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Committee on Constitution and Ethics
Public Hearing, AJR 93
January 11, 2018

Thank you Chairman and members of the Committee for this opportunity to testify on AJR 93, eligibility and conditions for release prior to conviction of persons accused of certain crimes and considerations for imposing bail.

A few months ago, an issue was brought to my attention regarding a sexual predator who molested his grandchildren. Though the individual admitted he committed the crime, he was allowed bail at $75,000 while he awaited his hearing, which he was able to post. With a school bus stop in close proximity to his home, this appalled many of the neighbors. I personally spoke to the ADA of Waukesha County, asking him how a person, who could be a danger to the community, could be allowed out on bail. This is a legislative issue which judges and court commissioners struggle with daily. You will hear from some of these individuals today about how this Amendment is needed to address this problem.

There have been plenty of examples where a person commits a crime while out on bail that, with more flexibility under the state Constitution, may not have been out on bail to begin with. In a recent instance, a man was arrested and charged with his 6th OWI while out on a signature bond for his 5th OWI, $1,000 bail for two pending drug possession cases, and a $500 bail for a drug paraphernalia possession case. In such an instance, if judges had the flexibility to consider the dangerousness of this individual, his bail could have been set higher so it would have been more difficult to post bail. Instead, he killed a Good Samaritan who was helping another driver change a tire and injured two others.

Commissioners and judges say over and over they are not to consider the dangerousness or violence of a defendant when deciding how much cash bail to set. The last time an Amendment regarding bail was done was in 1981. An update is needed to provide additional flexibility when determining bail amounts by including the consideration of the safety of the community, seriousness of offense, and previous record to reflect the needs of judges and commissioners to keep harmful people off the streets while they await trial.

The Wisconsin Constitution prohibits judges from considering the dangerousness of an individual when deciding the initial question on whether to impose case bail. Specifically, under Article I Section 8 (2), the state Constitution reads: "*Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court*".

Our state Constitution also specifies that: *"All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect*

members of the community from serious bodily harm, or prevent the intimidation of witnesses." The term "serious bodily harm" refers to "bodily injury which causes or contributes to the death of a human being or which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." As applied, this has resulted in excluding crimes such as molestation of a child or repeat offenders for drunk driving.

This Amendment would allow judges to consider multiple factors, instead of just ensuring appearance in court, when determining the amount of bail. More specifically, the Amendment reads, *"In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the accused, the probability that the accused will appear in court, and the need to protect members of the community from serious harm or prevent the intimidation of witnesses."* It is important to note that, under the U.S. Constitution, a person does not have a right to bail. Our state Constitution, under this Amendment, will still guarantee a right to bail, but allow more flexibility in determining the bail amount in order to protect members of the community.

It is my hope that the Committee will support AJR 93 in order to provide protections for community members from individuals who could pose a threat to their safety.

Thank you again for the opportunity to testify.

Representative Cindi Duchow

Rob Hutton

STATE REPRESENTATIVE • 13TH ASSEMBLY DISTRICT

January 11, 2018

To: The Assembly Committee on Constitution and Ethics
From: Rep. Rob Hutton
Re: Assembly Joint Resolution 93

Testimony of Rep. Rob Hutton in Support of AJR 93

Mr. Chairman and members of the committee, thank you for giving AJR 93 a public hearing. The issue of the use of bail is critical one that needs to be a balance of an individual's rights and the right for the community to feel safe and protected. Our previous legislative bodies along with the public thought this so important that the reasoning and purpose for bail was outlined in the Wisconsin Constitution. We are before you today nearly 40 years after the last change to bail. We have heard from stakeholders in the criminal justice system and the public that this amendment to our Constitution is needed to make sure our criminal justice system functions as it should and that judges have the necessary tools to ensure victims and the community are kept safe.

Currently, the Wisconsin constitution states that the amount of bail can only be set to ensure the defendant appears in court. We have talked with judges, DA's, police officers, and others in this field and they have indicated that the tool of bail is currently inadequate to address the crime that faces our communities. To ensure more effective use, we propose changing how bail can be set to consider: the seriousness of the offense charged, the previous criminal record of the accused, the probability the accused will be show up in court, and the needs to protect the community. The public expects someone charged with a serious crime such as sex trafficking, multiple OWI's, or homicide, to be given bail that reflects the seriousness of the offense and the effects to the community to ensure that the individual faces trial without committing another crime.

Thank you again for hearing AJR 93. I believe this discussion is an important one to have. The process of changing the Wisconsin Constitution is such to insure that there are ample opportunities for all voices to speak into the matter. Ultimately, this decision would be left to the citizens of Wisconsin to determine how they would like their communities and criminal justice system to function. We have members from the criminal justice system hear to testify and give their view on how this would provide a more adequate tool. I am happy to take any questions at this time.

