Report to the Joint Legislative Council

Study Committee on Bail and Conditions of Pretrial Release

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STUDY COMMITTEE ON BAIL AND CONDITIONS OF PRETRIAL RELEASE

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LRB-0852/1, RELATING TO PRETRIAL DETENTION

LRB-0852/1 makes a variety of changes to Wisconsin's pretrial detention statute. The bill draft takes effect only if an amendment to Wis. Const. art. I, s. 8 (3), such as the amendment proposed in LRB-0850/2, is ratified to permit the changes. Key changes include the following:

- Expanding the categories of defendants who may be detained under this statute to include a person who is accused of any offense if there is a serious risk that: (1) the person poses a danger of inflicting serious bodily harm on a member of the community; (2) the person will intimidate a witness; or (3) the person will not appear in court as required.
- Authorizing a court to hold a pretrial detention hearing, upon its own motion, under certain circumstances.
- Providing that the rules governing the admissibility of evidence that apply in criminal proceedings do not apply in pretrial detention hearings.
- Modifying the burdens of proof in pretrial detention hearings.
- Lengthening the period a person may be detained prior to trial and allowing a court to extend this time period if it finds that the ends of justice are best served by extending that period.

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LRB-1714/1 requires a court to review the bail of a defendant within 72 hours of initial appearance if the defendant remains in custody as a result of his or her inability to meet the bail. The court must review the bail every seven days thereafter if the defendant remains in custody. If the court does not adjust the bail and release the defendant, the court must set forth the reasons for the continuation of bail. This bill draft takes effect only if an amendment to Wis. Const. art. I, s. 8 (3), the provision relating to pretrial detention, is ratified.

PART II
COMMITTEE ACTIVITY

ASSIGNMENT

The Joint Legislative Council established the Study Committee on Bail and Conditions of Pretrial Release and appointed the chairperson by an April 9, 2018 mail ballot. **Appendix 2** identifies the membership of the Joint Legislative Council at the time the mail ballot was approved. The committee was directed to review Wisconsin's pretrial release system, including considerations for courts in imposing monetary bail and for denying pretrial release. The committee was also directed to review relevant Wisconsin constitutional and statutory provisions and best practices implemented by Wisconsin counties and other states, including use of risk assessment tools for informing pretrial detention decisions. The committee was further directed to recommend legislation regarding bail and pretrial release that enhances public safety, respects constitutional rights of the accused, considers costs to local governments, and incorporates evidence-based strategies.

Membership of the study committee was appointed by a June 4, 2018 mail ballot. The final committee membership consisted of three representatives, two senators and nine public members. A list of committee members is included as **Appendix 3** to this report.

SUMMARY OF MEETINGS

The committee held six meetings on the following dates:

- August 16, 2018.
- September 17, 2018.
- October 16, 2018.
- November 13, 2018.
- December 11, 2018.
- January 29, 2019.

At the committee's **August 16, 2018** meeting, Katie Bender-Olson and David Moore, senior staff attorneys, Legislative Council staff, summarized the material in Staff Brief 2018-06, *Study Committee on Bail and Conditions of Pretrial Release*. The summary highlighted relevant terms, as well as the constitutional and statutory frameworks for bail and pretrial release in Wisconsin.

Amber Widgery, senior policy specialist, National Conference of State Legislatures provided a presentation highlighting state legislation relating to bail and pretrial release proposed and passed across the country in recent years. Ms. Widgery explained that nationwide policy has

moved to evaluating pretrial risk posed by a particular individual, rather than focusing on the crime charged.

Dr. Constance Kostelac, director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice and Tiana Glenna, criminal justice manager, Eau Claire County provided a presentation regarding Wisconsin's evidence-based decision making pretrial pilot in seven counties throughout the state. The speakers explained the reasons for using evidence-based decision making, the principles of evidence-based decision making, and the multi-phase approach employed by the pilot project.

Dr. Kostelac and Ms. Glenna also explained risk assessment tools, which are used in the pretrial context to assess an individual's risk of: (1) not appearing for court; and (2) being arrested on a new criminal offense. The tools are based on research regarding likelihood of pretrial success or failure based on specific static and dynamic factors, such as prior arrests, convictions, and incarceration; prior failure to appear; pending charges; age; substance use; residence; and employment. Dr. Kostelac and Ms. Glenna emphasized that risk assessment tools are intended to supplement judicial discretion, and not replace it. The presenters also emphasized the importance of data collection for monitoring and measuring outcomes of the county pretrial pilots.

