Van H. Wanggaard
Wisconsin State Senator

Testimony on Senate Joint Resolution 2 and Assembly Joint Resolution 1

Thank you Mr. Chairman and members for today's Joint Hearing on Senate Joint Resolution 2 and Assembly Joint Resolution 1, which update Wisconsin's constitutional restrictions on bail.

Anyone paying attention knows that Wisconsin's current system of bail is broken. Time and again, we see dangerous criminals released on low or no bail committing additional crimes. While Darrell Brooks and the Waukesha parade murders are the highest profile incident, it is not the only time a violent criminal committed an additional violent crime while on released on bail. In 2021, of the 117 people charged with homicide in Milwaukee, a whopping 21% were committed by person on bail.

In fact, in national conversations, Wisconsin is held out as an example of what NOT to do when it comes to bail. Wisconsin is the only state that only allows judges to consider only a single factor – whether or not a person will return to trial - when setting cash bail. Some states, like Georgia, give judges great authority when determining bail. Most states have between 5 – 15 different factors for judges to consider. The key is that EVERY OTHER STATE allows judges to consider multiple factors when setting bail.

Senate Joint Resolution 2 and its companion are our attempt to modernize Wisconsin's broken bail system bringing it in line with the rest of the country. The proposals do three things.

First, it allows a judge to consider "serious harm" to others instead of "Serious Bodily Harm" when setting conditions of release. This is an important change, because "Serious Bodily Harm" is a statutorily defined term, essentially meaning harm that could cause death or serious, permanent, disfigurement.

The proposed amendment also broadens the factors that a judge can consider when setting a monetary condition for release, or cash bail for violent crimes. As I said earlier, Wisconsin is the only state that only allows judges to consider a single factor when setting cash bail. Under our proposal, and for violent crimes only, judges will have the flexibility to determine bail based on the totality of the circumstances. In addition to flight risk, judges will also be able to consider the previous convictions of violent crimes, the need to protect the public from serious harm, and prevent the intimidation of witnesses. Judges will be able to consider potential affirmative defenses, too.

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While this provision broadens the existing clause of the constitution, it should be noted that it is actually narrowly drafted. First, the expanded considerations are limited to violent crimes only. This isn't about every little misdemeanor out there, it's about violent crimes.

Next, let's look at the new factors that we are allowing to be considered. Forty-Five other states allow judges to consider previous convictions when determining bail. Although the words may be different in the other states, 32 states also consider protecting the community from serious harm.

In California, public safety is actually the primary consideration when determining release. Preventing the intimidation of witnesses is specifically mentioned in 15 states, although additional states consider it within other language. Additionally, our proposal also allows judges to consider affirmative defenses, which is something only a handful of states use.

Finally, a judge must put on the record why they feel the amount of bail is appropriate. While this isn't getting a lot of attention, it is important so that defendants and the public know why a bail amount is set where it is. The bail must be justified.

That's important to note because excessive bail is prohibited under both the 8th Amendment to the US Constitution, and Article 1, Section 6 of the Wisconsin constitution. Nothing in this amendment changes that in any way. Under this proposal, Excessive bail is still be prohibited.

Wisconsin's bail system is in need of reform. Thanks to a 1981 amendment to Wisconsin's constitution, our bail system is the most restrictive among the 50 states, and Wisconsin's public safety pays the price. This proposal will not fix every problem with the criminal justice system, or pre-trial detention, and it's not intended to. But it will give judges the flexibility to consider the totality of the circumstances when setting bail which is common sense, and a good start.

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Assembly Committee on Judiciary
and
Senate Committee on Judiciary and Public Safety
Public Hearing, Assembly Joint Resolution 1
January 10, 2023

Thank you Chairman and members of the Committees for this opportunity to testify on Assembly Joint Resolution 1, relating to considerations for imposing bail. I also want to extend my sincere appreciation to Sen. Wanggaard for his collaboration on this proposal.

As legislators, citizens look to us to keep our communities safe and protect our 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 these principles in mind, we introduced this constitutional amendment.

Since 1982, Wisconsin has been somewhat of an outlier when it comes to how we set bail. No other state handcuffs courts the way we do. For example, 48 states allow courts to consider "dangerousness" in some fashion, but Wisconsin does not. Nine states are limited to prohibiting "excessive bail" only, matching the language of the U.S. Constitution. Twenty-two states guarantee the right to bail except in certain circumstances. In Wisconsin, broadly speaking, bail is set to ensure a defendant's appearance in court, prevent witness intimidation, and protect members of the community from serious bodily harm.

Those three goals sound fine, but in reality, courts rely on the integrity of defendants arrested for violent crimes when granting pre-trial release. We hope and pray they do not commit a new violent crime while out on bail. Unfortunately, they often do. Let's discuss a few of the proposed changes.

The idea is simple and essentially results in a two-tier system for bail to distinguish between violent crimes and all other crimes. There would be no changes in our current bail system for nonviolent defendants.

However, if accused of a violent offense (which the legislature defines), courts would be able to consider a wider range of factors: whether the accused has a previous conviction for a violent crime, flight risk, the need to protect the community from serious harm, the need to prevent the intimidation of witnesses, and the defendant's potential affirmative defenses.

The proposal makes a modification to the phrase "serious bodily harm." This is the phrase that first brought my attention to how we do bail. Currently "serious bodily harm" is defined to mean "bodily injury that causes death or creates a substantial risk of death."

No other state mentions "serious bodily harm." Our amendment changes the phrase to "serious harm." Here's why we believe this is important:

Several sessions ago, constituents in my neighborhood let me know about a sexual predator living nearby. The defendant confessed to molesting his grandchildren and was later convicted. The court set bail at $75,000 while he awaited his hearing to plead guilty. The defendant posted the full amount of bail.

Neighbors pointed out that the school bus stops at the end of his driveway. But 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."

His time on pretrial release occurred over Halloween, when parents usually stroll by on the street while their kids have fun. Not that year.

Moms and dads shouldn't have to live with that kind of fear. Modifying "serious bodily harm" to "serious harm, as defined by the legislature by law" will let the legislature and ultimately a court address harm other than "death or risk of death." It could be child molestation or rape.

In closing, I want to make something clear: this constitutional amendment is not about Darrell Brooks, or even low bail. This is about the factors that a court can consider when setting bail. Courts will still be able to set bail at one dollar or $1 million dollars; we just want courts to be able to consider the fullest picture available to them.

And it's not about an isolated incident. We're all familiar with Darrell Brooks, convicted of six counts of homicide and numerous other felonies for the Waukesha Christmas parade attack. Other suspects have amassed lengthy criminal records with violent criminal convictions, too long to read here. If we had the time, we could examine the violent criminal histories of Trevon Adams, Lamar Jefferson and many many more.

Critiques of this amendment range from "it doesn't do anything" to "it violates due process." In crafting this, we looked at all 50 states and designed a common-sense pathway for courts to balance fundamental rights with public safety.

It is my hope that the Committee will support AJR 1, and give judges and court commissioners the ability to consider important factors when setting bail for those accused of violent crimes.

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

Wisconsin State Lodge
Fraternal Order of Police

PO Box 206 West Bend, WI 53095

Ryan Windorff
President

Shane Wrucke
Secretary

January 10, 2022

Wisconsin Fraternal Order of Police Testimony in Support of Senate Joint Resolution 2 and Assembly Joint Resolution 1

Senate Committee on Judiciary and Public Safety

Thank you, Senator Wanggaard, Representative Duchow and fellow committee members of the joint committees for the opportunity to provide testimony in support of Senate Joint Resolution 2 and Assembly Joint Resolution 1.

My name is Mark Sette, and I am the Vice President of the Wisconsin State Lodge of the Fraternal Order of Police. The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 364,000 members in more than 2,200 lodges. The Wisconsin State Lodge proudly represents more than 2,800 members in 26 lodges throughout the state. We are the voice off those who dedicate their lives to protecting and serving our communities. We are committed to improving the working conditions of law enforcement officers and the safety of those we serve through education, legislation, information, community involvement and employee representation.

We are seeing a crime wave across Wisconsin, the likes we have not seen before. According to crime data from the Federal Bureau of Investigation, Wisconsin has seen a 29% increase in violent crime, and 171% increase in homicides from 2011 to 2021. 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. 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.

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President

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Secretary

These inconsistencies and failures of some officials require intervention from the legislature, and that is why we are here. 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. Under current law, cash bail can only be imposed upon a finding that there is a "reasonable basis to believe that bail is necessary to assure the appearance of the accused in court". This language precludes court commissioners and judges from another essentially important consideration for pre-trial release, the protection of the public.

Senate Joint Resolution 2 and Assembly Joint Resolution 1 would allow court commissioners and judges to consider the "totality of the circumstances" when considering pre-trial release conditions for a defendant charged with a violent crime. These considerations include the seriousness of the offense charged; whether the accused has a previous conviction for a violent crime, the probability that the accused will fail to appear in court; the need to protect members of the community from serious harm; the need to prevent the intimidation of witnesses; and the potential affirmative defenses of the accused. We believe that these changes would offer the courts more latitude in imposing the necessary pre-trial conditions of release, including cash bail if necessary, to assist law enforcement officers in keeping our communities safe.

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

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Protecting Justice for all Since 1977

Kelli S. Thompson
State Public Defender

Jon Padgham
Deputy State Public Defender

Assembly Committee on Judiciary
Assembly Joint Resolution 1/Senate Joint Resolution 2
Tuesday, January 10, 2023

Good morning Chairmen and members,

Thank you for having this hearing on Assembly Joint Resolution (AJR) 1 and Senate Joint Resolution (SJR) 2, 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.

AJR 1/SJR 2 make several 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, a previous conviction for a violent crime, 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. These four new factors are prefaced with the language that the judge or court commissioner must consider the "totality of the circumstances." This broad phrase would seem to indicate that Judges are free to use whatever factors they want to consider when setting cash bail. There is also a fifth factor included on page 2, line 14 regarding the "potential affirmative defenses of the accused." Practically, this is not a factor that anyone, including the client and their attorney, would know at the hearing to set bail. Including this as a factor to consider when

setting bail is neither practically feasible nor constitutionally permitted. 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 through the imposition of cash bail. Given this overly broad standard, it is likely that far more people will be detained pretrial than under our current standards.

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 ballot questions contained in AJR 1/SJR 2 split the proposed changes into two questions. While Question 1, related to the earlier change in the Section 8(2) can stand alone, if the voters were to approve Question 2 but not Question 1, the redrafted section would contain contradictory statutory language. At the beginning, it would refer to "serious bodily harm" while further down in the section it would use the language "serious harm as defined by the legislature by law." This potentially creates two different systems - one where non-monetary conditions are based on serious bodily harm, but another where monetary conditions are based on serious harm as defined by the legislature.

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, more than 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.

Attached to our testimony is a white paper prepared by the SPD examining the policy in several states and the lessons learned from the implementation. There is also a one page summary of the pretrial best practices. Briefly, those best practices include: that risk should be the sole factor in determining pretrial outcomes; that release on non-monetary conditions should be the default

outcome; that the use of cash bail should be restricted and that pretrial detention based solely on the inability to pay cash bail should be eliminated.

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

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.

Cash bail is not an adequate measure of protecting public safety. It simply exacerbates the socioeconomic divide in the criminal legal system. Those with means can afford to post a cash bail amount, even if it is set high based on the totality of the circumstances. Those who are poor will often be held on cash bail amounts as low as $200 which, as the data above shows, actually increased the risks of future recidivism.

To reiterate the principles spelled out in the *Salerno* decision, bail should be the carefully limited exception, not the norm. Changing the constitution to make cash bail more pervasive in the criminal justice system makes changes that affect the vast majority of people arrested for low level crimes to try and predict public safety for the minority of those arrested. A comprehensive report on cash bail was released by the United States Commission on Civil Rights in January. It highlights a significant amount of data that shows the negative impact of cash bail without a corresponding increase in community safety. One national statistic highlighted was that nationwide in 2016, 5% of all arrests were for violent offenses, 83% were for low level offenses. In 2018 in Wisconsin, there were 247,794 arrests. 3.2% were for violent crime. Even adding in serious crimes that aren't necessarily violent, that number is 13.8%.

To provide additional context, on one day in May 2019, a county conducted a detailed review of the individuals being held in the jail. Out of 796 individuals, 82 were being held pre-trial on 135 new cases alone (another 17 individuals had both new charges and were being held for another reason such as probation revocation.) The median amount of cash bail for the 135 pending cases was $1,000. From the standpoint of the 82 individuals, the median cash bail amount was $2,750. Either way, these amounts were sufficient to hold these individuals who are presumed innocent pending trial. These are not amounts that most of us at this hearing would have difficulty paying, but on that day in 2019, those amounts were enough to account for 10% of the jail population. Making it easier to set cash bail of any amount will almost certainly increase the jail populations across Wisconsin and will make detention based on cash bail the norm, rather than the exception.

Thank you for the opportunity to testify on Assembly Joint Resolution 1 and Senate Joint Resolution 2. 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." (S*tack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)).

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Reimagining Wisconsin's Pretrial Justice System

The United States and Wisconsin Constitutions protect fundamental rights such as the presumption of innocence until proven guilty. However, courts in the pretrial justice system can impose a number of pretrial conditions of release or detain an individual pretrial based on a number of factors. Monetary, or cash, bail has been one of the conditions historically imposed. Recent research has demonstrated the lack of efficacy that cash bail has in accomplishing the goals of ensuring release at future court appearances and protecting public safety. Several states have implemented significant policy changes to more effectively and efficiently prevent pretrial criminality and ensure individuals appear in court.

Wisconsin's Current Pretrial System

Purpose

Article I of the Wisconsin State Constitution holds that Wisconsin's pretrial system must serve to assure appearance in court, protect members of the community from serious bodily harm, and prevent the intimidation of witnesses.

Outlining Wisconsin's Pretrial Justice System

Currently, the court can only impose pretrial conditions of release if the individual is unlikely to appear at trial if released on his or her own recognizance. If release would not assure appearance, courts can impose three categories of conditions for release.

1. First, the court can order non-monetary conditions. These conditions can include prohibiting an individual from possessing a weapon, ordering a no contact order with the victim, or require an individual to wear an ankle monitor.
2. The second category is monetary bail conditions. The Wisconsin Constitution only permits monetary bail to assure appearance of the defendant; bail cannot be used to protect the public from serious bodily injury or prevent witness intimidation. Currently, the court may only set bail "in the amount necessary to assure the appearance of the defendant."
3. The third category is pretrial detention. Courts can only order pretrial detention for individuals charged with certain violent offenses and only if the court believes no other conditions of release would adequately protect the community from serious bodily harm or prevent witness intimidation. Before ordering detention, the court must conduct a pretrial hearing to determine if detention is truly necessary to accomplishing either of the two preceding goals.

In determining what pretrial outcome is most appropriate in a given case, the court is to consider a number of statutory factors, including the ability of the arrested person to pay bail and their prior record of criminal convictions.

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At a Glance: Pretrial Best Practices

- ***Risk should be the sole factor in determining pretrial outcomes.***

When a defendant's wealth determines whether or not they are released pretrial, our state is undoubtedly made less safe. Several states and the federal criminal justice system have demonstrated that one's ability to pay does not impact appearance or pretrial crime rates, as these jurisdictions were able to nearly eliminate cash bail without seeing a statistically significant drop in these metrics.

- ***Release on recognizance should be the default pretrial outcome.***

The most effective pretrial systems create a presumption that all defendants will be released on recognizance pretrial. Ensuring conditions of release or detainment are only imposed when absolutely necessary improves outcomes for defendants and eliminates imposing unneeded, and costly, detention or conditions pretrial.

- ***Restrict the use of monetary bail and eliminate pretrial detention solely due to an inability to pay.***

Detaining an individual pretrial simply because they cannot afford to post bail does not make communities safer. In fact, the disruptive consequences of pretrial detention push individuals toward criminogenic behavior.

- ***Fortify high procedural burdens for imposing pretrial detention.***

Pretrial detention imposes steep financial and personal costs on the defendant, increases their odds of being convicted, lengthens their average sentence, and increases their risk of future criminality. Because detention has such a destabilizing impact, it should be used only when necessary to protect the community.

