



## WISCONSIN LEGISLATIVE COUNCIL STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON BAIL AND CONDITIONS OF PRETRIAL RELEASE

FROM: David Moore and Katie Bender-Olson, Senior Staff Attorneys

RE: Discussion Items Related to Pretrial Detention Procedure

DATE: October 9, 2018

This memorandum summarizes current pretrial detention procedures under Wisconsin law and relevant aspects of the District of Columbia's and New Jersey's pretrial detention laws.<sup>1</sup> Following this summary, the memorandum identifies changes to Wisconsin's pretrial detention process the committee could consider and explains whether each change would require a constitutional amendment.

### **PRETRIAL DETENTION UNDER WISCONSIN LAW**

The procedure for pretrial detention, under Wisconsin law, is set forth in both the Wisconsin Constitution and the Wisconsin Statutes. The constitutional provisions provide a prescriptive framework for establishing a pretrial detention process, and the statutory provisions implement and expand on this framework.

#### **Constitutional Provisions**

Wisconsin Constitution, Article I, Section 8 (3), provides that the Legislature may authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to a pretrial detention hearing to persons accused of any of the following:

- Committing a murder punishable by life imprisonment.

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<sup>1</sup> The summaries of the District of Columbia's and New Jersey's pretrial detention procedures should not be construed as exhaustive explanations. Rather, the summaries are intended to highlight aspects of these procedures that may inform the committee's discussion with respect to analyzing modifications that might be made to Wisconsin's pretrial detention laws.

- Committing a sexual assault punishable by a maximum imprisonment of 20 years.
- Committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another.

Wisconsin Constitution, Article I, Section 8 (3), further provides that the Legislature may authorize by law, but may not require, circuit courts to deny release for those persons described above for an additional 60 days, if the law authorizing detention contains all of the following requirements:

- There be a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the felony.
- There 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.

### **Statutory Provisions**

As noted above, the Wisconsin Constitution empowers the Legislature to authorize preventative detention of accused individuals. The Legislature has done so by enacting s. 969.035, Stats. (the pretrial detention statute).

### **Qualifying Crimes Under the Statute**

The pretrial detention statute enumerates statutory violations for which a court may deny pretrial release. Under the statute, an individual is eligible for pretrial detention if either of the following apply:

- The defendant is accused of committing: first-degree intentional homicide; first-degree sexual assault; first- or second-degree sexual assault of a child; engaging in repeated acts of sexual assault of the same child; or sexual assault of a child placed in substitute care.
- The defendant was previously convicted of committing or attempting to commit a “violent crime” as defined in s. 969.035 (1), Stats., and is presently accused of committing or attempting to commit a “violent crime.”<sup>2</sup>

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<sup>2</sup> “Violent crime” means any of the following: first-degree intentional homicide; first-degree reckless homicide; felony murder; second-degree intentional homicide; second-degree reckless homicide; homicide resulting from negligent control of vicious animal; homicide by negligent handling of dangerous weapon, explosives or fire; homicide by negligent operation of vehicle; causing great bodily harm to another with intent to cause great bodily harm to that person or another; causing great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child or to the woman pregnant with that unborn child; mayhem; first-degree sexual assault; reckless injury; tampering with household products; first-degree sexual assault of a child; second-degree sexual assault of a child; engaging in repeated acts of sexual assault of the same child; physical abuse of a child; and sexual assault of a child placed in substitute care. [s. 969.035 (1), Stats.]

[s. 969.035 (1) and (2), Stats.]

### **Initiating the Pretrial Detention Process**

The pretrial detention statute requires the district attorney to make certain allegations and provide specific documents before the court may consider pretrial detention. Before a court may proceed with pretrial detention, a district attorney must do all of the following:

- Allege that the defendant is eligible by being accused of committing one of the qualifying crimes or by committing or attempting a violent crime while having a prior conviction.
- Allege that available conditions of release would not adequately protect the community from serious bodily harm or prevent the intimidation of witnesses.
- Provide a copy of the complaint charging commission or attempted commission of one of the qualifying crimes.

[s. 969.035 (3), Stats.]