The Honorable Jeffrey Kremers, retired judge, Milwaukee County Circuit Court provided a presentation regarding evidence-based pretrial release and monitoring in Wisconsin and noted the limited purpose for monetary bail under state law. Judge Kremers discussed evidence of pretrial approaches that work, such as implementing differential pretrial supervision strategies based on risk, and those that do not work to improve court appearance rates or community safety, such as monetary bail.

Judge Kremers noted the considerable variation in pretrial practices among counties and the attempt by the pretrial pilot project to test legal and evidence-based practices. He also explained what pretrial risk assessments are, how they are used, and the risk factors that are generally incorporated into an assessment. Judge Kremers highlighted one risk assessment tool, the public safety assessment, and explained how the tool was developed.

Judge Kremers detailed outcomes for Milwaukee County related to the county's implementation of a decision-making framework for pretrial release. He also discussed Wisconsin's pretrial detention statute and identified reasons why the process is not used, including requirements related to evidence, the 10-day timeframe for holding a hearing, and the inability of the prosecution to access police reports within that timeframe.

At the committee's **September 17, 2018** meeting, **Carlo Esqueda, Dane County Clerk of Circuit Court and Julie Beyler, lead social worker, Bail Monitoring Program, Dane County Clerk of Court** provided the committee with background on Dane County's Alternatives to Incarceration program. Mr. Esqueda told the committee that Dane County received a grant from the Arnold Foundation in 2016 to implement the use of the Pretrial Safety Assessment (PSA) tool developed by that foundation. Dane County is also partnering with researchers from Harvard University to conduct a two-year random control trial of the PSA. The study will measure two dimensions of risk: (1) failure to appear; and (2) commission of a new crime while released prior to trial.

Ms. Beyler provided the committee with an overview of Dane County's bail monitoring program. She explained that a judge or court commissioner may order a defendant into the bail monitoring program either as an alternative to cash bail or as a condition of posting cash bail. Through the bail monitoring program, defendants receive supervision of release conditions and referrals to community resources.

Michele LaVigne, distinguished clinical professor of law, University of Wisconsin Law School told the committee that she is working on a project, funded by the National Association of Criminal Defense Lawyers and the U.S. Bureau of Justice Assistance, to study Wisconsin's bail practices. Professor LaVigne informed the committee that bail practices vary enormously from county to county and confirmed that there is not uniform data on pretrial procedures statewide. Among other areas of variation, Professor LaVigne told the committee that there is significant variation statewide with respect to when cash bond is imposed, the amount it is set at when imposed, and the reasons for imposing cash bond. She also said that there is substantial variation statewide about what other release conditions are imposed and the financial consequences to defendants to comply with these conditions.

Daniela Imig, administrator, Wisconsin Community Services; and Nick Sayner, co-founder, JusticePoint, Inc., provided a general overview of the pretrial services their organizations provide. Among other services, Mr. Sayner explained that JusticePoint's pretrial services entail both screening individuals booked into the Milwaukee County Jail to conduct risk assessments of arrestees and running a pretrial supervision program to provide supervision and case management services to defendants ordered to supervision as a condition of release. Ms. Imig told the committee Wisconsin Community Services provides similar pretrial services in Waukesha County.

Mr. Sayner and Ms. Imig then described what they consider to be necessary elements for a high-functioning pretrial services agency. According to Mr. Sayner and Ms. Imig, these elements are: (1) a dedicated pretrial program with an operationalized mission; (2) universal screening for all release-eligible defendants; (3) assessment instruments that are validated and normed on pretrial populations; (4) sequential bail review; (5) risk-based supervision; and (6) performance measurement and feedback.

At the committee's **October 16, 2018** meeting, **Dr. Constance Kostelac, director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice** provided a presentation that addressed pretrial concepts, including 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. 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. Dr. Kostelac also noted existing research regarding the impact on defendants of pretrial detention, even for short periods.

Spurgeon Kennedy, vice president, National Association of Pretrial Services Agencies informed the committee 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.