TABLE OF CONTENTS

Wisconsin's Pretrial Justice System

Wisconsin's Current Pretrial Justice System

Wisconsin's bail and conditions of release are outlined in Chapter 969 of the Wisconsin statutes and in Article 1 of the Wisconsin Constitution. The purpose of Wisconsin's pretrial system is to assure appearance in court, protect members of the community from serious bodily harm, and prevent the intimidation of witnesses.[1] In the pretrial process, the court must first consider whether the defendant is likely to appear at trial if released on his or her own recognizance.[2] Only if release would not assure appearance may the court then impose conditions for release.[3]

Wisconsin courts can currently impose three categories of conditions for release. First, the court can order non-monetary conditions. These conditions can span from relatively minor, such as prohibiting the individual from possessing a dangerous weapon, to more constrictive terms, such as ordering the individual to wear an ankle monitor.[4] In determining the appropriate non-monetary condition, the court must only impose what is "deemed reasonably necessary" to accomplish any of the three pretrial goals.[5]

The second category is monetary bail conditions. The Wisconsin Constitution only permits monetary bail conditions to assure appearance of the defendant; monetary bail cannot be used to protect the public from serious bodily injury or prevent witness intimidation. Additionally, the court may only set bail "in the amount necessary to assure the appearance of

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[1] Wis. Stat. § 969.01(1).
[2] *Id.*
[3] *Id.*
[4] *See* Wis. Stat. § 969.02 - 969.03.
[5] Wis. Stat. § 969.02(3)(d); Wis. Stat. § 969.03(1)(e).

the defendant."[6] Monetary provisions that cannot be shown to assure appearance are prohibited by the Wisconsin state Constitution.[7]

The third category of conditions for release allow an individual to be detained pretrial. This category can only be ordered in a few narrow circumstances. First, a court may only order pretrial detention for individuals charged with certain violent crimes listed in Wis. Stat. § 969.035(1)-(2). For such individuals, the court can only order pretrial detention if it believes that no available conditions of release would adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses.[8] Before ordering pretrial detention, however, the court must conduct a pretrial hearing in order to determine if pretrial detention is necessary.[9] This hearing must occur within 10 days of the date the defendant is detained.[10]

During this pretrial hearing, the state has the burden of proving by clear and convincing evidence that the defendant committed the alleged violent offense or that "the defendant committed or attempted to commit a violent crime subsequent to a prior conviction for a violent offense." [11] The state must also demonstrate by clear and convincing evidence that alternative conditions of release will not adequately prevent witness intimidation or protect members of the community from serious bodily harm. Throughout this hearing, the defendant will be afforded the rules of procedure and evidence outlined in Wis. Stat. § 969.035(6). After the conclusion of the hearing, the court will determine whether the state has met their burdens of proof. If the state has failed to meet their burdens, the court must release the individual but may impose other conditions of release.[12] If the state has met the required burdens, the court may deny release of

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[6] Wis. Stat. § 969.01(4).
[7] Wis. Const. art. I, § 8.
[8] Wis. Stat. § 969.035(3)(c).
[9] Wis. Stat. § 969.035.
[10] Wis. Stat. § 969.035(5)
[11] Wis. Stat. § 969.035(6)(a).
[12] Wis. Stat. § 969.035(7)

the defendant for up to 60 days following the hearing.[13] An individual detained pretrial is entitled to placement on an expedited trial calendar.[14]

For all cases pretrial, the court should consider the following statutory factors when determining the appropriate pretrial outcome in a particular case:

- 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,
- 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, and
- the policy against unnecessary detention of the defendant's pending trial.[15]

In sum, Wisconsin's current pretrial justice system gives courts immense discretion in

[13] Wis. Stat. § 969.035(8)
[14] Wis. Stat. § 969.035(11).
[15] Wis. Stat. § 969.01(4)

determining pretrial outcomes. In determining which non-monetary conditions of release to impose, courts are only required to believe that the condition is "necessary" to meet one of the three pretrial goals. Monetary bail conditions, however, are prohibited by the Wisconsin Constitution except for the purpose of assuring appearance in court. Finally, pretrial detention can only be ordered after conducting a pretrial detention hearing using the procedures outlined in Wis. Stat. § 969.035(6).

How AJR 107 Would Change Wisconsin's Pretrial System

In 2022, the Wisconsin Legislature passed Assembly Joint Resolution 107 ("AJR 107"), a proposed amendment to the Wisconsin State Constitution that would fundamentally change Wisconsin's pretrial system. Specifically, AJR 107 makes two Constitutional changes to the pretrial system. First, AJR 107 would allow courts to impose conditions of release to protect members of the community from "serious harm" instead of "serious bodily harm." This change would expand the categories of harm that a court may consider when imposing pretrial conditions of release.

More importantly, however, AJR 107 expands the availability of monetary conditions of release in the pretrial process. Currently, the Wisconsin Constitution only permits courts to impose monetary bail conditions to assure appearance in court.[16] Monetary conditions beyond what is necessary to assure appearance are unconstitutional.[17] AJR 107 would eliminate this Constitutional restriction and permit courts to consider four other factors when imposing monetary bail conditions: "seriousness of the offense charges, previous criminal record of the accused, the need to protect members of the community from serious harm," and the need to

[16] Wis. Const. art. I, §§ 6, 8.
[17] *Id.*

"prevent the intimidation of witnesses."[18]

In short, AJR 107 would likely expand the use of monetary bail throughout the state and give judges the discretion to impose monetary conditions of release for nearly every defendant pretrial. The restrictions on the monetary amount imposed would also be relaxed, giving courts greater flexibility in the monetary amount required for release. Thus, AJR 107 would encourage greater use of monetary bail conditions.

Improvements to Pretrial Justice Nationwide

Other jurisdictions have implemented reforms that mitigate the use of cash bail, favor the release of defendants pretrial, and address other pretrial deficiencies. These jurisdictions have seen promising success; early data indicates that many of these reforms reduce jail populations, largely eliminate the use of monetary bail, and maintain similar failure to appear and pretrial crime rates.

Some reforms, however, have been more sweeping and successful than others. New Jersey's Bail Reform & Speedy Justice Act ("Act"), [19] for example, has been lauded as the country's most comprehensive and successful bail reform legislation.[20] Kentucky's bail reform, on the other hand, has not seen similar success, while Washington D.C.'s system poses significant logistical obstacles to adoption by other jurisdictions. Finally, Illinois' pretrial reform looks promising, but has only recently been implemented. As a result, Wisconsin could look to emulate New Jersey's policies while considering best practices and lessons learned from other reform efforts. Guided by research-backed reform practices, Wisconsin can create an effective,

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[18] Assembly Joint Resolution 107 (2021).
[19] Legislation also called the New Jersey Bail Reform Act.
[20] *See* Blair R. Zwillman, *New Jersey Leads the Way in Bail Reform*, N.J. Law., June 2019, at 16; The State of Pretrial Justice in America, Pretrial Justice Institute 1, 12 (2017), /https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_ pji_2017.pdf.

equitable, and cost-efficient pretrial justice system.

New Jersey: "the country's most comprehensive and successful pretrial system."

New Jersey is largely considered the country's premier pretrial justice system; indeed, it is the only state to receive an "A" grade by the Pretrial Justice Institute.[21] Fortunately, New Jersey's "phenomenal" pretrial justice system can serve as a guide for other states, including Wisconsin, which want to improve their current pretrial justice system.[22] First, New Jersey was able to pass effective bail reform through a bipartisan effort that garnered support from a vast majority of New Jerseyans. Second, particular aspects of New Jersey's plan -- including their presumption of pretrial release, guardrails on when courts can order detainment or set cash bail, and their use of risk assessment systems -- can illuminate and inform effective pretrial policy. Third, the shortcomings of New Jersey's system, such as the state's enduring racial disparities, can also guide the policy discussion.

I. New Jersey's road to adopting pretrial justice reform.

In 2013, the New Jersey Drug Policy Alliance (DPA) reported that over 12% of the New Jersey jail population were detained solely because they could not meet bail of $2,500 or less.[23] [24] This report troubled state leaders, including New Jersey Supreme Court Chief Justice Stuart Rabner, who initiated a statewide committee to propose meaningful bail reform policy.[25] The

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[21] The State of Pretrial Justice in America, Pretrial Justice Institute 1, 12 (2017), /https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_ pji_2017.pdf.

[22] *See Id.*

[23] Over half of these individuals could not meet bail of $500 or less. *See* Mark F. Bernstein, *How New Jersey Made a Bail Breakthrough*, Princeton Alumni Weekly (Nov. 2020), https://paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough.

[24] Marie VanNostrand, *Identifying Opportunities to Safely and Responsibly Reduce the Jail Population*, Drug Policy Alliance, 12 (2013), https://drugpolicy.org/sites/default/files /New_Jersey_Jail_Population_Analysis_March_2013.pdf;

[25] Mark F. Bernstein, *How New Jersey Made a Bail Breakthrough*, Princeton Alumni Weekly (Nov. 2020), https://paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough.

committee, which included stakeholders from across the political spectrum, agreed that transformative reforms were needed to make the pretrial justice system more effective and equitable.[26] The committee recommended broad changes which included amending the state's Constitution to eliminate New Jersey's Constitutional right to cash bail in all cases.[27]

Within two years of the committee's recommendations, the people of New Jersey voted to amend the state's constitution to create a presumption of pretrial release subject to the court's discretion to detain individual's without bail in specific situations.[28] The amendment also gave the state legislature the freedom to further reform New Jersey's pretrial justice system. The Legislature utilized this constitutional mandate by passing the Bail Reform & Speedy Justice Act, a bipartisan piece of legislation that transformed New Jersey's bail system. [29] This piece of legislation made significant structural changes to the state's pretrial justice system and largely eradicated the use of the monetary bail in New Jersey.

II. Outlining the Bail Reform & Speedy Justice Act

The Bail Reform & Speedy Justice Act made significant changes to the state's pretrial justice system by instituting a risk-centric model and creating procedural guardrails to ordering restrictive pretrial conditions.

A. Creating a risk-based model for pretrial justice.

First, this new process for determining pretrial outcomes reoriented the pretrial justice system from a resource-based model to a risk-based model. New Jersey defendants are now given a presumption of release subject to restrictions, monetary bail, or pretrial detainment based solely on their public safety risk, risk of not appearing in court, or risk of obstructing justice. To

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[26] *Id.*
[27] *Id.*
[28] S. Con. Res. 128, 216th Leg. (NJ 2014).
[29] Also called the Bail Reform Act.

help courts make risk determinations, the Bail Reform & Speedy Justice Act implemented the Public Safety Assessment (PSA) system, a data-driven risk assessment algorithm developed by the Laura and John Arnold Foundation.[30] Drawing from a dataset of over 750,000 cases, the PSA's algorithm uses nine factors to assess an individual's risk of new criminal activity, violent criminal activity, and failure to appear.[31] These risk factors include age at current arrest, current offense, prior convictions, and prior failures to appear at trial.[32]

In order to aid courts in making pretrial decisions, every defendant is run through the PSA system and given both a New Criminal Activity score and Failure to Appear score. These scores fit into one of six risk categories, which each carry a recommendation for appropriate pretrial restrictions.[33] Courts are required to consider the PSA score and recommendation, but these recommendations are not binding.[34] The onus is still on the prosecutor and defense attorney to make appropriate arguments, and for the judge to apply discretion in deciding the appropriate -- and least restrictive -- pretrial outcome for each individual's risk level.[35]

B. A roadmap to guide pretrial outcomes.

The Act also gave courts a procedural roadmap to guide pretrial decision making and guard against frivolous pretrial restrictions.[36] This roadmap first prioritizes releasing the defendant's on their own recognizance or on an unsecured appearance bond unless the court finds that such release would not assure the defendant's appearance in court or protect the safety

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[30] *Public Safety Assessment FAQs ("PSA 101")*, Arnold Ventures (2019), https://craftmedia bucket .s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf

[31] *Id.*; John Logal Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725 (2018)

[32] *Public Safety Assessment FAQs ("PSA 101")*, Arnold Ventures (2019), https://craftmedia bucket .s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf.

[33] *Id.* at 9-10.

[34] *New Jersey's Former Top Prosecutors; Bail Reform isn't easy, but it works*, 2018 WL 5928320.

[35] *Id.*; N.J. Stat. Ann. § 2A:162-16(2).

[36] William M. Carlucci, *Death of A Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 Emory L.J. 1205, 1236–37 (2020); N.J. Stat. Ann. § 2A:162-16.

of others.[37] If the court determines that release on recognizance would not assure appearance or protect the community, the court may order release subject to minimal restrictions such as an order not to commit any new offenses, avoid contact with the alleged victim, or avoid contact with any potential witnesses.[38] However, if the court determines that these conditions are also insufficient, they may then order a number of other non-monetary restrictions such as requiring the defendant to remain employed, prohibiting the possession of a firearm, or requiring the individual to be subjected to electronic monitoring.[39] When ordering conditions of release, the court must order the least restrictive condition or combination of conditions to assure appearance or protect the public.[40]

In addition to creating procedural safeguards for defendants facing non-monetary restrictions, New Jersey also made monetary bail the last resort for assuring appearance at court. The court may impose monetary bail only after determining that none of the other available non-monetary restrictions would reasonably assure appearance.[41] Additionally, monetary bail may only be used to assure appearance in court; it may not be used to address public safety concerns.[42] Finally, prosecutors may only move to impose monetary conditions if the defendant is reasonably believed to have the financial assets to post monetary bail in the amount requested.[43] Otherwise, any monetary bail decisions must be solely on the court's initiative.[44]

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[37] Courts can also deny release on recognizance or an unsecured bond if they reasonably believe that the defendant may obstruct or attempt to obstruct the criminal justice process. However, this rationale is very rarely used by courts to deny such release. N.J. Stat. Ann. § 2A 162-18.

[38] N.J. Stat. Ann. § 2A:162-17.

[39] N.J. Stat. Ann. § 2A:162-17(2).

[40] *Id.*; *see Holland v. Rosen*, 895 F.3d 272, 299 (3d Cir. 2018).

[41] N.J. Stat. Ann. § 2A:162-17(c)(1).

[42] *Id.*; William M. Carlucci, *Death of A Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 Emory L.J. 1205, 1236–37 (2020)

[43] Alexa Van Brunt, Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. Crim. L. & Criminology 701, 754 (2018)

[44] *Id.*

Finally, the Bail Reform & Speedy Justice Act also changes how courts make pretrial determinations for those individuals who pose the biggest threat to public safety. Prior to the state's pretrial reforms, courts were prohibited from detaining individuals without bail. This meant that any individual, no matter the severity of the offense changed, would be released if they met the imposed monetary bail conditions.[45] However, the Constitutional amendment and Bail Reform Act now permits courts to detain an individual without bail as long as the prosecutor and the court both find that no conditions of release would reasonably protect members of the public from the defendant.[46]

In summary, New Jersey's plan prioritizes minimally restrictive solutions, emphasizes risk-based determinations, and requires procedural safeguards in the pretrial process. This reorientation of the state's bail system has profoundly impacted the state's pretrial system.

III. The impact of New Jersey's bail reform.

New Jersey's Bail Reform & Speedy Justice Act has nearly eliminated the use of monetary bail, drastically reduced the state's jail population, and provided millions in fiscal savings for the state. These gains have been made without reducing appearance rates or compromising public safety. New Jersey's reforms have not, however, eroded the wide racial disparities present across the state's criminal justice system.

A. Reduction in cash bail, prison population.

New Jersey's plan has slashed the use of cash bail and reduced the state's jail population. First, New Jersey's bail reform has nearly eradicated the use of cash bail, as monetary bail is

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[45] *See New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, Ballotpedia, https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)#:~:text=Currently%2C%20the%20New%20Jersey%20Constitution,or%20she%20poses%20to%20society.