If the court determines the district attorney has complied with these requirements, the court may order that the detention of a person who is in custody be continued or may issue a warrant commanding any law enforcement officer to bring the defendant without unnecessary delay before the court. When the defendant is brought before the court, he or she shall be given a copy of the documents provided to the court by the district attorney and informed of his or her rights in a pretrial detention hearing. A pretrial detention hearing must then be held within 10 days.

### **Pretrial Detention Hearing**

The pretrial detention statute specifies that a “pretrial detention hearing is a hearing before a court for the purpose of determining if the continued detention of the defendant is justified.” Under the statute, a pretrial detention hearing may be held in conjunction with a preliminary examination, or with a conditional release revocation hearing. At the pretrial detention hearing, the state must prove both of the following by clear and convincing evidence:

- That the defendant committed a qualifying crime or committed or attempted to commit a violent crime after a prior violent crime conviction.
- That available conditions of release will not adequately protect the public from serious bodily harm or prevent the intimidation of witnesses.

[s. 969.035 (6) (a) and (b), Stats.]

### **Rules and Rights Applicable at the Pretrial Detention Hearing**

The statute grants certain rights to the accused at the pretrial detention hearing. Specifically, the statute grants the right of confrontation, the right to call witnesses, the right to cross-examination, and the right to an attorney. [s. 969.035 (6) (c), Stats.]

The statute also provides that the rules of evidence applicable in criminal trials govern the admissibility of evidence at a pretrial detention hearing. The court may exclude or separate witnesses prior to their testimony. Under the statute, the testimony of the accused at the pretrial detention hearing is inadmissible on the issue of guilt in any other judicial proceeding, other than for perjury proceedings or impeachment purposes. [s. 969.035 (6) (c), (d), and (e), Stats.]

### **Time Period for Pretrial Detention**

Under the statute, a person may not be denied release for more than 10 days prior to a hearing. If the court finds the state has met its burden of proof to make the requisite showings at the hearing, the court may deny release<sup>3</sup> for 60 days following the hearing. The accused must be released if the time period passes, but the release may be subject to conditions. [s. 969.035 (5) and (8), Stats.]

Finally, the statute provides that any delay or continuance initiated by the accused is not calculated into the 10-day and 60-day time periods. The statute specifies that delay is caused by the accused only if the delay is “expressly requested” by the accused. [s. 969.035 (9), Stats.]

### **PRETRIAL DETENTION LAWS IN SELECTED OTHER JURISDICTIONS**

Committee members requested information about pretrial detention processes in other jurisdictions and expressed particular interest in the District of Columbia’s and New Jersey’s pretrial detention laws.

#### **District of Columbia**

The Code of the District of Columbia (the Code) provides two procedures relevant to pretrial detention. The first authorizes a judicial officer to detain persons charged with an offense and who were on release for certain reasons at the time the offense was committed for not more than five days. In addition, the Code authorizes a judicial officer to hold a pretrial detention hearing, upon oral motion of the attorney for the government, to determine whether a person should be detained before trial.

#### **Pretrial Detention of Persons Charged With an Offense Committed While on Release**

D.C. Code s. 23-1322 (a) provides that a judicial officer shall order the detention of a person charged with an offense for a period of not more than five days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that both of the following apply:

- At the time the offense was committed, the person was on: release pending trial for a felony or misdemeanor under local, state, or federal law; release pending imposition

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<sup>3</sup> The statutory language states that the court may deny “bail” to the defendant for an additional period not to exceed 60 days following the pretrial detention hearing. [s. 969.035 (8), Stats.] However, use of the term “bail” can reasonably be interpreted to refer to release, consistent with the constitutional provision.

or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under local, state, or federal law; or probation, parole, or supervised release for an offense under local, state, or federal law.

- The person may flee or pose a danger to any other person or the community or, when a hearing on whether release should be revoked for violation of conditions of release is requested, is likely to violate a condition of release.

A person who is detained under these circumstances may have his or her release revoked following a hearing. If the official fails or declines to take the person into custody during the five-day period described above, the person shall be treated in accordance with other provisions of law governing release pending trial.

### **Pretrial Detention Upon Oral Motion of the Prosecutor**

The Code provides that a prosecutor may make an oral motion requesting a pretrial detention hearing in a case that involves any of the following:

- A crime of violence or a dangerous crime, as defined by the Code.
- An offense under Section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982.
- Serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten injure, or intimidate a prospective witness or juror.
- A serious risk that the person will flee.