Mr. Kennedy concluded by commenting that many purposes of monetary bail do not address the stated purposes of bail, but instead is often used because it is convenient for courts. 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.

At the committee's **November 13, 2018** meeting, Legislative Council staff provided the committee with a brief overview of the six bill drafts prepared for the committee and the committee moved to discussion of the individual bill drafts.

Legislative Council staff explained that the two draft joint resolutions represent opposite ends of the spectrum with respect to changes to the Wisconsin Constitution the committee could propose. He explained that LRB-0502/P2 would retain constitutional language authorizing the Legislature to create a pretrial detention process, but would remove the provisions the Wisconsin Constitution currently requires be in a pretrial detention statute. He then explained that LRB-0503/P2 would generally retain current constitutional provisions, with the exception of the requirement that any pretrial detention statute require the court to find by clear and convincing evidence that the person committed the underlying offense before he or she could be detained prior to trial. In addition, LRB-0503/P2 would allow pretrial detention to be sought in cases involving any offense where there is a significant risk the defendant may flee or pose a danger to public safety.

The committee discussed both drafts together. The committee directed staff to prepare a new draft joint resolution that would authorize the Legislature to create a pretrial detention

process as long as that process: (1) is limited in application; (2) includes a pretrial detention hearing; and (3) guarantees the detention period is limited.

Legislative Council staff explained that LRB-0509/P3 was drafted in response to the committee's request for a bill draft that would make changes to the pretrial detention statute that do not require a constitutional amendment. Legislative Council staff explained that LRB-0509/P3 would modify how the pretrial detention process is initiated; change certain rules that apply to pretrial detention hearings; and modify the circumstances under which delay is considered to have been caused by the defendant.

There was general discussion about how any recommendation the committee makes with respect to amending the Wisconsin Constitution would fit into recommendations to amend the statutes. The committee directed staff to prepare a bill draft that would also make changes to the pretrial detention statute that would be contingent upon passage of a constitutional amendment.

Legislative Council staff explained that LRB-0506/P2 modifies the crime of bail jumping to replace the element of a defendant's failure to comply with "the terms of his or her bond" with failure to appear before the court as required.

Following discussion, the committee requested staff prepare two additional bill drafts as follows:

- One bill draft that would retain the current elements of bail jumping, but that would penalize all bail jumping as a misdemeanor.
- One bill draft that would modify the crime of bail jumping to criminalize only violations of bond conditions that either: (a) jeopardize public safety; or (b) are related to the offense with which the defendant is accused.

Legislative Council staff explained that the bill draft requires a court to explain its reason for imposing bail in a written order, and requires the court to review the bail for a defendant who continues to be detained after 24 hours as a result of the defendant's inability to meet the bail. There was general agreement among committee members that these requirements would create significant burdens on the courts and that the committee should not continue to pursue this proposal.

Legislative Council staff explained that LRB-0508/P2 expressly authorizes courts to consider the results of a pretrial risk assessment in imposing bail or other pretrial release conditions.

There was general agreement in favor of including this language within the statutes. Committee members requested that current law considerations for imposing bail or other pretrial release conditions to be replaced by the nine factors used in the Arnold Foundation's public safety assessment.

At the committee's **December 11, 2018** meeting, Legislative Council staff provided the committee with an overview of the five bill drafts prepared for the committee and began the discussion with the two bill drafts related to pretrial detention.

Legislative Council staff explained that LRB-0850/1 would amend the Wisconsin Constitution to remove much of the prescriptive language regarding pretrial detention, and allow the Legislature to create the pretrial detention procedure in statute. Under the bill draft, any law enacted by the Legislature authorizing courts to deny release prior to conviction must: (1) limit the circumstances under which an accused may be denied release prior to conviction; (2) limit the period of time an accused may be denied release prior to conviction; and (3) require that the court conduct a pretrial detention hearing. Committee members discussed whether constitutional changes must be paired with proposed changes to the pretrial detention statute. The pretrial detention statute creates a procedure that members concluded would remain unusable without changes to the Constitution.