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Van H. Wanggaard
Wisconsin State Senator

TESTIMONY ON ASSEMBLY JOINT RESOLUTION 93

Thank you Mr. Chairman and committee members for today's hearing on AJR 93, which amends our state constitution so that public safety is the primary concern when setting bail.

I first starting looking into this issue several years ago in response to constituent complaints about repeat criminals. Specifically, people were upset about individuals on bail committing additional crimes. This lack of respect for the criminal justice system and conditions of release is troubling, and creates additional crime victims. So, when Representative Duchow approached me with this proposal, I was happy to sign on and lead in the Senate.

Most people are shocked to learn that a bail amount is only meant to ensure that a defendant appears for trial. The fact that potential danger to the public is only a secondary concern, if the analysis even makes it that far, is shocking. But that's the truth. If a person has roots in the community, a local family, a job, or friends, the current state constitution means they're more likely to be released on cash bail, or even just their word.

The simple fact is that starting a bail analysis at flight risk, does not adequately address the needs to the community. We have seen individuals free and awaiting trial committing crimes time after time. Too many people view their arrest and subsequent release awaiting trial as a mere speed bump for their criminal careers. This is unacceptable, and doesn't protect the public. Under the resolution, when setting bail, a judge must consider a number factors, including the seriousness of the offense, past criminal history, flight risk, and risk to the public and intimidation of witnesses. Simply put, there will be fewer criminals on the street, awaiting trial. And fewer crime victims.

I am generally reluctant to amend the state's constitution. If this could be fixed by a mere statutory change, I would be happy to do so. But it cannot. A statutory change would run afoul of Article I, Section 8. Setting higher minimum bails would also likely find constitutional difficulty. Under this bill, flight risk is still a consideration for setting bail, but it is weighed equally with other factors. By giving judges several factors to use when determining bail, rather than a single starting point, we are giving judges flexibility to make case-by-case determinations in the interest of public safety.

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Protecting Justice for all Since 1977

Kelli S. Thompson
State Public Defender

Michael Tobin
Deputy State Public Defender

Assembly Committee on Constitution & Ethics
Assembly Joint Resolution 93
Thursday, January 11, 2018

Good afternoon Chairman Allen and members,

Thank you for having this hearing on Assembly Joint Resolution (AJR) 93, which proposes changes to the Wisconsin Constitution related to eligibility and conditions for release prior to conviction. The State Public Defender (SPD) is concerned that these changes will result in a significant increase in the number of people detained pretrial who are presumed innocent and do not pose a serious risk to the community.

It is a fundamental principle that individuals accused of committing a crime are presumed innocent until proven guilty. As the U.S. Supreme Court has noted, "[i]n our society social liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). In determining whether to impose pretrial conditions of release under current law, a court first considers whether an individual is likely to appear at future court hearings. A monetary condition of release, bail, may be imposed only if the court finds that there is a reasonable basis to believe it is necessary to ensure the individual's appearance in court. The court may also impose any reasonable non-monetary condition of release to ensure a defendant's appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. Courts also have the ability to deny pretrial release from custody to persons accused of certain violent crimes.

As presented, AJR 93 makes three changes that run counter to the 5th and 8th amendments to the United State Constitution.

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

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

Finally, the proposed change for Article 1, Section 8(2) creates a due process concern under the 5th Amendment of the U.S. Constitution. By removing the requirement that a court make a finding about "a reasonable basis to believe that the conditions are necessary to assure appearance in court," the Wisconsin Constitution would remove the due process requirement guaranteed by the U.S. Constitution

when determining bail. The proposed amendment only requires considerations of factors; it does not require any findings before a court imposes a cash bail.

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

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

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

A preventive detention model removes the role that money plays in this system by instead determining pretrial release, on a case-by-case basis, though 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 a significant improvement over the current process, which allows people with access to money, though potentially high-risk, to be released before trial, while people who are low-risk, but who are unable to post even modest amounts of cash bail, often remain in custody.

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

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

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

Thank you for the opportunity to testify on Assembly Joint Resolution 93. We urge the committee to strongly consider whether the resolution is the answer to a perceived problem or whether a more comprehensive discussion by all criminal justice system partners should be held before amending the Constitution. As the U.S. Supreme Court has explained, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)).