[46] S. Con. Res. 128, 216th Leg. (NJ 2014); N.J. Stat. Ann. § 2A:162-16-19.

now imposed in just .1% of all cases.[47] Instead, most individuals are released on recognizance or nonmonetary conditions while a minority (18%) of the most high-risk individuals are detained without bail.[48] This dramatic reduction in New Jersey's use of monetary bail has virtually ended the state's practice of detaining individuals solely due to an inability to pay. While 12% of the jail population could not meet their set bail of $2,500 or less in 2012, that percentage plummeted to 0.2% -- just 14 individuals -- in 2020.[49]

The reduction in those detained on monetary bail conditions of $2,500 or less reflects broader reductions to the state's jail population. The Act's presumption of pretrial release, emphasis on least restrictive conditions, and limited use of monetary bail has reduced New Jersey's jail population by over 40%.[50] These reductions have not been distributed evenly, however. By simultaneously limiting the use of cash bail and allowing judges to detain high-risk individuals without bail, New Jersey's bail reform prioritized releasing low-risk individuals while detaining those deemed to be the riskiest. This has led to the largest reduction in the jail populations amongst low-risk individuals.[51]

B. New Jersey sees fiscal savings.

This sharp reduction in New Jersey's jail population also led to immense fiscal savings for the state, as the reforms have saved the state over $68 million in annual corrections spending.[52] Additionally, New Jersey likely sees substantial indirect fiscal benefits, as individuals released pretrial are less likely to recidivate, given shorter prison sentences, more

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[47] Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Practice & Clinical L. 83, 109 (2020).
[48] *Id.*
[49] Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 19 (2020).
[50] *See* Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 18 (2020).
[51] *See* Glenn A. Grant, New Jersey Courts, 2018 Report to the Governor and the Legislature 6 (2018) (while only 35% of the jail population in 2012 included inmates charged with a violent offense, that number rose to 47% in 2018).
[52] *New Jersey's former top prosecutors: Bail reform isn't easy, but it works*, 2018 WL 5928320.

likely to maintain employment and stable housing, and are able to work -- and pay taxes -- prior to trial.[53] These outcomes lower state corrections spending, increase the tax base, and strengthen New Jersey's economy.[54]

C. Reforms had negligible impact on appearance rates or crime rates for those awaiting trial.

Prior to passing the Bail Reform & Speedy Trial Act, opponents argued that such changes would lead to rampant pretrial criminality and discourage individuals from appearing in court. Early data, however, demonstrates that these reforms have had no significant impact on pretrial criminality or failure to appear rates. While defendants appeared in court 92.7% of the time in 2014, the last year before the Act was implemented, that number dipped just 1.8% to 90.9% by 2019.[55] Likewise, the Bail Reform & Speedy Justice Act only led to a slight increase, from 12.7% to 13.7%, in new criminal activity amongst individuals awaiting trial.[56] [57] This includes a total serious pretrial crime rate of less than 0.5%.[58]

New Jersey can credit some of this stability in pretrial crime rates to the implementation of the Pretrial Safety Assessment. The PSA's tangible, data-driven assessment of risk can help judges make informed decisions about the individual's risk of new criminal activity. Indeed, case outcomes support the PSA's effectiveness; those who were given the highest risk scores by the

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[53] *Id.*; *Bail Reform and Risk Assessment: The Cautionary tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1128 - 29; Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Economic Activity, 2 (2021), https://www.brookings.edu/ wp-content/uploads/2021/03/BPEASP21_Dobbie-Yang_conf-draft.pdf.

[54] While critics will argue that New Jersey is currently running a deficit on pretrial services, this deficit is more than made up for by the savings realized through lower jail populations. *See* William M. Carlucci, *Death of a Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 Emory L. J. 1205, 1245 (2020).

[55] Glenn A. Grant, New Jersey Courts, 2018 Report to the Governor and the Legislature 15 (2018); Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 10 (2020).

[56] Statewide crime rates indicate that New Jersey's bail reform has also not led to a dramatic increase in criminal activity, as the state has seen a 35.4% decrease in total crime from 2010 to 2019. (https://nj.gov/njsp/ucr/current-crime-data.shtml).

[57] Glenn A. Grant, New Jersey Courts, 2018 Report to the Governor and the Legislature 13 (2018); Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 8 (2020).

[58] Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 9 (2020).

PSA were over six times more likely to commit a new offense compared to those deemed least risky.[59] [60] Those flagged by the PSA as being at risk for committing a violent crime were twice as likely to commit a violent crime compared to those not flagged.[61] While the PSA brings its own challenges (see below), New Jersey has been able to use this new tool to release more individuals while maintaining similar failure-to-appear and pretrial criminality rates.

D. Racial disparities persist in New Jersey's pretrial system.

When New Jersey started implementing bail reform in 2014, the state had one of the country's highest disparities in Black-to-white incarceration rates.[62] Unfortunately, New Jersey's bail reform has been ineffective in narrowing this disturbing disparity in the state's jail population. While 54% of the state's jail population was Black prior to reform efforts, despite Black individuals comprising just 13.7% of the state's population, that figure jumped to almost 60% in 2020.[63] White individuals, who previously accounted for 28% of the jail population, now comprise just 23% of the state's jail population.[64] Additionally, Black individuals are detained, on average, for nearly twice as long as white detainees pretrial.[65]

Clearly, these stark and persistent racial disparities have not adequately been addressed by the state's bail reform efforts, and there are a number of reasons why New Jersey's pretrial reforms may be perpetuating these disparities.

i. Differences in pretrial outcomes inevitable within a broader disparate justice system.

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[59] There has been no reported data on the system's ability to predict appearance rates in New Jersey.
[60] Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 12 (2020).
[61] *Id.*
[62] Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, The Sentencing Project, 10 (2007).
[63] Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 23 (2020); United States Census Bureau; 2010 Census: New Jersey Profile (2010).
[64] *Id.*
[65] Hafsa S. Mansoor, *Guilty Until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DePaul L. Rev. 15, 58 (2020).

The persistent disparity in pretrial detention may partially be a symptom of the racial disparities present in most aspects of New Jersey's justice system. Like the rest of the United States, New Jersey over-polices, over-prosecutes, and over-incarcerates their Black population.[66] For example, Black New Jerseyans are up to 9.6 times more likely to be arrested for minor crimes compared to white individuals.[67] Comprehensive police data shows that Hispanic and Black New Jerseyans are also significantly more likely to be stopped by police while driving.[68] These disparities carry into charging practices, as Black and Hispanic New Jerseyans are more likely to be charged with a serious offense compared to white individuals.[69] Finally, these disparities continue into incarceration, as New Jersey still has the country's highest disparity in Black-white incarceration rates at 12.5 to 1.[70] This gap in incarceration rates is even greater amongst New Jersey's youngest citizens; Black children are 17.5 times more likely to be placed in juvenile detention compared to white children.[71]

It is likely that these wide disparities in all aspects of New Jersey's justice system impact the state's pretrial justice system. When Black individuals are over-policed, over-charged, and over-incarcerated, even "race neutral" systems will generate disparate racial outcomes.[72]

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[66] Doaa Ab Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 Colum. Sci. & Tech. L. Re. 376, 428 (2020); Elizabeth Hinton & LeShae Henderson & Cindy Reed, *An Unjust Burden: Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice 1 (2018), https://www.vera.org/downloads/publications/ for-the -record-unjust-burden-racial-disparities.pdf.

[67] Press Release, ACLU New Jersey, Study Documents Extreme Racial Disparity in Arrests for Low-Level Offenses (Dec. 21, 2015)(on file with author); *see generally* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (2021)(outlining racial disparities in criminal justice system broadly).

[68] *Race & Justice News: Disparities in New Jersey Traffic Tickets and Marijuana Arrests*, The Sentencing Project (July 17, 2017), https://www.sentencingproject.org/news/5422/.

[69] *See* Glenn A. Grant, New Jersey Courts, Annual Report to the Governor and the Legislature 25 (2020).

[70] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project 1, 10 (2021).

[71] Josh Rovner, *Black Disparities in Youth Incarceration*, The Sentencing Project (July 15, 2021).

[72] *See e.g.,* Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice,* 5 Ohio St. J. Crim. L. 1 (2007); Doaa Aby Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System,* 21 Colum. Sci. & Tech. L. REv. 376, 391 (2020); Leah Sakala & Nicole D. Porter, *Criminal justice reform doesn't end system's racial bias*, USA Today (Dec. 12, 2018),

ii. New Jersey's risk assessment tool does little to mitigate racial bias in pretrial outcomes.

Risk assessment tools, including New Jersey's Pretrial Safety Assessment, have been found to perpetuate racial disparities in the pretrial system. As previously stated, New Jersey's bail reforms included the implementation of the Pretrial Safety Assessment. The PSA is one of the first, and currently most widely used, risk assessment tools in the country.[73] While research on racial bias in risk assessment systems is sparse, early studies show that pretrial risk assessment tools may be, at best, neutral in combating racial disparities in pretrial outcomes.[74] At worst, these algorithms can widen and strengthen the disparities already present in pretrial justice systems.[75] There are two primary factors that explain how the PSA system may inhibit progress towards shrinking racial inequities.

First, these systems may be perpetuating racial disparities because the data that undergirds the algorithms reflect biased policing and criminal justice practices.[76] Because black individuals have historically been disproportionately represented in the criminal justice system (especially in New Jersey), the data used by these systems to assign risk is skewed against minority groups.[77] Algorithms "are only as good as the data that goes into them," meaning these

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https://www.usatoday.com/story/opinion/policing/politics-policing/2018/12/ 12/racial-injustice-criminal-justice-reform-racism-prison/2094674002/.

[73] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125 (2018).

[74] *Id.* at 1132-33; *see also* D. James Greiner et al., Randomized Control Trial Evaluation of the Implementation of the PSA-DMF System in Dane County, WI Interim Report 1, 5 (2020).
(where initial findings suggest there was not a statistically significant difference in racial fairness between Dane County courts who implemented the PSA system and those who did not).

[75] *See Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1132-33 (2018); Hafsa S. Mansoor, *Guilty Until Proven Guilty: Effective Bail Reform As A Human Rights Imperative*, 70 DePaul L. Rev. 15, 54 (2020).

[76] Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. Rev. 910 (2021).

[77] *Id.*; Tim O'Brien, *Compounding Injustice: The Cascading Effect of Algorithmic Bias in Risk Assessments*, 13 Geo. J.L. & Mod. Critical Race Persp. 39, 56 (2021); Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 Colum. Sci. & Tech. L. Rev. 376, 428 (2020).

risk assessment tools cannot produce equitable outcomes if they derive risk from biased data.[78]

Take the PSA system employed by New Jersey. The PSA system gives a risk score based on 9 factors which include, among others, whether the person has a prior misdemeanor charge, whether the person has a prior felony charge, whether the person has a prior conviction for violent crime, and whether the person has previously been sentenced to incarceration.[79] Because minority communities have historically been over-policed and over-incarcerated, using past arrests, charges, and convictions to make present risk assessments means these risk determinations have a biased foundation.[80] Simply put, mathematical formulas cannot mitigate discriminatory practices when the data inputted into the formulas is fraught with racial disparities.[81] By making risk assessments based on racially disparate data, the PSA may be substituting race for wealth as a proxy for pretrial outcomes.[82]

The second factor is that risk assessment models may add a sheen of scientific credibility and obscurity that makes it more difficult to confront and pinpoint systemic racial bias. The mathematical and disconnected nature of risk assessment algorithms, as opposed to judicial subjectivity, likely gives the public a "false assurance of neutrality" in pretrial outcomes.[83] This

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[78] Lyle Moran, *Pretrial risk-assessment tools should only be used if they're transparent and unbiased, warns ABA House,* ABA Journal (2022).

[79] *Public Safety Assessment FAQs ("PSA 101")*, Arnold Ventures (2019), https://craftmedia bucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190 319_14 0124.pdf

[80] *See, e.g.,* Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. Rev. 910 (2021); Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 Colum. Sci. & Tech. L. Rev. 376, 428 (2020); Hafsa S. Mansoor, *Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DePaul L. Rev. 15, 59-60 (2020).

[81] Doaa Abu Elyounes, *Bail or jail? Judicial versus algorithmic decision-making in the pretrial system*, 21 Colum. Sci. & Tech. L. Rev. 376, 391 (2020); *see also* Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor 178 (2017) ("[i]t is mere fantasy to think that a statistical model or a ranking algorithm will magically upend culture, policies, and the institutions built over centuries").

[82] *See* Hafsa S. Mansoor, *Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DePaul L. Rev. 15, 59-60 (2020).

[83] John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1780-81 (2018); *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1132-33 (2018)); Hafsa S. Monsoor, *Guilty until proven guilty: Effective bail reform as a human rights imperative*, 70 DePaul L. Rev. 15, 59-60 (2020).

sheen of scientific credibility may also make it more difficult to drum up the public support necessary to fix such disparities.[84] Additionally, many of these mathematical algorithms are confidential intellectual property. This creates a "Black-box" risk-assessment system that makes it more difficult to identify bias within these systems. As a result, risk assessment systems threaten to ingrain and obscure the disparities and bias within the justice system.[85]

In summary, New Jersey's bail reforms, including the use of the PSA, has effectively eliminated wealth-based determinations in favor of a risk-based model. However, states looking to implement similar reforms must be cognizant of disparities that can become baked into risk assessment systems. New Jersey's reforms demonstrate how blindly relying on risk assessment algorithms may perpetuate, widen, and strengthen current racial disparities in pretrial outcomes.

Learning from other state's reform efforts.

The majority of criminal justice experts believe that New Jersey's pretrial justice system should serve as a guide for other states looking to implement bail reform.[86] However, other jurisdictions have also made changes to their pretrial justice system. The successes and shortcomings of these reform efforts can also illuminate best practices.

I. Outlining the federal pretrial justice system

The federal pretrial justice system is governed by the 1984 Bail Reform Act.[87] Broadly, the federal pretrial justice system directs judicial officers, typically federal magistrate judges, to

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[84] John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1780-81 (2018).

[85] *Id.*

[86] *See e.g.,* Alexander Shalom & Claudia Jom Demitro, *Is Bail Reform in New Jersey a Success? Two Years into Criminal Justice Reform, One Question Often Asked Is: "Is Bail Reform in New Jersey a Success"*, N.J. Law., June 2019, at 10-11.

[87] For a comprehensive analysis of the federal pretrial system and its impacts, see the following studies authored by current Wisconsin Law professor Stephanie Holmes Didwania: Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24 (2020); Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261 (2021).

release the defendant under the least restrictive conditions necessary to reasonably assure appearance in court or protect the safety of the community.[88] More specifically, the Bail Reform Act permits four outcomes for defendants pretrial.

First, federal policy prioritizes releasing defendants on recognizance or on unsecured appearance bonds.[89] The court must order the pretrial release of the defendant on personal recognizance or unsecured appearance bond unless the judicial officer determines that "such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person in the community."[90] If the judicial officer does determine that release on recognizance or on an unsecured appearance bond will not accomplish one of these goals, they may impose a number of additional conditions of release, including, but not limited to, a requirement to maintain employment or actively seek employment, an order to avoid all contact with an alleged victim or potential witness, a ban on possessing weapons, or a requirement to return to custody for specified hours.[91] Judicial officers may also impose monetary bail as a condition of release. However, courts are prohibited from imposing a financial condition that "results in the pretrial detention of the person."[92] When determining additional conditions of release, the court again must only impose the least restrictive conditions to reasonably assure appearance in court or protect the safety of the community.[93]

The third option for the court pretrial is to order temporary detention to address revocation concerns for those on parole or deportation issues for non-citizens.[94] This option is

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[88] 18 U.S.C. § 3142; Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).
[89] 18 U.S.C. § 3142(b).
[90] *Id.*
[91] 18 U.S.C. § 3142(c)(1).
[92] 18 U.S.C. § 3142(c)(1)-(2).
[93] 18 U.S.C. § 3142(c)(1)(B).
[94] 18 U.S.C. § 3142(d).

only available for individuals on parole or individuals who are not citizens or lawfully admitted residents of the United States.[95] If the defendant meets either of these conditions and poses a risk of fleeing or endangering the community, the judicial officer may order the short-term detention of that individual.[96] During this short detention, the federal prosecutor will notify the relevant state or local authority (if the defendant is on parole) or the Immigration and Naturalization Services (if the individual is not lawfully residing in the United States).[97] If the relevant authority declines to take the defendant into custody during this 10 day period, the court must then exercise one of the three other pretrial options listed in 18 U.S.C. § 3142(b)-(e).[98]

The fourth pretrial option for judicial officers is pretrial detainment. Defendants can only be detained pretrial if no combination of conditions of release outlined in 18 U.S.C. § 3142(c) could reasonably address the defendant's risk of nonappearance at trial or adequately protect the safety of another person or the community.[99] If the court believes that any of these circumstances may apply, they shall hold a detention hearing within 5 days of initial appearance to determine whether any condition(s) of release would reasonably address these concerns.[100] At this hearing, the defendant has a right to counsel and an opportunity to testify, present witnesses, cross-examine witnesses, and present evidence.[101] If the court finds that no conditions will reasonably address the pretrial concerns, the court shall order detention of the defendant.[102]

These detention hearings occur very quickly, and pretrial decisions are made only with

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[95] 18 U.S.C. § 3142(d)(1).
[96] 18 U.S.C. § 3142(d).
[97] 18 U.S.C. § 3142(d)(2).
[98] *Id.*
[99] 18 U.S.C. § 3142(f)(1)-(2). A defendant may also consent to be detained pretrial. This occurs most often amongst individuals charged with immigration-related offenses, as pretrial detainment reduces the defendant's chance of being transferred to INS custody or being deported. *See* Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).
[100] 18 U.S.C. § 3142(f).
[101] 18 U.S.C. § 3142(f)(2).
[102] 18 U.S.C. § 3142(f).

the limited information that is able to be collected and provided in the few days between the initial appearance and the detention hearing.[103] However, the Bail Reform Act does provide judicial officers with suggested considerations for determining appropriate pretrial outcomes. These include the nature and circumstances of the offense charged, the weight of evidence against the person, the "history and characteristics of the person," and the nature and seriousness of the danger posed by releasing the individual.[104] While the court "shall" consider these factors when determining pretrial outcomes, they can also consider other factors and can weigh any factor as heavily as they see fit.[105] Finally, if these considerations change, the court has the discretion to amend pretrial conditions at any time prior to trial.[106]