The committee requested a revised joint resolution to amend the Wisconsin Constitution for the January meeting. The members asked that the draft revise art. I, s. 8 (2) to provide that all persons are "presumed" eligible for release under reasonable conditions. They also asked that art. I, s. 8 (3) be revised to delete the language stating the Legislature "may not require" circuit courts to deny release prior to conviction. Members also asked that the wording of the first criterion appearing in SECTION 2 of LRB-0850/1 be changed slightly.

Legislative Council staff explained that LRB-0852/P2 amends the pretrial detention statute, s. 969.035, Stats., to incorporate both changes requested by the committee that would require a constitutional amendment, as well as changes that would not. Legislative Council staff explained that the modifications to current law made by LRB-0852/P2 include: the circumstances under which pretrial detention may be used; the procedure for initiating pretrial detention; the rules that apply at a pretrial detention hearing; the required showings the state must make at a pretrial detention hearing; and the period of time for which a person can be detained before conviction.

Members discussed the expanded circumstances under which pretrial detention could be used under the bill draft. Specifically, members discussed the new criteria allowing the pretrial detention procedure to be initiated for a person accused of any offense if: (1) the court finds a serious risk that the person poses a danger to another person or the community; or (2) the court finds there is a serious risk that the person will not appear in court.

Committee members suggested a number of changes to the bill draft, such as maintaining certain language in s. 911.01 (4) (c), Stats., that is deleted under LRB-0852/P2; allowing initiation of the pretrial detention procedure upon the court's own motion; ensuring that references to a "circuit court" include court commissioners; and permitting an initial pretrial detention determination by a commissioner to be reviewable by a court. Members also noted that expanding eligibility for pretrial detention to include misdemeanors under specified circumstances requires certain cross-references to be updated.

Legislative Council staff explained the two bill drafts making changes to the crime of bail jumping. She noted that LRB-0866/P2 changes the elements of the crime such that bail jumping applies to intentional failure to appear as required, or to intentional failure to comply with certain terms of an individual's bond. Under the bill draft, to be guilty of bail jumping, an accused must either intentionally fail to appear in court as required or violate a term of bond that relates to the offense for which the person has been released on bond or in a way that endangers public safety.

Legislative Council staff also explained that LRB-0864/P2 changes the penalty for bail jumping such that a violation of the statute is always a misdemeanor, regardless of the underlying offense.

The committee determined that the staff should communicate directly with Mr. Gerol to develop two bill drafts; one bill draft proposing a tiered system of bail jumping violations, and another bill draft proposing that each county criminal justice coordinating council (CJCC) must develop policies regarding how various violations of bond should be treated.

Legislative Council staff briefly described LRB-0923/P2 at the conclusion of the meeting. She noted that the bill draft replaces the current law list of factors for a court to consider in imposing bail or other conditions of pretrial release with the factors used in the public safety assessment developed by the Arnold Foundation. The committee requested that an additional consideration be added to the list under the bill draft allowing the court to take into account specifically enumerated considerations brought forward at the bail hearing.

At the final committee meeting on **January 29, 2019 meeting**, Legislative Council staff explained that the committee would discuss the bill drafts and vote by mail ballot.

Legislative Council staff summarized the changes in LRB-0850/2 from a prior bill draft the committee considered at its December meeting and provided a brief summary of the draft joint resolution. Under the draft, any law enacted by the Legislature authorizing courts to deny release prior to conviction must: (1) specify the circumstances under which an accused may be denied release prior to conviction; (2) limit the period of time an accused may be denied release prior to conviction; and (3) require that the court conduct a pretrial detention hearing. The draft would also modify language in the Constitution stating that all defendants are eligible for release under reasonable conditions to specify that all defendants are presumed eligible for release under reasonable conditions.

Committee members discussed the draft. No further revisions were requested.

Legislative Council staff next explained that LRB-0852/1 would amend the pretrial detention statute, s. 969.035, Stats., and take effect only if an amendment to Wis. Const. art. I, s. 8 (3) is ratified. He explained that certain aspects of the bill draft were modeled on provisions in the federal, New Jersey, and District of Columbia pretrial detention statutes.

Legislative Council staff highlighted key changes LRB-0852/1 would make to the pretrial detention process, including: (1) expanding the net of defendants eligible for pretrial detention; (2) allowing a court to initiate a pretrial detention hearing on its own motion with respect to certain defendants; (3) modifying the burdens of proof that apply during the pretrial detention hearing; and (4) changing the limits on the amount of time a defendant could be detained prior to a pretrial detention hearing.