PJCC
Pretrial Justice Center for Courts

Preventive Detention

Pretrial Justice Brief 9* September 2017

Preventive Detention as a Pretrial Reform

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

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

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

Cautionary Considerations

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

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

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

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

Prevention Detention in Three Jurisdictions

District of Columbia

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

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

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

New Jersey

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

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

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

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

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

New Mexico

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

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

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

Moving Forward with Precautions

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

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

Endnotes

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

1-4-18 Complaint filed
1st DSIA & Kidnapping
Bond set $10,000
1-5-18 POSTED Bond
1-9-18 Appeared in Ct.
1-9-18 Killed Victim
(Bond Conditions included
NO CONTACT; NO GUNS)

Violent attack preceded Tuesday's deadly domestic shooting in Harrison

Chris Mueller and Alison Dirr, Post Crescent Published 11:46 a.m. CT Jan. 10, 2018 | Updated 3:08 p.m. CT Jan. 10, 2018

(Photo: Danny Damiani/USA TODAY NETWORK-Wisconsin)

HARRISON - Robert Schmidt got out of jail on a $10,000 cash bond Jan. 5 after being charged with viciously attacking his wife.

He was ordered to have no contact with her. He was ordered not to have a gun. But four days later, his wife was dead.

Sara Schmidt, 38, was found dead in a vehicle by police responding to a domestic dispute at about 6 p.m. Tuesday on Sweet Clover Drive, a neighborhood near Darboy Community Park just east of Appleton. She had at least one gunshot wound.

Her husband, Robert Schmidt, 49, was found dead of a self-inflicted gunshot wound a short time later in the backyard of the residence.

Tuesday's deadly outburst by Robert Schmidt follows a series of violent attacks on his wife in recent days, according to Calumet County court records.

Robert Schmidt had been charged with two felonies for domestic abuse involving Sara Schmidt less than a week earlier. He posted the cash bond on the same day his wife filed for divorce.

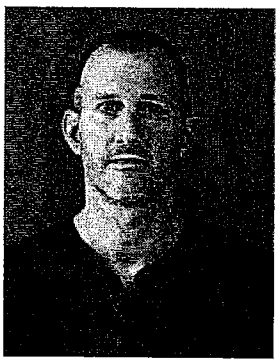
The first officers at the scene found Robert Schmidt and Sara Schmidt involved in an altercation, according to a statement released Wednesday from the Calumet County Sheriff's Office. Officers heard gunshots as they approached and immediately confronted Robert Schmidt, who fled to the backyard.

RELATED: Two dead after shooting on Sweet Clover Drive (/story/news/2018/01/09/police-scene-possible-shooting-darboy/1019350001/)

More officers responded and cornered Schmidt. They then heard another gunshot. Officers established a perimeter, but attempts to communicate with the man were not successful.

The Calumet County SWAT team determined Schmidt died from a self-inflicted gunshot wound. Sara Schmidt was found dead in her vehicle with at least one gunshot wound.

Autopsies will be performed Wednesday and Thursday by the Fond du Lac County medical examiner.



The response by police from multiple agencies shut down traffic for several hours near the scene. A large number of emergency vehicles lined the streets surrounding the neighborhood.

USA TODAY NETWORK-Wisconsin learned that Robert Schmidt was charged Jan. 4 in Calumet County with first-degree sexual assault and kidnapping. Schmidt was ordered to have no contact with Sara Schmidt and not to possess a gun.

Schmidt's wife met with an investigator from the Calumet County Sheriff's Office on Jan. 2, according to a criminal complaint. Schmidt's wife indicated she had been married to Schmidt for 15 years and had three children with him, but the couple had "been having marital problems that have been building for years."

Schmidt (Photo: Courtesy of the Calumet County Sheriff's Office)

She told the investigator she found a small black device labeled "SpyTec" in their kitchen on Dec. 22 and suspected Schmidt was tracking her car or phone.

She also told the investigator Schmidt had recently purchased a black handgun and on Dec. 31 had "held the gun to her head, tied her up with a cord and duct tape, cut off her clothes" and assaulted her.

Schmidt's wife said she wanted to report the New Year's Eve incident to police because "she does not feel safe at home with her children anymore."

Schmidt met with two Calumet County investigators on Jan. 2 and said the incident was "a result of stress" that had been building up all month and that he "snapped." Schmidt said his decision to use the gun was "spur of the moment."

Schmidt admitted to pointing the gun at his wife several times and tying her to the bed for "not more than a couple hours." He also admitted he had purchased a tracking device for his wife's car about a month before the Dec. 31 incident because he was suspicious of her relationship with a coworker.

Scotty DeClark, 21, who lives nearby, saw police vehicles lining Noe Road on Tuesday when he walked up from his downstairs, where he had his gaming headset on.

Two dead in Darboy shooting, Jan. 9, 2018

DeClark lives on a street near where police were called, but he and at least one of his neighbors initially thought the blue and red lights meant yet another traffic stop. They soon learned that wasn't the case.

