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## WISCONSIN LEGISLATIVE COUNCIL

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### MEETING MINUTES

### STUDY COMMITTEE ON BAIL AND CONDITIONS OF PRETRIAL RELEASE

Legislative Council Large Conference Room  
One East Main St., Ste. 401  
Madison, WI

October 16, 2018  
12:30 p.m. – 4:30 p.m.

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#### Call to Order and Roll Call

Vice-Chair Risser called the meeting to order. The roll was called, and a quorum was present.

COMMITTEE MEMBERS PRESENT: Sen. Van Wanggaard, Chair; Sen. Fred Risser, Vice-Chair; Reps. Evan Goyke and Ron Tusler; and Public Members Jennifer Dorow, Scott Horne, Gary King, Jane Klekamp, Joseph McCleer, Kelli Thompson, Paul Susienka, and Maxine White.

COMMITTEE MEMBER EXCUSED: Rep. Cindi Duchow and Public Member Adam Gerol.

COUNCIL STAFF PRESENT: Katie Bender-Olson and David Moore, Senior Staff Attorneys.

APPEARANCES: Dr. Constance Kostelac, Director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice, and Spurgeon Kennedy, Vice President, National Association of Pretrial Services Agencies.

## **Approval of the Minutes of the September 17, 2018 Meeting**

*Public Member Horne moved, seconded by Public Member Klekamp, to approve the minutes of the September 17, 2018 meeting. The motion was approved by unanimous consent.*

### **Presentations by Invited Speakers**

#### **Dr. Constance Kostelac, Director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice**

Dr. Kostelac provided a presentation entitled, "Using Data, Research, and Information for Informed Pretrial Decision Making." The presentation addressed pretrial concepts, including that pretrial is the period from initial arrest through case disposition and what constitutes pretrial success and pretrial failure. Dr. Kostelac also discussed the need for data to be collected in order to track pretrial progress and outcomes, and the need for common definitions and standardized methods of collecting and classifying the data.

Dr. Kostelac addressed the pretrial risk assessment used by the seven counties participating in the pretrial pilot project. She explained the multiple measures of risk determined by the assessment, and the static factors used in the assessment, including age, current offense, pending charge, prior failure to appear, prior conviction, prior violent conviction, and prior incarceration. She noted additional important measures related to pretrial processing, such as concurrence rate, length of detention for defendants, pretrial release rates, time on supervision, and reasons for detention. Dr. Kostelac also explained current challenges related to collecting pretrial data and described the work of the Data Sharing Subcommittee of the State Criminal Justice Coordinating Council.

Dr. Kostelac discussed the national movement for pretrial reform and the impacts of pretrial experiences on the rest of the criminal justice system. She noted existing research on risk of pretrial failure indicating that most defendants are low or moderate risk and that supervision level should match risk level. She also explained that 70% of defendants at the highest risk level do appear in court, and that less than 50% of those defendants at the highest risk level commit new crimes while on pretrial release. Dr. Kostelac also noted existing research regarding the impact on defendants of pretrial detention, even for short periods. She explained that defendants detained pretrial are more likely to be sentenced to jail or prison and to receive longer sentences than defendants who are not detained pretrial.

Dr. Kostelac concluded by highlighting key pretrial issues. She emphasized the important of using a validated risk assessment tool, a presumption of release, and least restrictive, nonfinancial release conditions. She emphasized that the goal of the pretrial process is to maximize release, maximize safety, and maximize court appearance. Following the presentation, Dr. Kostelac responded to committee member questions. Members discussed challenges related to data collection and sharing, as well as use and value of pretrial risk assessments.

*Spurgeon Kennedy, Vice President, National Association of Pretrial Services Agencies*

Mr. Kennedy provided a presentation entitled, "The Essentials of Reform – Lessons from the American Bail Reform Movement." The presentation noted that a defined and limited group of defendants pose an unmanageable risk to public safety and need to be detained prior to trial, and that the pretrial system needs to be able to determine who falls within that limited group. Mr. Kennedy explained that "failure," defined as missed court appearance or commission of new pretrial crime, is not prevalent in most defendant populations. He also provided information related to pretrial risk, which means the likelihood that a defendant will miss a court appearance or commit a new crime while on pretrial release.