Committee members discussed the bill draft and also engaged in a broader discussion about how a workable pretrial detention process should fit in with other components of a pretrial system, such as a robust pretrial service program. No further revisions were requested.

Representative Goyke asked committee members to support LRB-1225/P1, which he requested be drafted for the committee's consideration. He explained that this bill draft would require a court to review the bail of a defendant for whom bail is imposed and who after 24 hours

from the time of initial appearance before the judge or a bail review continues to be detained in custody as a result of the defendant's inability to meet the bail. The bill draft would take effect only if an amendment to the Wisconsin Constitution permitting the Legislature to revise the pretrial detention statute is ratified. Representative Goyke explained that his purpose in drafting LRB-1225/P1 was to create a mechanism to ensure that bail not have the effect of detaining a defendant solely because of the defendant's inability to pay.

Committee members asked that the bill draft be modified to require a bail review 72 hours after the defendant's initial appearance and weekly thereafter. The committee also requested the bill draft be modified to remove the requirement that the court's reasons for continuing bail be set forth on the record and that the bill draft be modified to specify that these review hearings could be conducted by court commissioners. The committee asked that a bill draft with these changes be included on the mail ballot.

Legislative Council staff told the committee that LRB-1261/1 was drafted in response to a discussion that occurred at the committee's December meeting and was based on an idea Judge Horne had proposed. Legislative Council staff explained that the bill draft would require each county to create a CJCC that includes representatives of the county's criminal justice system and members of the public. Under the bill draft, each CJCC would be required to review county practices regarding the crime of bail jumping and to develop policies and guidelines related to charging the crime.

Judge Horne told the committee that after seeing the idea as a bill draft, he does not support the proposal because he is not convinced that the additional layer of bureaucracy the proposal would create is merited. The committee agreed to not move forward with the bill draft.

Legislative Council staff explained that the final bill draft, LRB-0923/1, replaces the list of factors for a court to consider in imposing bail or other conditions of pretrial release, with the factors used in the public safety assessment developed by the Arnold Foundation. The bill draft also specifies that a court could consider the results of a pretrial risk assessment and any other consideration brought forth at the bail hearing.

Committee members raised a number concerns about using the factors from the Arnold Foundation's risk assessment. Among other concerns, committee members noted that the research these factors are based on may change and that simply listing the factors as permissible considerations does not accurately capture how these factors are weighted and incorporated into the risk assessment tool.

The committee requested that the bill draft be modified to retain the current law factors and add to these factors the results of a validated pretrial risk assessment.

PART III
RECOMMENDATIONS FOR INTRODUCTION BY THE JOINT LEGISLATIVE COUNCIL

LRB-0850/2, RELATING TO RELEASE OF A PERSON ACCUSED OF A CRIME PRIOR TO CONVICTION (FIRST CONSIDERATION)

Background

Wisconsin Constitution, Article I, Section 8 (2), provides, 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.

However, the Wisconsin Constitution also allows the Legislature to create a procedure to detain certain individuals prior to trial. Only individuals accused of committing certain offenses are eligible for pretrial detention. 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.
- 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.

The Wisconsin Constitution requires a pretrial detention procedure created by the Legislature to contain certain elements. Specifically, Wis. Const. art. I, s. 8 (3) 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.

The Legislature enacted a pretrial detention statute authorizing courts to detain certain defendants prior to trial under the authority granted by the Wisconsin Constitution. The committee heard testimony, however, that this process is rarely if ever used because it is widely

viewed as unworkable. The committee identified the following three requirements of the pretrial detention procedure as problematic: (1) the high degree of proof the prosecutor must show at the pretrial detention hearing that the person committed the offense with which he or she is accused; (2) the 60-day limitation on the amount of time a defendant may be denied release; and (3) the circumstances under which pretrial detention could be used. Because these requirements are prescribed by Wis. Const. art. I, s. 8 (3), there was general consensus among committee members that addressing the issues identified with the pretrial detention statute would require amending the Wisconsin Constitution.