Throughout the pretrial process, judicial officers are given wide discretion to determine pre-trial outcomes in a given case.[107] For example, the Bail Reform Act does not provide any guidance on how to weigh particular factors when determining conditions of release or deciding whether to detain an individual pretrial. Federal policy also does not create guidance for assessing a defendant's public safety or nonappearance risk, and courts receive no instruction regarding how much "risk" warrants detaining an individual pretrial.[108] At detention hearings, rules concerning admissibility of evidence do not apply, meaning courts have the discretion to consider any and all evidence presented when determining whether to detain the individual pretrial.[109] Finally, pretrial rulings made by the court are rarely reviewed or appealed by

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[103] E.g., Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1267 (2021).
[104] 18 U.S.C. § 3142(g).
[105] *Id.*; see Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1277 (2021).
[106] 18 U.S.C. § 3142(c).
[107] *See* Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).
[108] Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1277 (2021).
[109] 18 U.S.C. § 3142(f)(2).

appellate courts.[110] In sum, the Bail Reform Act gives judicial officers seemingly unfettered and unsupervised discretion to determine appropriate pretrial outcomes in each given case.[111]

A. The federal pretrial system delivers mixed results.

The federal pretrial system delivers a mixed bag of pretrial outcomes. First, the federal pretrial system provides numerous positive outcomes, particularly in its use of monetary conditions of release. The federal system utilizes cash bail at rates lower than most states, as monetary conditions of release are ordered in less than 8% of cases pretrial.[112] Instead of using monetary conditions, a vast majority of released individuals are released on personal recognizance or on non-monetary conditions.[113] Additionally, the Bail Reform Act's prohibition on setting monetary conditions of release that lead to pretrial detention has been remarkably effective; less than 0.3% of individuals are detained pretrial due to an inability to meet a financial bond obligation.[114]

In addition to limiting the use of monetary bail, the federal pretrial system also offers procedural protections not provided by most states.[115] For example, the right to counsel, the right to present evidence, and the right to cross-examine witnesses at the individual's detention hearing goes beyond the safeguards for pretrial detention provided in most other jurisdictions.[116] Finally, the federal system effectively meets its stated goals of ensuring appearance at court and

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[110] Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020); Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1279 (2021).
[111] Stephanie Holmes Didwania, Discretion and Disparity in Federal Detention, 115 Nw. U. L. Rev. 1261, 1263 (2021); Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).
[112] Bureau of Just. Stat., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, FISCAL YEARS 2011-2018 (2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf.
[113] Id.
[114] Id.
[115] Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1268 (2021); Amber Widgery, *Pretrial Detention*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2013).
[116] *Id.*

preventing additional criminality as only 1% of released defendants fail to appear and only 4% were arrested for new offenses while awaiting trial.[117]

While the federal pretrial system accomplishes a few laudable pretrial outcomes, the federal system also has notable deficiencies. First, less than 33% of all defendants are released pretrial; most individuals are detained while they await trial.[118] This percentage of individuals released in federal court is much smaller than that of other jurisdictions. For example, Washington D.C. releases almost 94% of individuals, New Jersey releases 88% of individuals, and even Kentucky releases 70% of defendants pretrial.[119] While the disparity between federal release rates and that of most states is partially due to the seriousness of charges brought in federal court versus state court, it can also be attributed to the immense discretion given to district court judges.[120] Since the passage of the Bail Reform Act in 1984, which gave courts substantially more discretion to determine pretrial outcomes, the rate of detention pretrial has quadrupled from 17% to almost 68%.[121]

The few guidelines and wide latitude given to federal judicial officers, as well as the minimal review of pretrial decision making, has also led to wide disparities in pretrial outcomes

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[117] Thomas H. Cohen, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, note 91, at 5 tbl.3 (2012); *see* Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1279.

[118] PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, FISCAL YEARS 2011-2018 (2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf. Some reports find this figure much higher, closer to 75%, when all defendants charged with immigration-related offenses are counted. *See* Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 11264 (2021).

[119] Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Practice & Clinical L. 83, 109 (2020); Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 42 (2019); *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1130 (2018).

[120] *See* Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).

[121] *Compare* Bureau of Just. Stat., PRETRIAL RELEASE AND MISCONDUCT 1 (1985), https://www.bjs.gov/content /pub/pdf/prm-foo.pdf with Bureau of Just. Stat., *with* PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, FISCAL YEARS 2011-2018 (2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf.

across federal districts.[122] For example, one study found that the most lenient federal district released almost 60% of defendants pretrial while the most stringent district released just 15.4% of defendants pretrial.[123] An analysis of individual judicial officers leads to an even more startling disparities; the most lenient judge released over 70% of defendants while the most stringent judge released just 3.8% of defendants.[124] Thus, pretrial outcomes are largely dependent on which district, and which judicial officer, presides over the defendant's case.

Unfortunately, the federal pretrial system is also plagued with stark racial disparities.[125] Black male defendants are over 30% more likely to be detained pretrial compared to white males, while Hispanic male defendants are over 22% more likely to be detained compared to white men.[126] There are also gender disparities in pretrial outcomes; white women are 42% less likely to be detained compared to white men and 70% less likely to be detained compared to Black men.[127] Racial and gender disparities persist even when one controls for offense charges, prior criminal behavior, and other confounding factors.[128] Because pretrial detention leads to an increased likelihood of pleading guilty and a longer average sentence, these disparities in the pretrial system contribute to the racial and gender disparities observed throughout the federal criminal justice system.[129]

In sum, the federal pretrial justice system admirably limits the use of monetary bail and

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[122] Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 35 (2020).
[123] *Id.*
[124] *Id.*
[125] *E.g.*, Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 Nw. U. L. Rev. 1261, 1302 (2021). This article also asserts that discrimination in federal charging practices and the rapid pace of pretrial hearings also contribute to racial disparities in federal pretrial outcomes.
[126] *Id.* Interestingly, Black women are less likely to be detained compared to white women, although Hispanic women are most likely to be detained amongst all female groups.
[127] *Id.*
[128] *Id.*
[129] *E.g.*, Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24 (2020); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511 (2018).

largely eliminates pretrial detainment solely due to an inability to pay. However, the federal system detains a significant number of defendant's pretrial, with racial minorities making up a disproportionately large number of those detained. Finally, the extensive discretion given to district courts means a defendant's pretrial outcome is largely dependent on which judicial officer hears a defendant's case. As a result, Wisconsin could use the federal system's limited use of monetary bail while seeking to avoid the disparities and other deficiencies present within the federal pretrial system as a model.

II. Washington D.C.

Washington D.C. was one of the first jurisdictions to reform their pretrial justice system when they passed the D.C. Bail Reform Act in 1992. This Act created a number of provisions that decreased pretrial jail populations and effectively eliminated monetary bail.[130] First, the system creates a strong presumption of release for all individuals, subject to a few statutory exceptions.[131] For example, courts must hold a hearing to determine additional restrictions if the defendant is charged with a violent or serious crime, charged with obstruction of justice, or is deemed at risk for absconding or endangering the community.[132] If the court finds probable cause for one of these factors, there is a rebuttable presumption in favor of pretrial detainment.[133] Second, the court may impose monetary bail provisions only to assure appearance at trial, but they may not impose monetary bail provisions that result in pretrial detention.[134] Finally, the court is aided by a risk assessment report drafted by the district's Pretrial Services Agency. The assessment's algorithm is unique to D.C., and the district does not reveal many of the relevant

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[130] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 38 (2019).
[131] *Id.* at 36.
[132] *Id.* at 37.
[133] *Id.*
[134] Kenechukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, Wis. Law., June 2017, at 30, 32-33.

factors used to compute the risk assessment score.[135]

A. Learning from Washington D.C.'s Pretrial Justice System

Washington D.C. has found tremendous success in their pretrial justice system; 94% of defendants are released pretrial, and the district's appearance and pretrial crime rates remain better than the national average.[136] However, there are still lingering concerns with D.C.'s pretrial system. First, D.C.'s system gives immense power to prosecutors in their charging practices, as hearings to determine pretrial restrictions or detention are based on offense charged and not risk posed by the defendant. Initiating pretrial hearings for detainment based on offense, and not risk, could empower prosecutors to overcharge individuals to trigger a hearing.[137]

Second, D.C.'s system uses a confidential risk assessment system, which shields courts from public scrutiny and threatens the defendant's due process rights.[138] Full transparency about the factors that produce risk assessment scores is crucial to ensuring the pretrial justice system is fair, effective, and open to improvement and scrutiny.[139] In this regard, D.C.'s pretrial justice system falls short.

Finally, Washington D.C.'s program is built around their Pretrial Service Agency, a federal agency that conducts D.C.'s risk assessments, provides extensive resources for individuals awaiting trial in D.C. courts, and collaborates with other organizations in D.C. to

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[135] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 37 (2019).

[136] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1130 (2018).

[137] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 36 (2019).

[138] Dorothy E. Roberts, *Digitizing the Carceral State: Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor by Virginia Eubanks. New York, N.Y.: St. Martin's Press. 2018,* 132 Harv. L. Rev. 1695 (2019); Hannah Bloch-Wehba, *Access to Algorithms*, 88 Fordham L. Rev. 1265, 1290-91 (2020).

[139] *See* Hannah Bloch-Wehba, *Access to Algorithms*, 88 Fordham L. Rev. 1265, 1284-91 (2020); Tim O'Brien, *Compounding Injustice: The Cascading Effect of Algorithmic Bias in Risk Assessments*, 13 Geo. J.L. & Mod. Critical Race Persp. 39, 78-80 (2021).

improve the pretrial justice system.[140] This federal agency is not available to states, making it more difficult and resource-intensive for states to adopt D.C.'s pretrial justice model.[141]

In conclusion, Washington D.C.'s relatively simple pretrial justice policy prioritizes pretrial release and ensures no individual is detained due to an inability to post bail. However, the immense discretion given to prosecutors, lack of transparency in assessing risk, and significant implementation difficulties for states may discourage other jurisdictions from adopting an identical pretrial system.

III. Kentucky

Kentucky was one of the first states to implement bail reform and is also frequently cited as being on the forefront of pretrial justice reform.[142] The Bluegrass state emphasizes pretrial release by automatically releasing certain low-risk offenders on recognizance.[143] For all other individuals, courts implement conditions of release as they see fit to assure pretrial outcomes. To help determine risk, Kentucky uses the Pretrial Safety Assessment system to discern an individual's risk level and provide recommendations to the court.[144] Courts, however, are not bound to the PSA's recommendations.[145] Finally, Kentucky prohibits courts from ordering pretrial detention without bail except for capital cases.[146] However, some charges do have mandatory release requirements such as a prohibition on possessing a firearm, while those charged with drug offenses are often forced to pay for their own regular drug testing as a

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[140] Pretrial Services Agency for the District of Columbia, https://www.psa.gov/ (last visited Aug. 3, 2022).
[141] Pretrial Services Agency for the District of Columbia, https://www.psa.gov/ (last visited Aug. 8, 2022).
[142] *See, e.g.*, William M. Carlucci, *Death of A Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 Emory L.J. 1205, 1225 (2020); Tiffany Woelfel, *Go Directly to Jail, Do Not Pass Go, Do Not Collect $200: Improving Wisconsin's Pretrial Release Statute*, 2016 Wis. L. Rev. 207, 236 (2016).
[143] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 40 (2019).
[144] *Id.*
[145] *Id.*
[146] *Id.* at 42.

condition for release.[147]

While Kentucky's automatic release program is commendable, courts are given immense discretion in setting non-monetary and/or monetary conditions of release for all other individuals. When setting monetary bail conditions, for example, judges must consider the person's ability to pay, but they still may set monetary conditions beyond what an individual is able to afford.[148] When setting non-monetary conditions, the judge is only directed to impose the "least onerous conditions" to ensure the defendant's appearance.[149]

A. Kentucky's bail reform efforts fall short.

Kentucky has found some success in implementing these reforms; the state releases about 70% of pretrial defendants, has an appearance rate over 90%, and is given a "B" grade by the Pretrial Justice Institute.[150] However, Kentucky's pretrial justice system still lags behind the nation's leaders.[151] There are a number of policy shortfalls that have inhibited the success of Kentucky's pretrial reforms.

First, Kentucky does little to ensure judges consider or utilize the risk assessment scores, meaning courts have, in practice, often disregarded this valuable tool. One study of Kentucky's pretrial justice system found that "if judges followed the recommendations associated with the risk assessment, 90% of defendants would be granted immediate non-financial release. In

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[147] KY. Rev. Stat. Ann. §§ 431.064, 431.520; Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 41 (2019).

[148] *Id.*

[149] KY. R. Crim. P. 4.12.

[150] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 42 (2019); *The State of Pretrial Justice in America*, Pretrial Justice Institute 1, 12 (2017), /https://www.prisonpolicy.org /scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf.

[151] For example, Kentucky still has a pretrial detention rate of 30%. For comparison, For example, New Jersey and Washington D.C.'s reforms have led to detention rates of less than 20% and 10%, respectively. For more information, *see* Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1 (2019).

practice, only 29% are released on non-monetary bond."[152] Kentucky's pretrial outcomes would improve if courts felt obligated to use the risk assessment reports.

Kentucky's reforms also provide few procedural hurdles to ordering cash bail, meaning any progress in reducing the use of monetary bail relies heavily on a given judge's cooperation with the spirit of the reforms. Relying on courts has, unfortunately, stunted bail reform efforts and made pretrial justice largely dependent on "where Kentuckians live."[153] For example, McCracken County courts impose monetary conditions of release in just 5% of cases, while Martin County imposed cash bail in 68% of pretrial cases.[154] The amount of cash bail also varies; while Kentucky statutes ask courts to consider an person's ability to pay, judges in many counties set "affordable" bail conditions in less than 30% of cases.[155] These disparate bail conditions disproportionately impact Black and low-income Kentuckians.[156]

The immense freedom given to courts has stunted pretrial justice reforms in many parts of Kentucky. Giving courts broad discretion to impose monetary bail while only recommending, as opposed to requiring, courts to consider an individual's risk level or financial condition can erode the efficacy of otherwise strong pretrial justice statutes.

IV. Illinois

In 2021, Illinois passed the Pretrial Fairness Act (PFA), which abolishes cash bail, presumes pretrial release on recognizance, and creates guidelines on when courts can set additional bond conditions.[157] Additionally, the act allows courts to detain individuals without

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[152] Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 311 (2018).
[153] Ashley Spalding, *Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail*, Kentucky Center for Economic Policy (June 11, 2019).
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Thomas A. Drysdale, *Illinois, Out on Bail*, 110 Ill. B.J. 34, 36 (2022); Marcia M. Meis, *Illinois Courts Prepare for the Pretrial Fairness Act*, Illinois Courts (March 30, 2021), https://www.illinoiscourts.gov/News/935/Illinois-Courts-Prepare-for-the-Pretrial-Fairness-Act/news-detail/.

bail if they determine that the individual poses a present threat to another person, has a high likelihood of willful flight, or commits a "forcible felony."[158] Forcible felonies include sexually based offenses, most firearms offenses, and certain other violent crimes.[159] As a result, the act restricts the number of individuals subject to detainment, but gives courts immense discretion in determining which qualifying individuals may be detained pretrial.[160]

In making risk determinations, Illinois uses the Virginia Pretrial Risk Assessment, a system similar to the Pretrial Safety Assessment. However, the PFA contains safeguards on the use of risk assessments by requiring information about the risk algorithm to be given to both parties, prohibiting courts from using the risk assessment as the sole basis for pretrial detention, and allowing defense attorneys to challenge the validity of the risk assessment score.[161]

A. Analyzing Illinois' Pretrial Fairness Act.

Because the PFA was implemented less than two years prior to this report, data and studies on the efficacy of the act is limited. However, a study of a nearly identical policy implemented in Cook County, IL found that the policies did effectively end the use of cash bail without significantly affecting pretrial criminal activity.[162] However, the study also discovered that the policy did not significantly increase the percentage of individuals released pretrial.[163] Rather, the policies simply changed how individuals were being released; instead of imposing a financial burden for release, the policy allowed low-risk individuals to be released on their own recognizance.[164] This change in policy saved defendants and their families over $31 million in

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[158] Thomas A. Drysdale, *Illinois, Out on Bail*, 110 Ill. B.J. 34, 36 (2022).
[159] *Id.*
[160] *See Id.*
[161] 730 Ill. Comp. Stat. Ann. 5/3-14-1.
[162] Don Stemen & David Olson, *Dollars and Sense in Cook County*, Safety + Justice Challenge, 1 (Nov. 19, 2020).
[163] *Id.* at 8.
[164] *Id.* at 1.

bond payments in just the six months following its enactment.[165] In summary, the PFA may not substantially increase pretrial releases, but likely makes it less burdensome for low-risk individuals to earn their own release prior to trial.