He was about to go to the gas station when he saw an officer with a large gun walking along a fence behind his home, he said.

He ended a FaceTime call with a friend in order to record what was happening. He filmed the officer walking along a fence behind his home.

He said he saw a man under a tree in a backyard diagonal from his own. The tree was at the end of the fence where an officer was positioned.

DeClark said the man died under that tree.

The violence was out of the ordinary for a normally quiet neighborhood.

"There's never cops over here, that's why it's weird (the shooting) was over here," DeClark said.

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PENAL CODE - PEN

PART 2. OF CRIMINAL PROCEDURE [681 - 1620] *(Part 2 enacted 1872.)*

TITLE 10. MISCELLANEOUS PROCEEDINGS [1268 - 1424] *(Title 10 enacted 1872.)*

CHAPTER 1. Bail [1268 - 1320.5] *(Chapter 1 enacted 1872.)*

ARTICLE 1. In What Cases the Defendant May Be Admitted to Bail [1268 - 1276.5] *(Article 1 enacted 1872.)*

1275. (a) (1) In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration. In setting bail, a judge or magistrate may consider factors such as the information included in a report prepared in accordance with Section 1318.1.

(2) In considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant.

(b) In considering offenses wherein a violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code is alleged, a judge or magistrate shall consider the following: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code.

(c) Before a court reduces bail to below the amount established by the bail schedule approved for the county, in accordance with subdivisions (b) and (c) of Section 1269b, for a person charged with a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, the court shall make a finding of unusual circumstances and shall set forth those facts on the record. For purposes of this subdivision, "unusual circumstances" does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses.

(Amended by Stats. 2014, Ch. 71, Sec. 128. (SB 1304) Effective January 1, 2015.)

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ARTICLE 1. In What Cases the Defendant May Be Admitted to Bail [1268 - 1276.5] *(Article 1 enacted 1872.)*

1269c. If a defendant is arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, and a peace officer has reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, the peace officer shall prepare a declaration under penalty of perjury setting forth the facts and circumstances in support of his or her belief and file it with a magistrate, as defined in Section 808, or his or her commissioner, in the county in which the offense is alleged to have been committed or having personal jurisdiction over the defendant, requesting an order setting a higher bail. Except where the defendant is charged with an offense listed in subdivision (a) of Section 1270.1, the defendant, either personally or through his or her attorney, friend, or family member, also may make application to the magistrate for release on bail lower than that provided in the schedule of bail or on his or her own recognizance. The magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. If, after the application is made, no order changing the amount of bail is issued within eight hours after booking, the defendant shall be entitled to be released on posting the amount of bail set forth in the applicable bail schedule.

(Amended by Stats. 2010, Ch. 176, Sec. 1. (SB 1049) Effective January 1, 2011.)

Wisconsin Justice Initiative

To: Assembly Committee on Constitution and Ethics
From: Gretchen Schuldt, Executive Director
Subject: Assembly Joint Resolution 93
Date: Jan. 11, 2018

Thank you for this opportunity to provide testimony on Assembly Joint Resolution 93.

The Wisconsin Justice Initiative opposes AJR 93. Cash bail now is allowed only when a judicial officer determines that it is needed to ensure that a defendant appears in court.

This amendment would gut that standard, which has served the state well for many years. Instead, the amendment would establish a requirement that the court take into consideration "the need to protect members of the community from serious harm ...."

What constitutes "serious harm" is undefined and appears to be at the complete discretion of the judge. Defendants with similar backgrounds facing similar charges would be treated completely differently from one another. Does someone carrying a personal-use amount of marijuana pose a threat of serious harm? Clearly some in law enforcement believe so. How about someone who steals a car for a joy ride? Or commits credit card fraud? It's inevitable that some judges, who are, after all, elected officials, will hide behind the "serious harm" language of this amendment and inappropriately set high bails.

The amendment, if enacted, will most adversely impact poor people who cannot afford even a moderate cash bail. Defendants with access to resources will be able to bail out; defendants without that access will not be able to do so. Cash bail simply serves to separate those who can buy their way out of jail from those who cannot.

The bill also creates an unfunded mandate. It allows state officials – prosecutors and judges – to impose significant costs related to housing pretrial jail inmates on local property taxpayers. Any effort to allow increased cash bail should take into consideration the increased cost to local governments.

Finally, the vague language problem of the "serious harm" standard also exists in the pretrial detention portion of Section 3. The state should not allow any defendant who has not been convicted of the pending charges to be detained for up to 70 days based on such vague language.

Thank you.

The Wisconsin Justice Initiative advocates for progressive change in the Wisconsin justice system by educating the public about its real-life impacts and partnering with other organizations to achieve more just outcomes.