Description

LRB-0850/2 replaces the specific requirements in the Wisconsin Constitution for a pretrial detention law with three broad requirements. Under the draft joint resolution, any law the Legislature enacts authorizing circuit courts to deny release prior to conviction must: (1) specify the circumstances under which an accused may be denied release prior to conviction; (2) limit the period of time an accused may be denied release prior to conviction; and (3) require that the court conduct a pretrial detention hearing.

The draft also removes language from the Wisconsin Constitution that prohibits the Legislature from enacting a law requiring courts to deny release to a defendant prior to conviction. Finally, the draft inserts the word "presumed" before eligible in the Wisconsin Constitution to provide that all persons before conviction shall be presumed 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.

LRB-0852/1, RELATING TO PRETRIAL DETENTION

Background

Section 969.035, (*Pretrial detention; denial of release from custody*), Stats., establishes a pretrial detention procedure that contains the requirements imposed by the Wisconsin Constitution and additional provisions.

Under current law, a court may proceed under the pretrial detention statute only if an individual is accused of committing certain homicide, sexual assault, or violent crimes. Specifically, an individual is eligible for pretrial detention for either of the following reasons:

- 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 by statute and is presently accused of committing or attempting to commit a "violent crime."

Before a court may proceed with pretrial detention, a district attorney must do all of the following:

- Allege that the defendant is eligible because he or she is 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.

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 must 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.

A pretrial detention hearing is a hearing before a court for the purpose of determining if the continued detention of the defendant is justified. The pretrial detention statute provides that the defendant has certain rights at this hearing, including the right of confrontation, the right to call witnesses, the right to cross-examination, and the right to an attorney. The statute also provides that the rules of evidence applicable in criminal trials govern the admissibility of evidence at a pretrial detention hearing.

Following a pretrial detention hearing, the defendant may only be detained for an additional period of time prior to trial if the state proves 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.

If the court finds the state has made these showings, the court may deny release for 60 days following the hearing. The accused must be released if the time period passes, but the release may be subject to conditions.

Description

LRB-0852/1 makes a variety of changes to the statutory pretrial detention procedure. These changes would only take effect if an amendment to Wis. Const. art. I, s. 8 (3), such as the amendment proposed in LRB-0850/2, is ratified.

Eligibility for Pretrial Detention

The bill draft expands the categories of defendants that are eligible for pretrial detention to include a defendant accused of any offense if there is a significant risk that: (1) the person poses a danger of inflicting serious bodily harm on a member of the community; (2) the person will intimidate a witness; or (3) the person will not appear in court as required.

Requesting Pretrial Detention

The bill draft allows a district attorney to request a pretrial detention hearing by alleging that the defendant is eligible for denial of release and that no available conditions of release will adequately protect members of the community from serious bodily harm, prevent the intimidation of witnesses, or reasonably assure the defendant's appearance in court when required. In addition, the bill draft allows a court to hold a pretrial detention hearing upon its own motion with respect to a defendant who is not eligible for pretrial detention by virtue of the specific offense with which he or she is charged, but who is eligible based on a serious risk the person poses a danger of inflicting serious bodily harm on a member of the community; will intimidate a witness; or will not appear in court as required.

Rules Governing Pretrial Detention Hearing

The bill draft provides that the defendant has the right to be represented by counsel and must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses, and to present information by proffer or otherwise. The bill draft provides that the rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at a pretrial detention hearing.

Required Showings

The bill draft eliminates the requirement that the state prove by clear and convincing evidence that the defendant committed the offense with which he or she is presently charged, and instead requires the state to establish probable cause that the defendant committed the offense.

The bill draft creates a rebuttable presumption that available conditions of release will not adequately protect members of the community from serious bodily harm, prevent the intimidation of witnesses, or assure the defendant's appearance when required when the defendant is eligible for pretrial detention because he or she is accused of committing or attempting to commit one of several enumerated offenses or is accused of committing or attempting to commit a violent crime and has previously been convicted of a violent crime.

If the defendant rebuts the presumption, the state may proceed to seek pretrial detention by proving by clear and convincing evidence that the available conditions of release will not adequately protect members of the community from serious bodily harm, prevent the intimidation of witnesses, or assure the defendant's appearance in court when required. For defendants to whom the presumption does not apply, the state must prove by clear and convincing evidence that the available conditions of release will not adequately protect members of the community from serious bodily harm, prevent the intimidation of witnesses, or assure the defendants appearance in court when required.