Mr. Kennedy explained that pretrial risk factors are consistent between jurisdictions and that risk prediction, using a validated risk instrument, is very accurate. Mr. Kennedy provided statistics regarding pretrial success across different U.S. jurisdictions and explained that many of the jurisdictions with high success rates have limited or prohibited financial conditions of release and have implemented pretrial risk assessments. He noted that static factors such as history of failure to appear, previous felonies, and pending charges are predictive of success in the pretrial phase. Mr. Kennedy also explained that when a new pretrial crime is committed by a defendant, it is most often a misdemeanor drug offense or property crime, and that less than 2% of defendants will be rearrested for a new violent crime prior to trial. He stated that even among defendants at the highest risk levels, there is a stronger likelihood of success than failure.

Mr. Kennedy concluded by commenting that many purposes of monetary bail do not go to the stated purposes of bail, but instead, that money bail is often used because it's the most convenient for courts. Following the presentation, Mr. Kennedy responded to committee member questions. Members discussed implementation of statewide risk assessment tools and successful preventative detention statutes in other jurisdictions. Mr. Kennedy advised that preventative detention procedures are used more often when monetary bail is not an option or when using monetary bail is more burdensome for courts.

### **Discussion of Committee Assignment**

David Moore, Legislative Council Senior Staff Attorney, reviewed the memorandum provided to committee members entitled "Discussion Items Related to Pretrial Detention Procedure." He briefly summarized Wisconsin constitutional and statutory provisions related to pretrial detention, as well as laws from Washington, D.C. and New Jersey. Mr. Moore also highlighted areas in which Wisconsin law differs from the laws of Washington D.C. and New Jersey, laws which have been raised as examples of well-functioning pretrial detention systems.

As part of the discussion, committee members asked Mr. Kennedy how pretrial detention hearings occur in Washington, D.C. He noted that pretrial detention is primarily initiated on oral motion at a combination initial appearance and pretrial detention hearing and that decisions are largely based on a "paper review." Mr. Kennedy also noted that even when a pretrial detention hearing is held, 56% of defendants are still released after the court denies a request for pretrial detention by the prosecution. He further stated that some states require consideration of a risk assessment tool as part of the preventative detention procedure.

Committee members discussed potential changes to the Wisconsin constitutional and statutory provisions related to pretrial detention. Members also discussed whether to eliminate the use of monetary bail entirely. The committee members requested that Legislative Council staff prepare the following bill drafts to be reviewed at the November meeting: (a) a draft that would make statutory changes to s. 969.035, Stats., *Pretrial Detention*, that would not require a constitutional amendment; (b) a draft that would remove the requirement for a court to find by clear and convincing evidence that the accused committed a qualifying crime; and (c) a draft that would require a court that imposes monetary bail to review the amount if the defendant is not released within 24 hours.

Next, Katie Bender-Olson, Legislative Council Senior Staff Attorney, briefly reviewed sections of the memorandum provided to committee members entitled "Topics for Committee Discussion." Committee members discussed policy options relating to pretrial risk assessment tools, least restrictive pretrial release conditions, and bail jumping charges. The members requested that Legislative Council staff prepare the following bill drafts: (a) a draft incorporating permissive language regarding use of a pretrial risk assessment tool; and (b) a draft that would redefine the crime of bail jumping to only criminalize failure to appear at a court proceeding.

### **Plans for Future Meetings**

Chair Wanggaard noted the committee's future meeting dates:

- November 13, 2018.
- December 11, 2018.

### **Other Business**

There was no other business brought before the committee.

### **Adjournment**

The committee adjourned at 4:30 p.m.

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