The purpose of the hearing is to determine whether any condition or combination of conditions will reasonably assure the appearance of the person and the safety of any other person and the community. The Code creates a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community under certain circumstances.<sup>4</sup>

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<sup>4</sup> There is a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by probable cause that the person: (a) committed a dangerous crime or a crime of violence as defined by the Code while armed with or having readily available a pistol, firearm, imitation firearm, or other deadly or dangerous weapon; (b) has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding; (c) committed a dangerous crime or crime of violence and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense; (d) committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense; (e) committed two or more dangerous crimes or crimes of violence in separate incidents that are joined in the case before the judicial officer; (f) committed a robbery in which the victim sustained a physical injury; (g) violated certain crimes related to firearm possession; and (h) violated the gun offender registry requirements while armed and while on probation or parole for committing a dangerous crime. [D.C. Code s. 23-1322 (c).]

### **Pretrial Detention Hearing**

The detention hearing must be held “immediately upon the person’s first appearance before the judicial officer, unless that person, or the prosecutor seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days and a continuance on motion of the attorney for the government shall not exceed 3 days.” [D.C. Code s. 23-1322 (d) (1).] The person shall be detained during the continuance. In addition, during a continuance, the judicial officer may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict.

During the hearing, the Code affords the person all of the following:

- The right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.
- The opportunity to testify.<sup>5</sup>
- The opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.

The Code specifies that the rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the pretrial detention hearing.

The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.

### **Considerations for Judicial Officer**

In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer is required to consider the following:

- The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime, or involves obstruction of justice.
- The weight of the evidence against the person.

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<sup>5</sup> Testimony of the person given during the hearing is not admissible on the issue of guilt in any other judicial proceeding, but is admissible under proceedings related to failure to appear, violating release conditions, or committing an offense while on release; in perjury proceeding; and for the purpose of impeachment in any subsequent proceedings. [D.C. Code s. 23-1322 (d) (3).]

- The history and characteristics of the person, including the following:
  - The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court appearance.
  - Whether at the time of the current offense or arrest, the person was on probation, on parole, on supervised release, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law.
- The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

If, after a hearing, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.<sup>6</sup>

### New Jersey

Section 2A: 162-19 of the New Jersey statutes provides that a prosecutor may file a motion with the court at any time seeking the pretrial detention of an eligible defendant for certain specified serious crimes. In addition, the statute authorizes a prosecutor to file a motion seeking the pretrial detention of an eligible defendant for any other crime for which the prosecutor believes there is a serious risk that any of the following apply:

- The eligible defendant will not appear in court as required.
- The eligible defendant will pose a danger to any other person or the community.
- The eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

### **Rebuttable Presumption in Favor of Detention for Certain Crimes**

Under the New Jersey statute, there is a rebuttable presumption that the eligible defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition, or combination of conditions would reasonably assure the eligible defendant's appearance in court, assure the protection of the safety of any other person or the community, and assure that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process if the court finds probable cause to believe the eligible defendant:

- Committed murder.

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<sup>6</sup> The Code sets forth time limitations relevant to the person's pretrial detention.

- Committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

The standard of proof for rebutting the presumption of pretrial detention is preponderance of the evidence. If the defendant successfully rebuts this presumption, the prosecutor shall have the opportunity to establish that the grounds for pretrial detention exist.

### **Pretrial Detention Hearing**

Under New Jersey law, a pretrial detention hearing shall be held no later than the eligible defendant's first appearance, unless the eligible defendant or the prosecutor seeks a continuance.

At the hearing, the eligible defendant shall be afforded all of the following:

- The right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.
- The opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer.

New Jersey law provides that the rules concerning the admissibility of evidence do not apply to the presentation and consideration of information at the hearing.

In pretrial detention proceedings for which there is no indictment, New Jersey law requires the prosecutor to establish probable cause that the eligible defendant committed the predicate offense. In addition, except in cases in which the presumption of pretrial detention applies and the defendant has failed to rebut that presumption, a court's finding that no amount of monetary bail, nonmonetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process shall be supported by clear and convincing evidence.