In conclusion, it remains to be seen whether Illinois' Pretrial Fairness Act lowers pretrial detention rates and improves other pretrial outcomes. The wide discretion given to courts to detain certain individuals may lead to overly punitive or racially-disparate outcomes.[166] However, Illinois's decision to restrict the use of pretrial detention, abolish cash bail, and regulate the use of risk assessment systems all seem to be steps in the right direction.

Conclusion

Many states and jurisdictions have seen tremendous improvements in pretrial outcomes after adopting pretrial justice reforms. Most have improved pretrial release rates and eased the financial burden facing those in the pretrial justice system. Only New Jersey, however, has a proven track record of drastically reducing the population of people incarcerated prior to trial while maintaining similar appearance rates and crime levels amongst those released. Policymakers should learn from the successes and failures of bail reform efforts in New Jersey, the federal system, Washington D.C., Illinois, and Kentucky.

Reimagining Wisconsin's Pretrial Justice System.

Wisconsin can imagine a better pretrial justice system that lowers the number of individuals in jails pretrial, slashes the use of monetary bail, assures appearance at court, and protects the community from individuals awaiting trial. In order to implement such a system, policymakers should prioritize five guiding principles. These principles would ensure that courts

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[165] *Id.* at 2.

[166] Doaa Abu Elyounes, *Bail of Jail? Judicial versus algorithmic decision-making in the pretrial system*, 21 Colum. Sci. & Tech. L. Rev. 376, 405 (2020).

are consistently conferring appropriate pretrial outcomes. Finally, additional reforms could be considered which increase defendant engagement pretrial, decreases failure to appear rates, and emphasizes equity and justice within our state's pretrial system.

Key Principles to Guide Wisconsin's Pretrial Justice Reform

Five guiding principles can help Wisconsin create a just, effective, and equitable pretrial justice system. These principles have underpinned the successes, and failures, of previous reform efforts in New Jersey, Washington D.C., Kentucky, and Illinois. Prioritizing all five principles will serve as a strong foundation for creating effective pretrial justice reform.

I. Risk should be the sole factor in determining pretrial outcomes.

Wisconsin's pretrial justice system is meant to secure appearance at court, ensure the safety of individuals in the community, and prevent the intimation of witnesses.[167] [168] Therefore, Wisconsin's pretrial justice system should be guided solely based on an defendant's risk to commit these infractions.

Monetary bail conditions interfere with a risk-centric model. When wealthy, high-risk individuals are released while low-risk individuals are detained on cash bail, wealth is substituted for risk as the condition for release. New Jersey and Washington D.C. have demonstrated that one's ability to pay does not impact appearance or pretrial crime rates, as these jurisdictions were able to nearly eliminate cash bail without seeing a statistically significant drop in these metrics.[169] If anything, imposing higher bail amounts may encourage non-appearance or

[167] Wis. Stat. § 969.01(1) (2019-20).
[168] These three objectives will be given the shorthand "pretrial goals" throughout this section for brevity.
[169] Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice 1, 2 (2019).

subsequent arrests pretrial.[170] Releasing high risk individuals (simply because they have enough wealth to post bail) undoubtedly makes our communities less safe, while detaining low-risk individuals imposes personal hardships that, in turn, encourage future criminality.[171] Imposing pretrial conditions solely based on offense charge also interferes with effective risk assessments by failing to address individual circumstances. Level of offense, like wealth, does not categorically indicate risk, and jurisdictions should weigh charged offense as a contributing factor, but not a determinative factor, for making pretrial risk assessments.

Fortunately, jurisdictions such as New Jersey and Kentucky have created models that emphasize making pretrial determinations based on the risk posed by the individual. Wisconsin's reform must also look solely at an individual's risk of not appearing in court or engaging in pretrial criminality when determining appropriate pretrial outcomes.

II. Make release on recognizance the default pretrial outcome.

A common thread between all of the following pretrial justice reforms is a presumption that individuals should be released on recognizance. Any jurisdiction looking to implement pretrial justice reform should create a rebuttable presumption that the goals of the pretrial justice system can be met through release on recognizance. Courts should only impose conditions of release or order detainment if there is sufficient evidence to reasonably believe that an individual poses a risk of failing to appear or endanger public safety. Similarly, states should require courts to order the least restrictive conditions that would reasonably alleviate public safety concerns or ensure appearance.

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[170] Samantha A. Zottola & Sarah L. Desmaris, *Comparing the Relationships Between Money Bail, Pretrial Risk Scores, and Pretrial Outcomes*, 46 APA J. L. & Hum. Behav. 277, 277 ("people who failed to appear or were rearrested has higher bail amounts, on average, than people who did not").

[171] *See, e.g.*, Amy McCrossen, *Bailout: Leaving Behind Pennsylvania's Monetary Bail System*, 57 Duq. L. Rev. 415, 423-25 (2019).

Pretrial conditions burden defendants and encourage criminogenic behavior.[172] Therefore, release on recognizance should be used generously and conditions should be imposed cautiously. Fortunately, Wisconsin statutes already direct courts to first determine whether an individual could be released on their own recognizance.[173] Any reform effort must strengthen the statute's emphasis on pretrial release and mandate only the prudent use of release conditions.

III. Restrict the use of monetary bail conditions and eliminate detention solely due to an inability to pay.

New Jersey has proven that heavily restricting the use of monetary bail can dramatically reduce jail populations while maintaining court appearance and pretrial crime rates. In crafting model pretrial justice reform, Wisconsin must minimize the use of monetary conditions of release and ensure it is only used as a last resort to assure appearance. Similarly, Wisconsin's pretrial justice system should not detain individuals simply because they cannot meet their monetary conditions of release. Wisconsin guidelines on ordering monetary bail should emulate those of Washington D.C. by being direct and unequivocal; courts may not set monetary conditions beyond what is financially feasible for the defendant.[174]

IV. Fortify high procedural burdens for imposing pretrial detention.

Pretrial detention imposes steep financial and personal costs, increases the defendant's odds of being convicted, lengthens their average prison sentence, and increases their risk of

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[172] *See, e.g.,* Amy McCrossen, *Bailout: Leaving Behind Pennsylvania's Monetary Bail System*, 57 Duq. L. Rev. 415, 423-25 (2019); Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice, 1 (2019).

[173] Wis. Stat. § 969.01(1) (2019-20).

[174] One of Kentucky's failures was underestimating the judicial resistance to limiting the use of cash bail; because Kentucky's statute only requires courts to *consider* an individual's ability to pay when setting bail, judges have often ignored the directive and continued to set punitive, unaffordable bail amounts. *See supra* p. 16-17; Ashley Spalding, *Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail*, Kentucky Center for Economic Policy (June 11, 2019).

committing future crimes.[175] Because pretrial detention has such a destabilizing impact, it should be used only when absolutely necessary to protect individuals in the community.

Wisconsin courts are currently only allowed to detain an individual upon a showing that available conditions of release will not adequately protect members of the community from serious bodily harm.[176] In order to make such a determination, the state must move for a pretrial hearing to determine whether the defendant meets this standard.[177] This relatively high bar for detainment is commendable, but any pretrial reform efforts should only fortify and build upon these processes. Specifically, any bail reform effort in Wisconsin should follow New Jersey's stringent procedural guardrails for ensuring that pretrial detention is only implemented when the court has exhausted all other pretrial alternatives.

V. Adopt pretrial procedures that lower racial disparities in the criminal justice system.

New Jersey's pretrial justice system is largely considered to be the best in the nation; Wisconsin would be well-served to emulate New Jersey's success through similar policies. However, there are still shortcomings in New Jersey's system that should be acknowledged and addressed when Wisconsin considers pretrial justice reform. Most importantly, Wisconsin must address the racial disparities that lay bare in New Jersey's reformed pretrial system. While New Jersey currently has the highest Black-white incarceration rate in the country, Wisconsin has the second-highest disparity.[178] Simply copying New Jersey's scheme would do little to address this wide racial disparity. All pretrial reform efforts must prioritize racial equity and work to reduce,

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[175] *See, e.g.*, Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Prac. & Clinical L. 83, 89 (2020); Amy McCrossen, *Bailout: Leaving Behind Pennsylvania's Monetary Bail System*, 57 Duq. L. Rev. 415, 423-25 (2019).

[176] Wis. Stat. § 969.035(6)(b) (2019-20).

[177] Wis. Stat. § 969.035(3)-(5) (2019-20).

[178] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project 1, 10 (2021).

not maintain, the racial disparities currently present within our state's pretrial justice system.

Policy reforms to improve Wisconsin's pretrial justice system.

With these guiding principles in mind, Wisconsin can craft effective policies and procedures to ensure courts are consistently conferring appropriate pretrial outcomes. First, Wisconsin must adopt a uniform risk assessment system statewide and implement safeguards that minimize, if not eliminate, pretrial racial disparities. Second, Wisconsin should create strong procedural safeguards to ensure courts adopt the optimum, least-restrictive outcome for each given case. Finally, policymakers should adopt complementary reform measures that will enrich and support this new pretrial justice system.

I. Effectively use risk to guide pretrial outcomes.

When determining pretrial outcomes, courts must order conditions that ensure appearance at court, protect members of the community from serious bodily harm, and prevent witness intimidation. Therefore, the risk of the individual to violate a pretrial goal, as opposed to one's ability to pay, must guide all pretrial decisions.

A. Adopt a quality risk assessment system statewide.

To assist courts in making risk determinations, Wisconsin should implement a risk assessment system statewide.[179] Not only is this tool used in New Jersey and around the country, it is also used by many Wisconsin counties across the state.[180] Wisconsin should emulate New Jersey's implementation of a uniform risk system by requiring every county to conduct universal risk assessment screening. Once screened, counties will be required to draft and submit a pretrial services report to the court. This report will show the risk assessment data and give the

[179] *Public Safety Assessment FAQs ("PSA 101")*, Arnold Ventures (2019), https://craftmedia bucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf.
[180] Wisconsin Supreme Court Office of Court Operations, 2020 Wisconsin Pretrial Survey 3 (2020).

recommended pretrial outcome using a pretrial matrix to be created by the state. Wisconsin's scoring matrix will emulate New Jersey's system and have four different levels of pretrial outcomes: Release on Recognizance, Minimal Release Conditions, Moderate Release Conditions, and Pretrial Detainment.[181] Because cash bail has not been demonstrated to categorically ensure pretrial appearance or prevent pretrial criminality, the risk assessment matrix will not recommend monetary conditions of release.[182]

Wisconsin courts will be required to consider the risk assessment score when determining any pre-trial outcome, but they will not be bound by the assessment's recommendation. However, if the court deviates from the recommended pre-trial outcome in this report, the court must, in their order, clearly and thoroughly articulate their rationale for deviating from the report's recommendation. This requirement encourages transparency, promotes judicial accountability for pretrial outcomes, and prevents the consistent disregard of the risk assessments that has become common in Kentucky.[183] In summary, implementing a quality risk assessment system across the state will help courts make more accurate risk assessments, guide judges as they execute appropriate pretrial procedures, and ensure transparency and accountability in the pretrial justice system. [184]

B. Implement preventive measures to mitigate racial disparities when using

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[181] ACLU & NACDL & NJPD, *The New Jersey Pretrial Justice Manual*, 1, 7 (2016), https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf

[182] *See* Kristin Bechtel, John Clark, Michael R. Jones, and David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, Pretrial Justice Institute (2012); Timothy R. Schnacke, U.S. Dept. of Just., Nat'l Inst. of Corr., *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 1, 12 (2012); Samantha A. Zottola & Sarah L. Desmaris, *Comparing the Relationships Between Money Bail, Pretrial Risk Scores, and Pretrial Outcomes*, 46 APA J. L. & Hum. Behav. 277, 277 (2022).

[183] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 21 (2019); *see* Ashley Spalding, *Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail*, Kentucky Center for Economic Policy (June 11, 2019).

[184] *See supra* p. 28.

risk assessment systems.

Risk assessment systems have the power to "decrease jail populations without corresponding increases in crime rates."[185] However, New Jersey's reforms have demonstrated how risk assessment systems cannot, on their own, mitigate the racial disparities caused by a system that over-polices, over-prosecutes, and over-incarcerates people of color.[186] Therefore, Wisconsin must accompany any statewide implementation of risk assessment systems with policies that combat and mitigate racial disparities within the risk assessment systems.

i. Continuously update the assessment's underlying data.

A risk assessment system is only as good as the data that is inputted.[187] Therefore, the use of risk assessment systems should be predicated on the algorithm receiving the most recent, local data that accurately reflects the jurisdiction's present realities.[188] Updating the assessment's data is especially important when states and jurisdictions adopt criminal justice reforms. As cities, counties, or states adopt reforms, the pretrial justice system can fall behind, as the risk assessments fail to account for changes caused by these reforms.[189] For example, if a jurisdiction implements pretrial reforms that improve appearance rates for all or certain defendants, those improved appearance rates will not be reflected in the algorithm unless the data is updated. This

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[185] Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 Colum. Sci. & Tech. L. Rev. 376, 410 (2020).

[186] *See. e.g, Id.* at 428; Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor, 178 (2017); Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Prac. & Clinical L. 83, 111 (2020) ("historical arrest, conviction, and incarceration rates reflect biases in the criminal justice system, and algorithmic predictions will inherit some of that bias").

[187] Lyle Moran, *Pretrial risk-assessment tools should only be used if they're transparent and unbiased, warns ABA House*, ABA Journal (2022).

[188] Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Prac. & Clinical L. 83, 111 (2020); John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1757 (2018).

[189] *See* John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1793-97 (2018).

means courts will be assessing risk using inaccurate data, to the detriment of the defendant.[190]

Simply put, "risk assessment tools developed solely from historical data that predates the enactment of significant risk-mitigating reforms will not reflect the defendant's new odds of success on release and could, in turn hamper overall reform efforts."[191] Consistently updating the data in the risk assessment systems can allow the pretrial justice system to keep up with improvements and reforms, including those that reduce racial disparities in other areas of the justice system. Therefore, ensuring the algorithm's data reflects the present reality for defendants is crucial to the system's effectiveness. Any implementation of a statewide risk assessment system should prioritize consistent data upkeep.[192]

ii. Require transparency and accountability from risk assessment systems.

Wisconsin must require transparency and accountability from all actors in the pretrial justice system, including the operators of the risk assessment systems. Requiring transparency and accountability from the operators of risk assessment systems allows policymakers and others actors to monitor the pretrial justice system, identify the sources of disparities and bias within the system, and craft reforms that eliminate such disparities. Systems that withhold their algorithms, such as those in Washington D.C., reinforce the "Black-box" problem, making it even more difficult to identify and resolve pretrial disparities.[193] Wisconsin should, at a minimum, emulate Illinois's policies for ensuring transparency and accountability from their risk assessment

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[190] *See Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1132-33 (2018); John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1757 (2018).

[191] John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1793-94 (2018).

[192] *See e.g.*, Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Prac. & Clinical L. 83 (2020); John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725 (2018).

[193] For a background on the "black-box" problem with many risk assessment systems, see *supra* page 13.

systems.[194] As states, including Wisconsin, increasingly rely on risk assessment systems, these systems must be able to be monitored and reformed as necessary to accomplish pretrial goals.

II. Implement effective and just pretrial procedures.

Wisconsin should also emulate New Jersey's pretrial process by starting with a presumption of release and creating procedural hurdles to ordering more restrictive pretrial conditions. By implementing appropriate procedural steps, courts can prudently and methodically order the optimum, least-restrictive outcome for each given case.

A. Presumption of release on recognizance

The best pretrial justice systems, including those in New Jersey, Washington D.C., and Illinois, have a strong presumption of release. Currently, Wisconsin's pretrial justice system only requires judges to "consider the likelihood of the defendant appearing for trial if released on his or her own recognizance."[195] Statutory reforms should strengthen the rebuttable presumption of release by requiring judges to release an individual on recognizance unless there is reasonable evidence, including evidence in the risk assessment report, to suggest that such release would not assure appearance at court, protect members of the community from serious bodily harm, or prevent witness intimidation. Reinforcing release as the default pretrial outcome ensures no superfluous restrictions or conditions are placed on defendants in the pretrial stage.

B. Imposing conditions of release at first appearance.

There must be a rebuttable presumption in favor of release on recognizance. If, however, the court has reasonable cause to believe that release of recognizance would not ensure pretrial goals, the court should first consider and order any of the following minimally restrictive conditions to remedy these concerns:

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[194] *See supra* p. 18.
[195] Wis. Stat. § 969.01(1) (2019-20).

- Defendant shall not commit a crime during the period of release.
- Defendant shall avoid all forms of contact with witnesses who may testify concerning the offense.
- Defendant shall avoid any contact with the victim(s) of the alleged offense.
- Defendant shall remain at least 500 feet from the victim(s) place of residency.
- Pretrial services will provide the defendant with reminders of court dates via phone or text.[196]
- Pretrial services will provide a list of non-mandatory AODA, job training, or housing resources.

