
Wisconsin Legislative Council

AMENDMENT MEMO



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Contact: Melissa Schmidt, Principal Attorney

2021 Assembly Joint Resolution 107

Assembly Substitute Amendment 2

2021 Assembly Joint Resolution 107 is a proposal to amend the Wisconsin Constitution (on first consideration), relating to the eligibility and conditions for release prior to conviction of persons accused of certain crimes and considerations for imposing bail. To become law, the joint resolution must be passed by both the Assembly and the Senate in two successive Legislatures and then submitted to the people for ratification. [[Wis. Const. art. XII, s. 1.](#)]

BACKGROUND

Excessive Bail

The Eighth Amendment to the U.S. Constitution prohibits excessive bail. [Article I, Section 6](#) of the Wisconsin Constitution provides a parallel guarantee.

Right to Release, Conditions of Release, and Permissible Reasons for Imposing Monetary Conditions of Release

The Wisconsin Constitution provides a right to release under reasonable conditions prior to trial in most cases and specifically limits the reasons for which monetary conditions of release (or bail¹) may be required. Specifically, Wis. Const. [art. I, s.8 \(2\)](#) provides the following:

All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release.

The Wisconsin Supreme Court has held that this provision prevents a court from considering any factor other than assuring the arrestee's appearance in court when setting the amount of the monetary conditions of release. According to the Court, "this language unambiguously provides that the *only* factor a court can consider when setting monetary conditions of bail is whether the amount is necessary to assure appearance in court. That reading is one which the courts of this state have long endorsed." [*State v. Iglesias*, 185 Wis. 2d 117, 139, 517 N.W.2d 175, 182 (1994) (emphasis in original).]

¹ Wisconsin law includes two definitions for bail, each relating specifically to money posted to secure release and not to pretrial release more generally. For the purposes of the bail chapter of the Wisconsin Statutes (ch. 969), the term "bail" is defined to mean "monetary conditions of release." [[s. 969.001\(1\), Stats.](#)]

Pretrial Detention

The Wisconsin Constitution also contains additional provisions specifying the limited circumstances under which state law may authorize courts to deny the pretrial release of a person (pretrial release), and the maximum period during which courts may deny such release. [Article I, Section 8 \(3\)](#) of the Wisconsin Constitution provides the following:

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

To restate, Wis. Const. art. I, s. 8 (3) specifies that courts, pursuant to authorizing statutes enacted by the Legislature,² may deny pretrial release to: (1) arrestees accused of a homicide offense that carry life sentences; (2) arrestees accused of sexual assault crimes that carry 20-year maximum sentences; or (3) arrestees accused of felonies involving or threatening “serious bodily harm”³ and who have a previous conviction for a felony of this type. The constitutional language further requires a court to make particular findings to continue denying pretrial release following a hearing.

2021 ASSEMBLY JOINT RESOLUTION 107

The joint resolution proposes to amend Wis. Const. art. I, s. 6, which prohibits excessive bail, to provide that a court, when fixing an amount of bail, may take the following into consideration:

- The seriousness of the offense charged.
- The previous criminal record of the accused.
- The probability that the accused will appear in court.
- The need to protect members of the community from serious harm, as defined by the Legislature by law, or prevent the intimidation of witnesses.

² The Legislature has authorized this pretrial detention in [s. 969.035, Stats.](#)

³ “Serious bodily harm” has been defined by the Legislature to mean “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.” [\[s. 969.001 \(2\), Stats.\]](#)

In proposing the above changes to the state constitution's prohibition against excessive bail, the joint resolution also eliminates current constitutional language that allows monetary conditions of release to be imposed only upon a finding the conditions are necessary to assure appearance in court.

With respect to Wis. Const. art. I, s. 8 (3) related to pretrial detention, the joint resolution also clarifies the sexual assault offenses that may trigger the pretrial detention process are sexual assault offenses that are punishable by a maximum imprisonment of "20 years or more."

ASSEMBLY SUBSTITUTE AMENDMENT 2

Assembly Substitute Amendment 2 does not amend Wis. Const. art. I, s.6, which prohibits excessive bail. The substitute amendment also does not amend Wis. Const. art. I, s. 8 (3) related to pretrial detention. Rather, the substitute amendment only amends Wis. Const. art. I, s. 8 (2), which sets forth the right to release, the conditions of release, and the permissible reasons for imposing monetary conditions of release.

The substitute amendment generally retains the constitutional language which provides that **monetary conditions of release** may only be imposed upon a finding the conditions are necessary to assure appearance in court. However, the substitute amendment creates an exception to this limitation for a person accused of a "violent crime," as defined by the Legislature.

Under the substitute amendment, if the person is accused of a "violent crime," as defined by the Legislature, monetary conditions of release may be imposed only upon a finding that there is a reasonable basis to believe that the monetary conditions are necessary based on the totality of the circumstances, taking into account:

- Whether the accused has a previous conviction for a violent crime as defined by the Legislature by law.
- The probability that the accused will fail to appear in court.
- The need to protect members of the community from serious harm as defined by the Legislature by law.
- The need to prevent the intimidation of witnesses.
- The potential affirmative defenses of the accused.

The substitute amendment also modifies the purposes for which **reasonable conditions of release** may be designed and imposed on a person accused of a crime. As stated in above, Wis. Const. art. I, s. 8 (2) provides that these reasonable conditions may be designed to "assure their appearance in court, protect members of the community from serious bodily harm, or prevent intimidation of witnesses." The substitute amendment amends the term "serious bodily harm" to "serious harm." In doing so, the joint resolution provides that that reasonable conditions of pretrial release may be designed to protect members of the community from serious harm.

BILL HISTORY

Assembly Substitute Amendment 2 was introduced on February 4, 2022, by Representative Duchow. On February 8, 2022, the Assembly Committee on Judiciary voted to recommend adoption of the substitute amendment, by a vote of Ayes, 6; Noes, 3; and passage of the bill, as amended, by a vote of Ayes, 6; Noes, 3.

MS:ksm