A pretrial detention hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

### **DISCUSSION**

Committee members have expressed an interest in modifying Wisconsin's pretrial detention statute and have suggested that pretrial detention processes in other jurisdictions may provide guidance on the types of changes that could be made to Wisconsin law. The discussion below highlights aspects of Wisconsin pretrial detention law that differ from the laws of the



District of Columbia and New Jersey. The committee may wish to discuss whether to change these aspects of Wisconsin law, some of which would require a constitutional amendment.

### **Circumstances Under Which Pretrial Detention Process is Available**

Wisconsin law limits the pretrial detention process to certain types of crime. Minor changes could be made to expand the specific crimes eligible for pretrial detention, but the extent to which these changes could be made would be circumscribed by the Constitution's limitation on the types of crimes for which a pretrial detention process could be used.

Like Wisconsin law, District of Columbia and New Jersey laws provide that the pretrial detention process may be used for certain specified serious crimes. Unlike Wisconsin law, however, District of Columbia and New Jersey laws also allow a prosecutor to seek pretrial detention in other types of cases for certain permissible reasons, such as the risk the person could flee or the risk releasing the person would pose to public safety.

Broadening Wisconsin law to allow the pretrial detention process to be used in cases other than for specified types of crimes would require a constitutional amendment.

### **Obligation of District Attorney Prior to the Pretrial Hearing**

Wisconsin law requires the district attorney to make certain allegations and provide certain documents, such as a copy of the complaint, to the court to initiate the pretrial detention process. The requirement that the district attorney file a copy of the complaint with the court prior to the pretrial detention hearing could be eliminated without a constitutional amendment.

### **Pretrial Detention Hearing**

#### **Burden of Proof**

Wisconsin's pretrial detention statute requires the state to prove, by clear and convincing evidence, both of the following:

- That the defendant committed an offense that makes the defendant eligible for pretrial detention.
- That available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses.

As under Wisconsin law, both District of Columbia and New Jersey laws require the prosecutor to show by clear and convincing evidence that the available conditions of release are insufficient. Unlike under Wisconsin law, neither District of Columbia nor New Jersey laws require the prosecutor to **also** prove by clear and convincing evidence that the defendant committed the offense with which the defendant is charged. (In New Jersey, in cases in which there is no indictment, the prosecutor must prove there was probable cause the defendant committed the offense.)

Wisconsin's requirement that the prosecutor prove, by clear and convincing evidence, that the defendant committed the crime with which he or she is charged is prescribed by the

constitution. Therefore, a constitutional amendment would be necessary to modify this requirement.<sup>7</sup>

### **Defendant's Rights**

Wisconsin law provides that the defendant has the right to counsel, the right to confrontation, and the right to present evidence at a pretrial detention hearing. These rights are not prescribed by the constitutional pretrial detention provisions, though they may be imputed from other provisions of the Constitution. Subject to constitutional limitations, it is possible that certain of these rights could be eliminated from Wisconsin's pretrial detention procedure. For example, neither the D.C. Code nor New Jersey Statutes specify that a defendant has the right to confrontation at a pretrial detention hearing.

### **Rules of Evidence**

Wisconsin law provides that "the rules of evidence applicable in criminal trials govern the admissibility of evidence at [a pretrial detention hearing.]" [s. 939.035 (6) (c), Stats.] Under District of Columbia and New Jersey law, the rules concerning the admissibility of evidence in criminal proceedings do **not** apply to pretrial detention hearings. Wisconsin law could be modified to specify that the rules of admissibility of evidence do not apply to pretrial detention hearings. This change would not require a constitutional amendment.

### **Time Periods**

Under Wisconsin law, a person may be detained for not more than 10 days prior to a pretrial detention hearing and no more than 60 days following the hearing. A court must omit any period of time found by the defendant to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant.

These time periods are prescribed by the Constitution and could only be changed by constitutional amendment.

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<sup>7</sup> The Wisconsin Constitution does not apply the "clear and convincing" standard to the required showing that the available conditions of release will not adequately protect the members of the community from serious bodily harm or prevent the intimidation of witnesses. The Legislature could remove this burden of proof from the statute.