There should be a rebuttable presumption that the preceding conditions are sufficient to accomplish pretrial goals. If, however, the court has reasonable cause to believe that these conditions would also not accomplish pretrial goals, a model policy would permit courts to order any of the following conditions of release:

- 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 weapons as defined by Wis. Stat. § 939.22(10).
- Refrain from excessive use of alcohol, or any unlawful use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner.

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[196] *See supra* p. 35-36.

- Report on a regular basis to a designated law enforcement agency, other agency, or pretrial services program.

When considering the appropriate conditions of release, the court must order the least restrictive condition or combination of conditions above to assure the defendant meets pretrial goals.

C. Restrictions necessitating a detention or conditional release hearing.

A court may only, *sua sponte*, order the conditions of release outlined in Section B. Any other conditions, including the use of monetary bail and pretrial detention, may only be initiated by the prosecutor through a motion for a detention or conditional release hearing ("DCR").

i. Guidelines for the Detention and Conditional Release Hearing.

A DCR hearing will be held if a court finds probable cause that monetary bail, restrictive conditions of release, or pretrial detention is necessary to assure pretrial goals are met. There are a number of necessary guidelines to ensure these DCR hearings protect the defendant's due process rights and promote just pretrial outcomes. First, the state should only be permitted to move for a DCR hearing if:

- The state has probable cause to believe that no conditions or combination of conditions in Section B will assure appearance at trial or protect an individual in the community from serious bodily harm.
- The state has probable cause to believe that the defendant violated a prior condition of release while released pretrial or committed witness intimidation under Wis. Stat. §§ 940.42 or 940.43.

Second, this hearing should be required to occur within 48 hours of the first appearance if the

individual is currently in custody.[197] Third, the defendant has a right to counsel in the DCR hearing and will be appointed counsel if the defendant is unable to obtain constitutionally adequate representation. Fourth, the defendant should have the opportunity to submit evidence, present witnesses, and cross-examine witnesses according to Wisconsin Chapter 971. The defendant will also be afforded the opportunity to testify, but any testimony will be admissible in any future hearings to determine if the defendant violated their conditions of release. Defendant testimony at this hearing will not, however, be admissible at the defendant's trial.[198]

ii. Additional Conditions

States seeking additional conditions of release should be required to demonstrate by a clear and convincing standard that no combination of conditions outlined below or in Section B would assure appearance at trial, prevent witness intimidation, or appropriately address the threat of serious bodily harm to an individual in the public. If the court finds that the state has met this standard, they may order any of the following conditions or combination of conditions to accomplish pretrial goals:

- Maintain employment, or, if unemployed, actively seek employment;
- Maintain or commence an educational program;
- Requirement to self-report daily travel or location monitoring;
- Undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

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[197] Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 11-12 (2019); Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice 1, 6 (2019).

[198] For a helpful outline on appropriate DCR hearing procedures, *see* Colin Doyle & Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, Harvard Law School Criminal Justice Policy Program 1, 28-32 (2019)

- Be placed on electronic monitoring;
- Return to custody for specified hours following release for employment, schooling, or other limited purposes.[199]

Just as with all of the conditions available in Section B, the court must only order the least restrictive condition or combination of conditions to reasonably assure appearance at trial, protect members of the community from serious bodily harm, or prevent witness intimidation.

iii. Procedural steps for imposing cash bail

If the court finds clear and convincing evidence at the DCR hearing that no alternative condition or combination of conditions listed in Section 2 would reasonably assure the defendant's appearance at trial, the court may impose appropriate monetary bail conditions.[200] Courts may not impose monetary conditions to protect a member of the public from serious bodily harm or prevent witness intimidation. When setting monetary bail conditions, the court must consider the defendant's ability to pay and may not impose financial conditions beyond the individual's ability and which results in the detention of the individual.

iv. *Procedural steps for ordering detention without bail*

If the court finds clear and convincing evidence at the DCR hearing that no alternative condition or combination of conditions in Section 2 would reasonably protect a member of the public from serious bodily harm, the court may order pretrial detention for individuals who qualify under Wis. Stat. § 969.035(2). Courts cannot impose pretrial detention to prevent witness intimidation or to assure appearance in court, but the state may move for pretrial detention at a

[199] Before implementing any of the preceding conditions, the court must abide by all of the DCR hearing procedures outlined above.

[200] Ability-to-Pay assessments will be conducted by the Pretrial Services Agency in each county. For an outline on ways to ensure agencies accurately assess an individual's ability to pay bail, *see* Sandra van den Heuvel & Anton Robinson & Insha Rahman, *A Means to an End: Assessing the Ability to Pay Bail*, Vera Institute of Justice 1 (2019).

later date if they find clear and convincing evidence that witness intimidation occurred pretrial. At this time, courts may order pretrial detention upon a clear and convincing finding of witness intimidation as outlined in Wis. Stat. §§ 940.42 and 940.43.

The preceding proposal builds on the strengths of other pretrial justice reforms while also addresses and minimizes their shortcomings. Using this procedural outline, Wisconsin's pretrial justice system will emphasize pretrial release and minimally-restrictive conditions, encourage the use the risk assessment tools, and minimize the use of cash bail and pretrial detainment.

Additional Reforms that can improve pretrial outcomes.

In addition to adopting a statewide risk assessment system and implementing procedural processes, Wisconsin should embrace additional reforms that increase appearance rates and improve other pretrial outcomes. First, the adoption of a bail advocate and other pretrial assistance programs will better inform judges during the risk determination process and improve defendant appearance rates. Next, allowing defendants to appeal pretrial conditions will encourage judicial accountability. Finally, implementing broader changes to the criminal justice system is the surest way to reduce racial disparities in the pretrial system and shrink jail populations statewide.

I. Bail advocates improve pretrial justice outcomes across the board.

Implementing a bail advocate program could help Wisconsin cut bail violations, limit future arrests, and reduce racial disparities in pretrial outcomes. Bail advocate programs rose to prominence in 2017, when the city of Philadelphia implemented its own bail advocacy program. In this program, bail advocates meet with defendants shortly after arrest to discuss the criminal

adjudication process and collect background information.[201] After meeting with the defendant, the bail advocate will provide the court with a report on the defendant. This report, which contains information such as "community involvement, family arrangements, potential interactions with victim if released, or mitigating circumstances concerning prior offenses," gives the court a comprehensive and qualitative assessment of the defendant.[202]

This program has seen remarkable results since its implementation. First, the program has led to a 64% reduction in the likelihood of an individual violating their release conditions.[203] It has also decreased an individual's chance of committing a future crime by over 25%.[204] Experts credit these substantial reductions to the bail advocate's ability to explain the pretrial justice process, encourage defendant participation and engagement in this process, and inspire trust and compliance between the defendant and the pretrial system.[205]

In addition to improving defendant compliance and engagement, bail advocates have likely reduced racial disparities in pretrial outcomes. Initial evidence from the program indicates that bail advocates "are more effective at reducing detention [rates] for Black versus non-Black defendants.[206] Experts credit this to the bail advocate's pretrial report, which provides context about the individual and "humanize[s] the defendants" for the court.[207] Because there is significant evidence suggesting that implicit bias and heuristics lead to racially-disparate outcomes, furnishing courts with a more comprehensive understanding of the defendant helps judges overcome these biases and order more just and equitable outcomes.[208]

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[201] Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 Ind. L. J. 701 (2021).
[202] *Id.* at 730.
[203] *Id.* at 701.
[204] *Id.*
[205] *Id.* at 736-38.
[206] *Id.* at 728.
[207] *Id.* at 730.
[208] *Id.* at 734.

Wisconsin should adopt a similar bail advocate program to that of Philadelphia. Such a system would also, in tandem with the risk assessment report, provide courts with the comprehensive quantitative and qualitative information needed to accurately assess an individual's risk and order appropriate conditions, if any, for each case.

II. Implement programs that help facilitate appearance in court.

Logistical hurdles and human error can often prevent appearance in court. If Wisconsin wants to maximize court appearance rates in the pretrial justice system, they should reduce obstacles to appearing. First, Wisconsin should adopt a statewide, automated text messaging system that reminds individuals of future court appearances. Forgetting their court date is one of the most cited reasons for failing to appear, and text message reminders are a relatively inexpensive way to reduce failure to appear rates by over 25%.[209] Second, Wisconsin should also provide transportation assistance to court. Problems with transportation to court was the third most cited reason for failing to appear, and transportation assistance has been shown to decrease failure to appear rates.[210] By providing transportation assistance, states could alleviate obstacles to appearance and decrease failure to appear rates.[211]

Instead of relying on monetary bail to ensure appearance, Wisconsin should lean into simple, effective, and economical ways to improve appearance rates in court. By providing text reminders and eliminating transportation obstacles, courts can make it easier for individuals to appear and reduce failure to appear rates across the board. Wisconsin should implement both programs in tandem with broader pretrial justice reforms.

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[209] Jason Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, ABA Journal (July 17, 2018, 7:10 AM); John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1793 (2018).

[210] Brian H. Bornstein et al., U.S. Dep't Just., Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach (2011).

[211] John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1793 (2018).

III. Provide defendants with opportunity to appeal pretrial decisions.

Even after implementing all of the preceding pretrial reforms, courts can still err while interpreting risk factors and implementing appropriate pretrial outcomes. Because these errors affect an individual's liberty and impact trial outcomes, such decisions should be subject to interlocutory appellate review.[212]

Ensuring defendants have a right to appeal their pre-trial outcome will encourage trial judges to diligent and prudently assess each case. It will also discourage judges from disregarding newly enacted reforms or imposing overly-punitive pretrial conditions. Kentucky's shortfalls demonstrate how resistance to change can slow pretrial reforms; implementing a clear appellate process will tether all stakeholders to these newly enacted reforms.

IV. Enact criminal justice reforms that address broader systemic issues.

The United States has the world's highest incarceration rate, imprisoning almost 29% more people per capita than El Salvador, the second most incarcerated country.[213] Wisconsin's incarceration rate is also higher than every country (except the U.S.) on earth.[214] Unfortunately, this system of mass incarceration falls hardest on people of color, as arrest, conviction, and incarceration rates reflect the systemic racial biases within the broader criminal justice system.[215] From policing to parole decisions, Black and Hispanic groups are disproportionately disfavored

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[212] *See See Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1127-28 (2018); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura & John Arnold Foundation 1, 10 (2013).

[213] Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Institute (Sept. 2021), https://www.prisonpolicy.org/global/2021.html.

[214] *Id.*

[215] *See, e.g.*, Jordan Swears, *The Bail Problem*, 21 W. Mich. U. Cooley J. Prac. & Clinical L. 83, 111 (2020); Elizabeth Hinton & LeShae Henderson & Cindy Reed, *An Unjust Burden: Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice 1 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

by the criminal justice system.[216]

Ultimately, these disparities, especially at the front end of the justice system, impact pretrial outcomes. New Jersey's reforms have demonstrated that when there are massive disparities between Black and white individuals in the justice system, even relatively progressive pretrial reforms can perpetuate racially disparate outcomes.[217] Therefore, in order to create a truly equitable pretrial justice system, Wisconsin must have equitable outcomes in all aspects of the criminal justice system.

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[216] Elizabeth Hinton & LeShae Henderson & Cindy Reed, *An Unjust Burden: Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice 1 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

[217] *See e.g.*, Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice,* 5 Ohio St. J. Crim. L. 1 (2007); Leah Sakala & Nicole D. Porter, *Criminal justice reform doesn't end system's racial bias*, USA Today (Dec. 12, 2018), https://www.usatoday.com/story/opini on/policing/politics-policing/2018/12/12/racial-injustice-criminal-justice-reform-racism-prison/2094674002/.

STATE BAR OF WISCONSIN

Leaders in the Law. Advocates for Justice.®

To: Members, Senate Judiciary & Public Safety Committee and Assembly Judiciary Committee
From: President Margaret Hickey, State Bar of Wisconsin
Date: January 10, 2023
Subject: SJR 2/AJR 1 – Constitutional Amendment on Conditions for release prior to conviction

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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. The State Bar currently does not have a position on SJR 2 but is providing written testimony regarding the larger issues of bail and the legislature's consideration of bail reform legislation.

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.

While the State Bar appreciates the goal of greater flexibility for the consideration of public safety in pretrial release decisions, our position remains steadfast on the need to reduce of the use of cash bail. As has been shared before, the use of cash as a determination of whether someone can be released into the community before their case is adjudicated has differing impact due to the ability to pay. An accused who has significant ties to the community and otherwise is of little or no danger to the community, can remain in custody for fiscal reasons. Others who have been determined to be of concern may have resources above the amount of bail set. Should this amendment pass and as the Legislature considers implementing legislation, it is our hope that the use of cash in our pretrial release process can be balanced and possibly reduced.

In addition, a significant concern is how changes to the bail process might further impact the fiscal strain our justice system already faces. It is well known that Wisconsin is dealing with a critical staffing issue in many of our district attorney offices, within the State Public Defenders Office and in the courtroom for court reporters. Additional funding issues for an already stressed system is gravely concerning. Without knowing the specifics of how the legislature will define "serious harm" or implement changes to the pretrial release process, it is difficult to know the scope of impact on the justice system and the potential for negative unintended consequences.

Our hope is that the legislature looks for a long-term solution moving away from the use of cash bail and toward the reform of bail and pretrial release options. 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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STATE BAR OF WISCONSIN
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WISCONSIN LEGISLATURE

P. O. Box 7882 Madison, WI 53707-7882

Written Testimony from Rep. Madison - District 10

Hello, esteemed members of this committee; I thank you for taking the time to read this statement. I understand we are at a point where we must genuinely examine our criminal justice system, judicial process, and corrections system. It is written into both the U.S. Constitution and the Wisconsin Constitution to protect fundamental rights such as the presumption of innocence until proven guilty. This constitutional amendment deliberately increases the carceral state by increasing the conditions for release pre-trial and the considerations for bail. Both of these questions will result in an increase of holding defendants pre-trial when they still have a presumption of innocence. I oppose this amendment for the following reasons:

1. Public Safety - This constitutional amendment will make our communities less safe in the short and long run. Instead of increasing incarceration for the sake of it or because it scores a political point, we should focus on what the data tells us actually makes communities safer. According to the Wisconsin Office of Public Defenders, "Detaining an individual pre-trial simply because they cannot afford to post bail does not make communities safer. The disruptive consequences of pre-trial detention push individuals toward criminogenic behavior."

2. Bail - In recent years, there have been efforts from Democrats and Republicans across the country to reduce the impact of an individual's wealth on their outcomes in the justice system. Instead of following that trend, this amendment would expand the cash bail system by allowing judges to set bail based on the "totality of the circumstances," instead of simply setting bail to assure reappearance in court. As an intended effect, this amendment will have a disproportionate impact on lower-income communities.

3. Youth - As it relates to our young people, our youth justice system is supposed to be designed to help young people reach their full potential, get back on track, and become productive members of our society. If this legislation is passed, these goals will be hindered, youth recidivism will increase, and there will be an increased financial strain on working families. Every young person in our state deserves the opportunity to thrive even when they make mistakes, but this legislation criminalizes young people before they are proven guilty. In passing this amendment, we will be failing innocent youth across Wisconsin by adding yet another barrier to living a thriving life.

4. Racism - Perhaps most importantly, this constitutional amendment allows racism and bias to enter the criminal justice system in yet another way. By giving increased flexibility to judges and allowing them to consider the "totality of the circumstances," we would create more variability in how we treat defendants. Time after time, we see that increased variability and flexibility in cases often leads to disparities in justice for white defendants vs. defendants of color - I see no reason why this would be any different.

Finally, not only is this policy going to make communities across Wisconsin less safe, it is also bad policy design that gives extraordinary power to the legislature. By reducing one of the conditions of release from "serious bodily harm" to "serious harm as defined by the legislature," this amendment risks opening Pandora's Box as it relates to reasons to hold a defendant pre-trial. This is because the legislature could change the definition of "serious harm" at any time. The voters of Wisconsin cannot, in good faith, vote on a constitutional amendment if the interpretation of the amendment can be retroactively changed. I do not support giving this broad power to the legislature as it will result in more innocent-until-proven-guilty Wisconsinites held behind bars pre-trial.