Pretrial Detention Time Limits

The bill draft provides that if the state makes the required showings at a pretrial detention hearing, a defendant may be held for an additional period of time following the hearing not to exceed 60 days, with respect to a defendant accused of a misdemeanor, and not to exceed 90 days, with respect to a defendant accused of a felony. The bill draft also provides that a court may extend this time period, upon its own motion or the motion of any party, if it finds that the ends of justice are best served by extending that period.

Reopening Pretrial Detention Hearing

The bill draft provides that a pretrial detention hearing may be reopened at any time before trial if the court finds that information exists that was not known to the district attorney or the defendant at the time of the hearing and has a material bearing on the issue of whether there are conditions of release that adequately protect members of the community from serious bodily harm, prevent the intimidation of witnesses, or assure the defendant's appearance in court when required.

LRB-0508/1, Relating to the Use of a Pretrial Risk Assessment When Setting Conditions for Pretrial Release

Background

Current law specifies various factors a court may consider when setting bail or conditions of pretrial release. Consideration of any of these factors is permissive.

Description

This bill draft expands the list of factors a court may consider when setting bail or conditions of pretrial release to include a validated pretrial risk assessment. The bill draft also makes various other nonsubstantive formatting changes.

LRB-1714/1, Relating to Modification of Bail in a Criminal Action

Background

Current law requires a judge to review an individual's conditions of release if the individual remains detained after 72 hours because of inability to meet the conditions. Judicial review is not automatically triggered, but instead, a judge must review an individual's release conditions "upon application."

Description

This bill draft requires a court to review the bail of a defendant within 72 hours of initial appearance if the defendant remains in custody as a result of his or her inability to meet the bail. The court must conduct a similar review every seven days thereafter if the defendant remains in custody. Unless the bail is adjusted and the defendant is released, the court must set forth the

reasons for requiring the continuation of bail. The provisions in this bill draft only take effect if an amendment to Wis. Const. art. I, s. 8 (3), relating to pretrial detention, is ratified.

APPENDIX 1

STUDY COMMITTEE VOTES

On February 6, 2019, the study committee voted by mail ballot, to recommend the following bill drafts to the Joint Legislative Council for introduction in the 2019-20 session of the Legislature. The vote on the bill drafts were as follows:

- LRB-0850/2, relating to release of a person accused of a crime prior to conviction (first consideration) passed on a vote of Ayes, 10 (Sens. Wanggaard and Risser; Rep. Duchow; and Public Members Dorow, Gerol, Horne, King, McCleer, Susienka, and White); Noes, 4 (Reps. Goyke and Tusler; and Public Members Klekamp and Thompson).

- LRB-0852/1, relating to pretrial detention passed on a vote of Ayes, 9 (Sen. Wanggaard; Rep. Duchow; and Public Members Dorow, Gerol, Horne, King, McCleer, Susienka, and White); Noes, 5 (Sen. Risser; Reps. Goyke and Tusler; and Public Members Klekamp and Thompson).

- LRB-0508/1, relating to the use of a pretrial risk assessment when setting conditions for pretrial release passed on a vote of Ayes, 13 (Sens. Wanggaard and Risser; Reps. Duchow, Goyke, and Tusler; and Public Members Dorow, Horne, King, Klekamp, McCleer, Thompson, Susienka, and White); Noes, 1 (Public Member Gerol).

- LRB-1714/1, relating to modification of bail in a criminal action passed on a vote of Ayes, 12 (Sens. Wanggaard and Risser; Reps. Duchow and Goyke; and Public Members Dorow, Horne, King, Klekamp, McCleer, Thompson, Susienka, and White); Noes, 2 (Rep. Tusler and Public Member Gerol).

APPENDIX 2

JOINT LEGISLATIVE COUNCIL

[s. 13.81, Stats.]

