitutional amendment to allow courts to deny pretrial release to defendants charged with a felony if a prosecutor proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The amendment also prohibited courts from denying pretrial release for defendants who are not considered dangerous and do not pose a flight risk based solely on the defendant's inability to post a money or property bond.[26] In June 2017, the New Mexico Supreme Court issued detailed procedural rules for pretrial detention and release in the state's trial courts.[27] These rules became effective July 1, 2017.

Rule 5-409 of the New Mexico Rules of Criminal Procedure for the District Courts governs preventive detention in the District Courts.[28] The court may order pretrial detention only if the defendant is charged with a felony and the prosecutor files a motion for pretrial detention that states the specific facts supporting the motion.

The prosecutor may file a motion for pretrial detention at any time, but the hearing on the motion must be held within five days of filing or the arrest of the defendant based on the motion. The court rule spells out the defendant's rights, which include the right to appointed counsel. The prosecutor has the burden of proving "by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."[29] If the prosecutor fails to meet this burden, the court follows the provisions of Rule 5-401 to issue an order setting the conditions of release.[30] If the court finds that the burden has been met, the court must file written findings of the specific facts that explain the detention. The court also must expedite the trial date for any defendant detained pending trial.

Moving Forward with Precautions

Jurisdictions that institute preventive detention measures, whether through constitutional amendment, legislation, or court rule, should require explicit safeguards that provide defendants meaningful exercise of their due process rights as articulated by the U.S. Supreme Court in *United States v. Salerno*. Key elements of these safeguards should include (1) an adversarial hearing within a reasonably short time after arrest, (2) the right to counsel as an essential element of an adversarial proceeding, (3) a judicial finding of clear and convincing evidence that no conditions of release could provide reasonable assurance of public safety, (4) pretrial detention orders that clearly state the specific reasons for detention, (5) an opportunity for appeal or review of the detention order, and (6)

strict adherence to the jurisdiction's speedy trial requirements.[31] The underlying principle for any pretrial justice reform, and most pointedly for preventive detention, must be the Court's declaration in *Salerno:* "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[32]

Endnotes

[1] See Pretrial Justice Institute (2016) Key Features of Holistic Pretrial Justice Statutes and Court Rules; Criminal Justice Policy Program, Harvard Law School (October 2016) Moving Beyond Money: A Primer on Bail Reform.
[2] Key Features, note 1, at 13-16.
[3] National Institute of Corrections. A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency (February 2017); Amber Widgery (March 2015) Trends in Pretrial Release.
[4] United States v. Salerno, 481 U.S. 739.
[5] Bail Reform Act of 1984: Release or Detention of a Defendant Pending Trial, 18 U.S. Code § 3142.
[6] *U.S. v. Salerno*, note 4, at 750. See analysis of procedural requirements set out in *Salerno* in Moving Beyond Money, note 1, at 25-28.
[7] Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin. See Moving Beyond Money, note 1, footnote 210.
[8] In September 2017 the Circuit Court of Cook County, Illinois implemented pretrial reforms that include preventive detention of defendants found to be a danger to a person or the community. See General Order No. 18.8A.
[9] Moving Beyond Money, note 1, at 24-25; Preventive Detention in Policy & Practice [webcast]; John B. Howard, Jr., The Trial of Pretrial Dangerousness: Preventive Detention after United States v. Salerno, 75 Va. L. Rev. 639 (1989).
[10] Timothy R. Schnacke (2017). "Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention, at 30.
[11] Moving Beyond Money, note 1, at 27; Key Features, note 1, at 14. See Stack v. Boyle, 342 U.S. 1 (1951) (requirement for individualized review of factors to determine release conditions).
[12] See Moving Beyond Money, note 1; Timothy R. Schnacke, U.S. Dept. of Justice, National Institute of Corrections (2014) Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform; Pretrial Justice Institute (2017) Guidelines for Analyzing State and Local Pretrial Laws.
[13] National Conference of State Legislatures Pretrial Policy Laws Database-Pretrial Detention.
[14] Pretrial Services Agency for the District of Columbia: PSA's History.
[15] District of Columbia Court Reform and Criminal Procedure Act of 1970.
[16] District of Columbia Code Title 23 Release and Pretrial Detention. § 23–1322. Detention prior to trial.
[17] D.C. Code § 23-1322 (c) (1-8).
[18] Pretrial Services Agency for the District of Columbia, Release Rates for Pretrial Defendants within Washington, DC.
[19] New Jersey Preventive Detention Amendment Public Question No.1 (2014).
[20] N.J.P.L. 2014 c.31 (C.2A:162-15 et seq.)
[21] Id. at C.2A:162-19. The law includes a rebuttable presumption that the defendant shall be detained if the court finds probable cause that the defendant committed murder or any crime for which life imprisonment could be imposed.
[22] N.J.P.L. 2014 c 31 (C.2A:162-19 5.e.(1)), note 20.
[23] N.J.P.L. 2014 c 31 (C.2A:162-18 4.a.(1)), note 20.
[24] N.J.P.L. 2014 c 31 (C.2A:162-20), note 20.
[25] Remarks Before the Senate Budget and Appropriations Committee By Judge Glenn A. Grant, Acting Director of the Courts (May 4, 2017).
[26] New Mexico Changes in Regulations Governing Bail, Constitutional Amendment 1 (2016).
[27] Press Release: Supreme Court Issues New Procedural Rules Governing Pretrial Detention and Release (June 5, 2017). Separate rules tailored to the District Courts, Metropolitan Court, and Magistrate Courts.
[28] New Mexico Rules of Criminal Procedure for District Courts: 5-409. Pretrial detention.
[29] Rule 5-409 F. (4).
[30] New Mexico Rules of Criminal Procedure for District Courts: 5-401 Pretrial release.
[31] See Moving Beyond, note 1; Key Features, note 1; "Model" Bail Laws, note 10; ABA Standards of Pretrial Release. PART V. The Release and Detention Decisions.
[32] *U.S. v. Salerno*, at 755.