Incarceration Trends in WISCONSIN

Vera

Incarceration in Local Jails and State Prisons

Total people... ...locked up in Wisconsin

393%

7,269 people — INCREASE — 35,835 people

1983 — 2015

REGIONAL RANK

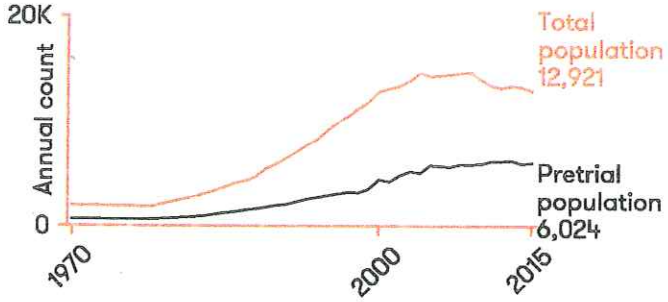
3 of 7 in total incarceration

Since 1970, the rate of incarceration in America has expanded more than fourfold, and the United States leads the world in locking people up. Many places in America have begun to reduce their use of prisons and jails, but progress has been uneven. Although the number of people sent to state prisons and county jails from urban areas has decreased, that number has continued to rise in many rural places. Racial disparities in incarceration remain strikingly wide. Women constitute a rising number of those behind bars.

This fact sheet provides at-a-glance information about how many people are locked up in both state prisons and county jails and shows where the state stands on a variety of metrics, so that policymakers and the public can better determine where to target reforms.

STATE TOTALS

JAILS

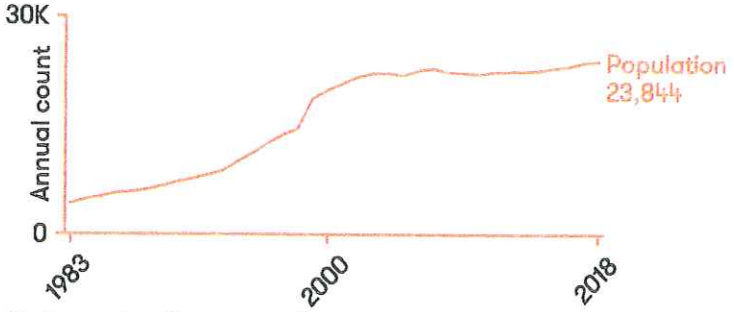


% change in jail population

SINCE 1970	SINCE 2000
553% ↑	1% ↑

Since 1970, the total jail population has increased 553%. In 2015, pretrial detainees constituted 47% of the total jail population in Wisconsin.

PRISONS



% change in prison population

SINCE 1983	SINCE 2000
464% ↑	20% ↑

Since 1983, the prison custody population has increased 464%. In 2018, there were 23,844 people in the Wisconsin prison system.

RACE

related on pg. 2 →

JAILS 2015

7% of state pop. | 29% of jail pop.

PRISONS 2017

7% of state pop. | 41% of prison pop.

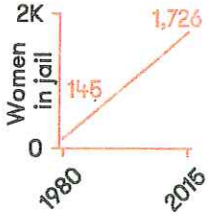
In Wisconsin, Black people constituted 7% of state residents, but 29% of people in jail and 41% of people in prison.

GENDER

related on pg. 2 →

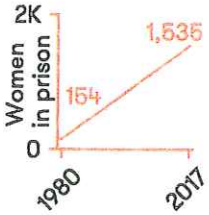
JAILS

1,088% ↑



PRISONS

897% ↑



Since 1980, the number of women in jail has increased 1,088%, and the number of women in prison has increased 897%.

GEOGRAPHY

related on pg. 3 →

Top admission rates, 2015 (rate per 100K)

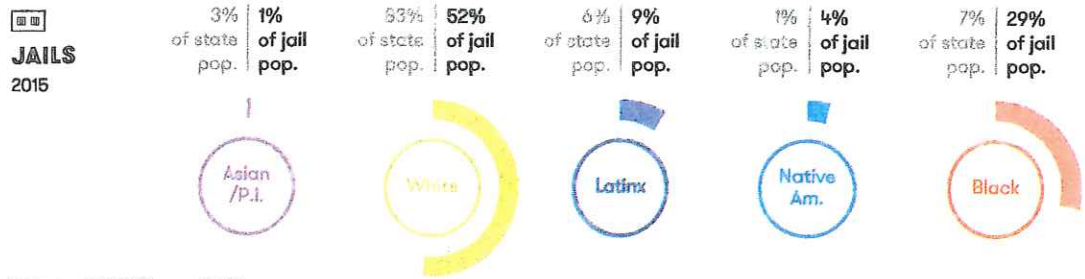
COUNTY	JAILS
Forest	17,312
Shawano	16,213
Menominee	15,731
Sawyer	14,831
Vilas	13,047

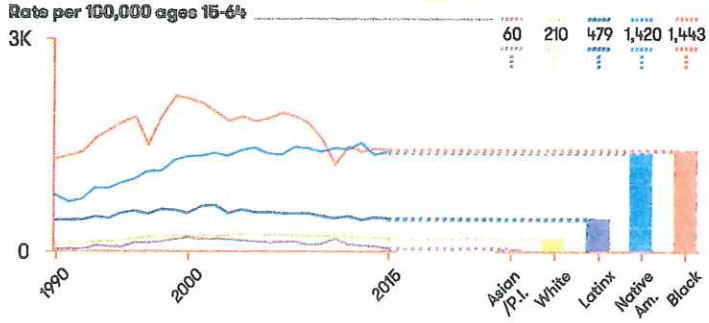
COUNTY	PRISONS
Florence	1,227
Sawyer	751
Shawano	589
Marinette	463
Racine	410

Incarceration is not only an urban phenomenon. In fact, on a per capita basis, the most rural places in the state often lock up the most people in jail and send the most people to prison.

RACE AND ETHNICITY

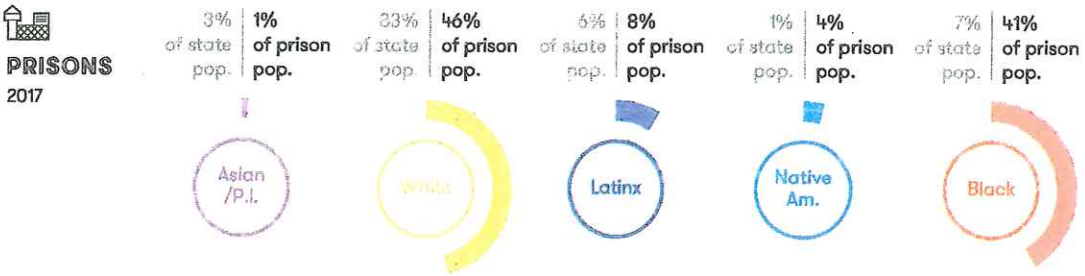
JAILS
2015

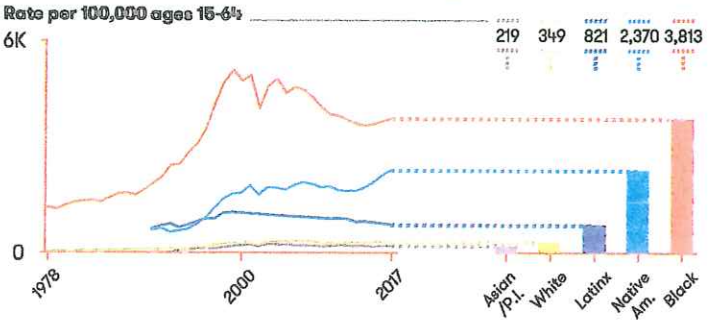




Since 1990, the Black incarceration rate has increased 10 percent. In 2015, Black people were incarcerated at 6.9 times the rate of white people, and Native American people were incarcerated at 6.8 times the rate of white people.

PRISONS
2017





Since 1978, the Black incarceration rate has increased 193 percent. In 2017, Black people were incarcerated at 10.9 times the rate of white people, and Native American people were incarcerated at 6.8 times the rate of white people.

NATIONAL CONTEXT

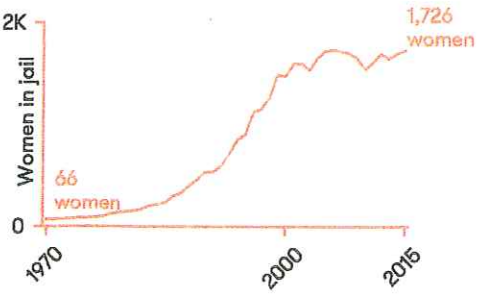
The overrepresentation of Black Americans in the justice system is well documented. Black men constitute about 13 percent of the male population, but about 35 percent of those incarcerated. One in five Black people born in 2001 is likely to be incarcerated in their lifetime, compared to one in 10 Latinx people and one in 29 white people.

Discriminatory criminal justice policies and practices at all stages of the justice process have unjustifiably disadvantaged Black people, including through disparity in the enforcement of seemingly race-neutral laws. Studies have found that Black people are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than white people—even when controlling for things like offense severity.

Nationally, Latinx people are also overrepresented in prisons and jails, yet common data misclassification leads to distorted, lower estimates of Latinx incarceration rates and distorted, higher estimates of white incarceration rates. Smaller and inconsistent data reporting make it difficult to measure the effects of racism for incarcerated people of other racial groups.

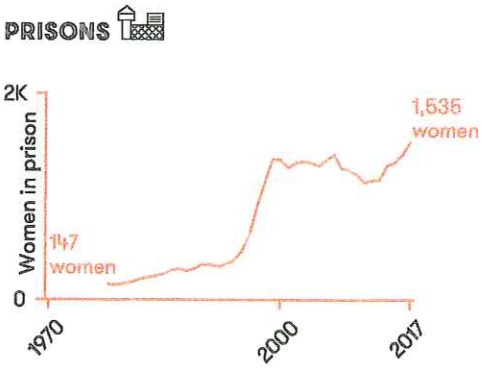
GENDER

JAILS



The number of women in Wisconsin's jails has increased more than 26-fold, from 66 in 1970 to 1,727 in 2015.

PRISONS



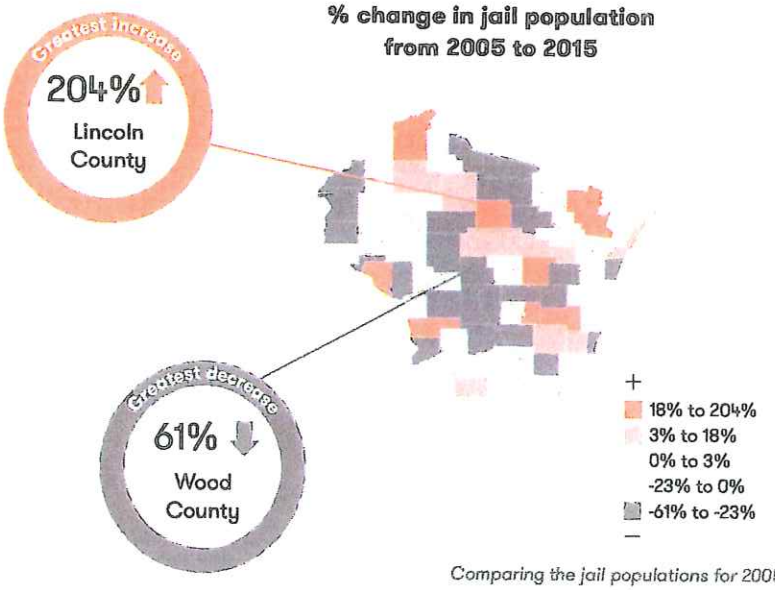
The number of women in Wisconsin's prisons has increased more than tenfold, from 147 in 1978 to 1,535 in 2017.

NATIONAL CONTEXT

Although men's jail admissions have declined by 26 percent since 2008, women's admissions have increased both as a total number and as a proportion of all jail admissions. Women now make up almost one out of every four jail admissions, up from fewer than one in 10 in 1983. Since 1970, the number of women in U.S. jails has increased 14-fold—from fewer than 8,000 to nearly 110,000 in 2013—and women in jail now account for approximately half of all women behind bars in the country.

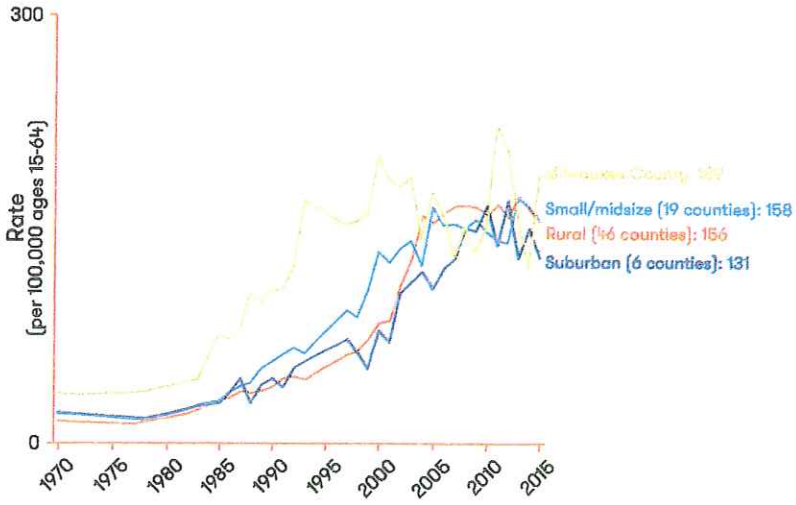
Statewide trends alone do not tell the whole story of incarceration: there is wide variation in the use of incarceration across the state. Today, the highest rates of prison admissions are in rural counties, and pretrial detention continues to increase in smaller counties even as it is on the decline in larger counties. It is critical to examine incarceration trends in every corner of the state, because although the largest counties may have the most people in jails—the highest rates of incarceration are in smaller cities and rural counties.

% change in jail population from 2005 to 2015



Comparing the jail populations for 2005 and 2015, counties shaded dark gray had fewer people in jail and those shaded dark red had more people in jail.

JAILS Pretrial population



Since 2000, the state's use of pretrial detention has taken different trajectories in different types of counties. The pretrial incarceration rate has increased 85% in the state's 46 rural counties, 65% in the state's six suburban counties, and 18% in the state's 19 small/medium counties. It has decreased 7% in the state's one urban county.

Vera's analysis of the urban-rural continuum changes the six categories defined by the National Center for Health Statistics Urban-Rural Classification Scheme for Counties to four. A county is labeled "urban" if it is one of the core counties of a metropolitan area with 1 million or more people and is labeled "suburban" if it is within the surrounding metropolitan area. Vera turns the remaining four categories into two by combining small and medium metropolitan areas ("small and midsize metro") and micropolitan and noncore areas ("rural").

JAIL ADMISSIONS (TOP 10 OF 72 COUNTIES)

2015

COUNTY	Rate (per 100K)	COUNTY	Annual count
Forest	17,312	Milwaukee	31,171
Shawano	16,213	Dane	13,401
Menominee	15,731	Brown	10,001
Sawyer	14,831	Racine	9,090
Vilas	13,047	Kenosha	7,926
Burnett	11,460	Waukesha	6,747
Ashland	11,141	Outagamie	5,909
Oneida	9,739	Rock	5,894
Langlade	9,653	Winnebago	5,515
Lincoln	9,505	Dodge	5,266

PRISON ADMISSIONS (TOP 10 OF 72 COUNTIES)

2015

COUNTY	Rate (per 100K)	COUNTY	Annual count
Florence	1,227	Milwaukee	2,459
Sawyer	751	Dane	544
Shawano	589	Racine	524
Marinette	463	Brown	441
Racine	410	Waukesha	434
Milwaukee	382	Kenosha	364
Forest	358	Rock	316
Kewaunee	341	Winnebago	239
Langlade	336	Outagamie	223
Lincoln	325	Washington	212

HOW DOES WISCONSIN COMPARE?

JAILS

Jail admissions

Rank	State	Rate (2015)	Rate change ('05–'15)
1	Iowa	6,216	-11%
2	**Wisconsin**	5,352	-18%
3	Missouri	5,315	-11%
4	Minnesota	5,268	-6%
5	Indiana	5,247	-24%
6	Michigan	4,680	-21%
7	Illinois	3,808	-17%

Jail pretrial population

Rank	State	Rate (2015)	Rate change ('05–'15)
1	Indiana	272	8%
2	Missouri	226	16%
3	**Wisconsin**	158	1%
4	Iowa	158	5%
5	Illinois	157	-19%
6	Michigan	126	-4%
7	Minnesota	111	5%

Jail sentenced population

Rank	State	Rate (2015)	Rate change ('05–'15)
1	**Wisconsin**	181	-0.2%
2	Michigan	119	-0.2%
3	Indiana	114	-0.3%
4	Minnesota	75	-0.2%
5	Illinois	64	0.5%
6	Missouri	60	-0.2%
7	Iowa	54	0.2%

PRISONS

Prison admissions

Rank	State	Rate (2016)	Rate change ('06–'16)
1	Missouri	465	-7%
2	Illinois	299	-36%
3	Iowa	298	-11%
4	Indiana	297	-29%
5	Minnesota	223	6%
6	Michigan	192	-12%
7	**Wisconsin**	175	-24%

Prison population

Rank	State	Rate (2018)	Rate change ('08–'18)
1	Missouri	768	0.2%
2	**Wisconsin**	637	3%
3	Indiana	620	-6%
4	Michigan	594	-18%
5	Illinois	472	-10%
6	Iowa	469	5%
7	Minnesota	279	-0.7%

Data

This fact sheet uses data from four U.S. Bureau of Justice Statistics (BJS) data series and is supplemented with data obtained directly from state governments for the more recent years for which BJS data is not yet available, when available. The Annual Survey of Jails, Census of Jails, and National Corrections Reporting Program provides data through 2016; the National Prisoner Statistics program provides data through 2017, and 2018 data is sourced from state agencies. Rates are per 100,000 residents aged 15 to 64. See *Data and Methods for Vera's State Fact Sheets*: www.vera.org/incarceration-trends-fact-sheets-data-and-methods.pdf for complete details. County-level data is available at trends.vera.org.

Acknowledgments

This series would not be possible without the excellent work of researchers at the Bureau of Justice Statistics—E. Ann Carson, Todd Minton, and Zhen Zeng—who maintain the Annual Survey of Jails, Census of Jails, National Corrections Reporting Program, and National Prisoner Statistics program. This report was designed by Paragini Amin and created by Christian Henrichson, Eital Schattner-Elmaleh, Jacob Kang-Brown, Oliver Hinds and James Wallace-Lee. This report was made possible by the support of Arnold Ventures. The views expressed in this report are those of the authors and do not necessarily reflect the views of Arnold Ventures.

An electronic version of this report is posted on Vera's website at www.vera.org/state-incarceration-trends. The Vera Institute of Justice is a justice reform change agent. Vera produces ideas, analysis, and research that inspire change in the systems people rely upon for safety and justice, and works in close partnership with government and civic leaders to implement it. Vera is currently pursuing core priorities of ending the misuse of jails, transforming conditions of confinement, and ensuring that justice systems more effectively serve America's increasingly diverse communities.

For more information

For more information, visit www.vera.org. For more information about this fact sheet, contact Jacob Kang-Brown, senior research associate, at jkangbrown@vera.org.

Wisconsin Justice Initiative

January 10, 2023

Senate Committee on Judiciary and Public Safety
Assembly Committee on Judiciary
State Capitol
Madison, Wisconsin

Re: SJR 2 and AJR 1

Dear Committee Members:

Thank you for the opportunity to provide comments on 2023 Senate Joint Resolution 2 and 2023 Assembly Joint Resolution 1. I offer these written remarks on behalf of the Wisconsin Justice Initiative, whose mission is to improve the quality of justice in Wisconsin by educating the public about legal issues and encouraging civic engagement in and debate about the judicial system and its operation.

Bail and pretrial release are important public policy areas that deserve careful attention, especially considering the recent tragic and heartbreaking events in Waukesha County in late 2021. The violence and loss of life at the Waukesha Christmas parade sent shockwaves through our state. It has now prompted an examination of our bail laws. I write today to highlight certain principles that should be kept in mind as the debate on these important questions moves forward.

First and foremost, it's important to understand that good bail decisions are made by relying on evidence. The problem that led to the tragedy in Waukesha was NOT that the evidence supported the decision to recommend a risky and dangerous person for release. The problem was that the evidence that was available – evidence that flagged the risk for violence and the risk for flight – was ignored.

The process of setting bail in Milwaukee County (and other jurisdictions) is assisted by a risk tool called the Public Safety Assessment (PSA). Each defendant who is arrested on new charges receives a risk score, and the results are available for prosecutors and defense attorneys who make bail recommendations, and to court commissioners and judges who make the ultimate bail decisions. Among the factors that the PSA "scores" are a person's prior record of convictions, the type of offense they are currently facing, their history of missing court, their history of violence, their age, and their record of prior incarceration.

SJR 2 and AJR 1 propose an amendment to the Wisconsin Constitution that will allow courts to consider additional factors (beyond the likelihood to appear) in setting bail when a person is charged with certain offenses. The additional factors are set forth in the amendment and include

the seriousness of the offense and the need to protect the public. However, these factors are already listed in chapter 969 of the statutes as appropriate considerations in setting the amount of bail – see §969.01(4): Considerations in Setting Conditions of Release. They are also part of the risk assessment used in many jurisdictions. It is arguably unnecessary to include them in the Constitution.

Amending the Constitution to focus more on the offense charged rather than the total risk profile of an accused person will likely result in locking up low-risk poor people before trial with high cash bail while rich people who may be dangerous can buy their way out of custody. This makes no sense and will have potentially devastating effects on moderate and low-income people who are, after all, presumed innocent. We cannot have a two-tiered justice system – one for the rich, and one for the rest of us. The U.S. Civil Rights Commission released a report last year that highlighted the economic and racial disparities in the cash bail system. It noted that, of those held in jail unable to post bail, "there were stark disparities with regards to race" (https://www.usccr.gov/reports/2021/civil-rights-implications-cash-bail).

In the last couple decades, we've increasingly come to rely on evidence, not emotion, in making decisions in the criminal justice system. This should be applauded, not criticized, because it results in rational decisions rather than ones driven by prejudice and fear. It's also important to note that studies have shown strong correlations between the length of time a low or moderate-risk person spends in pretrial detention and the likelihood that they would be re-arrested later in life. In other words, detaining low-risk individuals has societal costs – it can make us less safe.

Well-informed bail decisions are made by experienced prosecutors, defense counsel, and judges – *when* they rely on the evidence in each case. The key is following the evidence, meaning appropriate high cash recommendations when a person's history includes pending violent offenses, an extensive record of convictions, and a demonstrated history of missing court, as was the case with the defendant in the Waukesha Christmas parade incident. It also means release on recognizance even in some serious cases, IF the evidence shows a person is not high-risk.

It is important to remember the teaching of the United States Supreme Court from the case of *Salerno v. United States*, 481 U.S. 739 (1987), that "(i)n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Any proposal that violates this premise may be vulnerable to federal constitutional challenge.

Crucial evidence was missed or ignored in the 2021 Waukesha case, and the result was a tragedy. This should never happen in the future. We must make sure that future bail decisions are the result of an evidence-based, validated risk assessment that provides information to justice system professionals to make smart decisions in each case. The evidence points the way but gets the right result only if it's not ignored.

Because this amendment puts too much focus on the offense charged and does not adequately safeguard against unnecessary pretrial detention for low-risk individuals, we urge that you reject second consideration.

If the Legislature moves forward with a second consideration of the proposed amendment, we urge revision of Question 1 because it is misleading and fails to fully and fairly inform voters of the amendment's contents. The question fails to inform voters that the amendment replaces more narrow language allowing conditions to be imposed to protect the community from "serious bodily harm" with expansive language approving conditions to prevent "serious harm as defined by the legislature by law." The question needs to include that significant change, which allows application to situations not yet even contemplated by the Legislature and with which voters may not agree.

Sincerely,

Craig R. Johnson
Board President

AMERICAN CIVIL LIBERTIES UNION
Wisconsin

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Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

January 10, 2023

Chair Wanggaard, Chair Tusler, and Honorable Members of the Senate Committee on Judiciary and Public Safety and the Assembly Committee on Judiciary:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide testimony in opposition to Assembly Joint Resolution 1 and Senate Joint Resolution 2.

Wisconsin's reliance on cash bail has perpetuated a two-tiered system of justice: one for the wealthy and one for everyone else. AJR 1 and SJR 2 propose amendments to the Wisconsin Constitution that would undermine the safety and stability of people detained pretrial and their communities, exacerbate inequities in the state's cash bail system, and raise significant concerns under the due process clause of the Fifth Amendment and the excessive bail prohibition under the Eighth Amendment to the U.S. Constitution.

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 2017-2018 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. In 2019, Wisconsin Watch found that at least 23 Wisconsin counties assess "pay-to-stay" fees, 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, according to data collected by Prison Policy Initiative in 2021.

In addition to the cascading economic and social consequences, detention poses a systemic disadvantage to people unable to afford the price of freedom pretrial. 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. 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. The U.S. Supreme Court has held that, "the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary," but the changes proposed in AJR 1 and SJR2 would further entrench the reality that Wisconsinites charged with a crime are not innocent until proven guilty but instead innocent until proven poor.

We also cannot ignore the racial and wealth-based disparities that the cash bail system imposes on Wisconsinites, disparities that would be exacerbated by this proposal. According to a Vera Institute of Justice report, in 2015, Black people in Wisconsin were incarcerated at 6.9 times the rate of white people, and Native American people were incarcerated at 6.8 times the rate of white people.

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). However, the overly broad "serious harm" language proposed in AJR 1 and SJR 2 turns this principle on its head, allowing a court set the price of a legally innocent person's freedom based on endless hypothetical social, emotional, economic, or other harms (but presumably not the complex harm caused to individuals, families, and communities from incarceration itself). In addition to the significant due process concerns presented by this ambiguity for individuals whose physical liberty is at stake, the additional factors and catchall "totality of the circumstances" that may be considered when setting the price of one's freedom under the proposal do not provide guidance to a court as to when the bail amount set could lead to possible violations of the Eighth Amendment's excessive bail prohibition.

The ACLU of Wisconsin strongly urges committee members to vote against this proposal that would entrench our two-tiered system of justice and increase the damaging human and economic cost of cash bail for people accused of crimes, their families, and their communities.

Milwaukee County

Certified Copy

Resolution: 22-390

File Number: 22-390

A resolution mourning the tragedy of the Waukesha Christmas Parade Massacre and calling upon the State of Wisconsin to adopt criminal justice bail reform legislation premised on the bipartisan model developed in the State of New Jersey which denies pre-trial release to people who pose a significant danger to the community while releasing defendants charged with less serious and non-violent offenses

[Enter body here]

I, George Christenson, County Clerk in and for the County of Milwaukee, State of Wisconsin, do hereby certify that this is a true copy of Resolution No. 22-390, ADOPTED by the County Board on March 24, 2022, and SIGNED by the County Executive on April 7, 2022.
Given under my hand and official seal, at the Milwaukee County Courthouse, in the City of Milwaukee.

Attest: 

George Christenson

January 10, 2023

Date Certified

By Supervisors Rolland, Johnson, Jr., and Clancy File No. 22-390

AN AMENDED RESOLUTION

Mourning the tragedy of the Waukesha Christmas Parade Massacre and calling upon the State of Wisconsin to adopt criminal justice bail reform legislation premised on the bipartisan model developed in the State of New Jersey which denies pre-trial release to people who pose a significant danger to the community while releasing defendants charged with less serious and non-violent offenses

WHEREAS, "Wisconsin is one of a handful of states with cash bail, meaning people have to post the full amount in cash to be released from custody, and it already has a law on the books to hold people without bail for certain serious crimes," according to a February 15, 2022 *Milwaukee Journal Sentinel* article titled, "Assembly Passes Bail Measure Requiring Court Officials to Factor in a Crime's Severity, While Senate Passes COVID, Gun Bills"; and

WHEREAS, bail reform has been a hotly-debated topic since 2021 when according to a November 24, 2021 *Wall Street Journal* article titled, "The Waukesha Parade Suspect Was Out on Bail. Now the DA is Probing How Bail Is Set," the alleged perpetrator of the Waukesha Christmas Parade Massacre was found to have a long and violent criminal record including allegedly a domestic dispute which rose to the level of disorderly conduct and recklessly endangering safety when he allegedly punched the mother of his child and drove over her with his vehicle; with those charges he was out on a $1,000 cash bail; and

WHEREAS, the Milwaukee County District Attorney testified in File No. 21-1108 that the low bail and subsequent release of the alleged suspect in the Waukesha Christmas Parade Massacre had been the mistake of a younger assistant district attorney in an overburdened office; and

WHEREAS, The Supreme Court affirmed in United States V. Salerno that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"; and

WHEREAS, under Wis. Stat. § 969.035 a Circuit Court can deny the release of a person from custody if they are accused of committing or attempting to commit a violent crime and the person has a previous conviction for committing or attempting to commit a violent crime; and

WHEREAS, a pretrial detention hearing is required where the District Attorney must show by clear and convincing evidence that the defendant committed the crime and the defendant has the right of confrontation, access to police reports, rules of evidence apply meaning no hearsay, and their cases are expedited; and

WHEREAS, the State Bar Association of Wisconsin favors bail reform that uses a validated risk-assessment tool as the basis for pre-trial detentions, thereby denying bail to all who pose a significant threat to the community while also releasing defendants who are charged with non-violent offenses; and

WHEREAS, the State Bar Association of Wisconsin believes those individuals who pose a significant threat to the community should be held pre-trial, regardless of their wealth and affluence; likewise, the Association believes that setting cash bail for those who have committed less serious, non-violent offenses needlessly and unfairly incarcerates less affluent people while enabling wealthier individuals who can pay for bail to be released and prepare for trial; and

WHEREAS, the National District Attorneys Association Standards on Pretrial Release 45.2.1 explicitly states that "Whenever possible, release before trial should be on the recognizance of the accused".

; and

WHEREAS, the State Bar Association of Wisconsin favors a policy similar to that in New Jersey, where in 2014 the New Jersey Legislature passed, and Republican Governor Chris Christie signed, Public Law 2014, Chapter 31, more commonly known as the New Jersey Criminal Justice Reform Act of 2014, which took effect on January 1, 2017; and

WHEREAS, prior to the Act's adoption in 2014, a New Jersey March 10, 2014 "Report of the Joint Committee on Criminal Justice," hereto attached to this file, recommended more supervised pretrial release of suspects, preventive detention when necessary for those who pose a reasonable risk to community safety or fleeing criminal charges, and ensuring speedy trials pursuant to the United States Constitution, and found:

> "In short, the current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more

serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight."

; and

WHEREAS, pretrial detention is unnecessary as very few people released pretrial commit new crimes, and even less commit violent crimes; in Milwaukee County in 2017 98 percent of people released to pretrial supervision whose cases were resolved did not commit new crimes; and

WHEREAS, pretrial detention exacerbates poverty, defendants risk losing employment, or custody and placement of their children even if they are innocent and additional research concludes that defendants detained for pretrial even briefly are less likely to show up for court than defendants not detained; and

WHEREAS, the State of Illinois passed the Pretrial Fairness Act that eliminated money bonds in Illinois ensuring that access to wealth plays no role in a person being released and a person is only detained when it is determined that the person poses a specific, real and present threat to a person, or has a high likelihood of willful flight; and

WHEREAS, in the 2020 Annual Report to the Governor and the Legislature, hereto attached to this file, New Jersey Chief Justice wrote:

"Today, four years into the existence of CJR [Criminal Justice Reform], monetary bail is hardly used, replaced by a system that focuses on a defendant's risk of committing new criminal activity or failing to show up for court, and monitors individuals who are released pretrial.

. . .

"Defendants released pretrial are still showing up in court at rates comparable to the bail system. In 2020, court appearance rates exceeded 90 percent for the first time under CJR.

"While no responsible system of pretrial release can eliminate the risk that a defendant will commit a new crime before returning to court, the percentage of defendants on pretrial release who are charged with indictable criminal activity remains consistently low. . ."

; and

WHEREAS, a May 9, 2019 *Governing* magazine article titled, “Criminal Justice Reform Done Right” reported:

> “In 2014, then-Gov. Chris Christie signed a criminal justice reform legislation that eliminated mandatory cash bail and established a pre-trial monitoring program. Two and a half years of planning and then two years of careful implementation have dramatically reduced pre-trial jail detention with no adverse effects on public safety or subsequent appearances in court, according to the study, which was conducted by a research collaborative that included researchers from the University of Chicago and Luminosity Inc.
>
> “Now, on any given day an estimated 6,000 individuals who have been accused of a crime are not in jail but are permitted to continue the conduct of their lives as they prepare for trial: working, being with their families, and receiving physical and behavioral health treatment.”

; and

WHEREAS, sound criminal justice policy should always seek to strategically promote fairness while helping to ensure public safety; and

WHEREAS, the Committee on Intergovernmental Relations, at its meeting of March 10, 2022, recommended adoption of File No. 22-390 as amended (vote 4-0); now, therefore,

BE IT RESOLVED, Milwaukee County hereby mourns the tragic loss of life and injury to persons experienced by neighbors in Waukesha County from the November 5, 2021 Waukesha Christmas Parade Massacre and sends its express condolences to all involved; and

BE IT FURTHER RESOLVED, Milwaukee County hereby calls upon the State of Wisconsin to pass into law legislation appropriate to Wisconsin aligning to the bipartisan criminal justice bail reform model developed by former Republican Governor Chris Christie and the New Jersey Legislature in 2014, which denies pre-trial release to people who have been found by a validated risk-assessment tool to pose a significant danger to the community **or has a high likelihood of willful flight**, while releasing defendants charged with less serious and non-violent offenses; and

BE IT FURTHER RESOLVED, Office of Government Affairs staff is authorized and requested to communicate the contents of this resolution to the Wisconsin

Governor and State policymakers, and support legislation that achieves the criteria outlined in this resolution.

03/10/22
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