SENATE MEMBERS	ASSEMBLY MEMBERS
Roger Roth, Co-Chair Senate President Appleton	**Robert Brooks, Co-Chair** Assistant Majority Leader Saukville
Alberta Darling JFC Co-Chair River Hills	**Tyler August** Speaker Pro Tempore Lake Geneva
Scott Fitzgerald Majority Leader Juneau	**Joan Ballweg** Markesan
Howard Marklein President Pro Tempore Spring Green	**Peter Barca** Kenosha
Mark Miller Monona	**Dianne Hesselbein** Assistant Minority Leader Middleton
Terry Moulton Chippewa Falls	**Gordon Hintz** Minority Leader Oshkosh
Jerry Petrowski Marathon	**John Nygren** JFC Co-Chair Marinette
Fred A. Risser Madison	**John Spiros** Marshfield
Jennifer Shilling Minority Leader La Crosse	**Jim Steineke** Majority Leader Kaukauna
Lena Taylor JFC Ranking Minority Member Milwaukee	**Chris Taylor** JFC Ranking Minority Member Madison
Van Wanggaard Racine	**Robin Vos** Speaker Rochester

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

APPENDIX 3

STUDY COMMITTEE ON BAIL AND CONDITIONS OF PRETRIAL RELEASE

Chair Van Wanggaard, Senator
1246 Blaine Ave.
Racine, WI 53405

Vice Chair Fred A. Risser, Senator
100 Wisconsin Ave., Unit 501
Madison, WI 53703

Jennifer Dorow, Chief Judge District 3
Waukesha County Circuit Court Branch 2
Courthouse, Room C267
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Waukesha, WI 53188

Cindi Duchow, Representative
N22 W 28692 Louis Ave.
Pewaukee, WI 53072

Adam Gerol, District Attorney, Ozaukee County
1201 Spring St., Box 994
Port Washington, WI 53074

Evan Goyke, Representative
2734 W. State St.
Milwaukee, WI 53208

Scott Horne, Judge
La Crosse County Circuit Court Branch 4
333 Vine St.
La Crosse, WI 54601-3296

Gary King, District Attorney
Eau Claire Government Center – 2nd Floor
721 Oxford Ave., Ste. 2570
Eau Claire, WI 54703

Jane Klekamp, Assoc. County Admin.
La Crosse County
212 6th Street North, Ste. 2400
La Crosse, WI 54601

Joseph McCleer, Attorney
McCleer Law Office, LLC
1127 S. Main St.
Oshkosh, WI 54902

Kelli Thompson, State Public Defender
Office of the State Public Defender
315 N. Henry St.
Madison, WI 53703

Ron Tusler, Representative
W5721 Firelane 12
Harrison, WI 54952

Paul Susienka, Sheriff
Bayfield County Sheriff's Department
615 2nd Ave.
East Washburn, WI 54891

Maxine White, Chief Judge
Milwaukee County Circuit Court
901 N. 9th St., Room 609
Milwaukee, WI 53233-1425

STUDY ASSIGNMENT: The study committee is directed to review Wisconsin's pretrial release system, including considerations for courts in imposing monetary bail and for denying pretrial release. The committee shall review relevant Wisconsin constitutional and statutory provisions and best practices implemented by Wisconsin counties and other states, including use of risk assessment tools for informing pretrial detention decisions. The committee is directed to recommend legislation regarding bail and pretrial release that enhances public safety, respects constitutional rights of the accused, considers costs to local governments, and incorporates evidence-based strategies.

14 MEMBERS: 3 Representatives; 2 Senators; and 9 Public Members.

LEGISLATIVE COUNCIL STAFF: Katie Bender-Olson and David Moore, Senior Staff Attorneys; and Tracey Young, Support Staff.

APPENDIX 4

COMMITTEE MATERIALS LIST

[Copies of documents are available at www.legis.wisconsin.gov/lc]

August 16, 2018 Meeting

- Handout, *Crime Brief*, National Conference of State Legislatures (June 2015).
- *Handout, Trends in Pretrial Release: State Legislation Update, Civil and Criminal Justice*, National Conference of State Legislatures (April 2018).
- Presentation, *Wisconsin Evidence-Based Decision Making Pretrial Pilot - Project Overview*, by Dr. Constance Kostelac, director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice.
- Publication, *The Legislative Primer Series for Front End Justice: Mental Health* (August 2018), National Conference of State Legislatures.
- Handout, *Trends in Pretrial Release: State Legislation* (March 2015), National Conference of State Legislatures.
- Presentation, The Honorable Jeffrey Kremers, retired Milwaukee County Circuit Court Judge.
- Presentation, *Pretrial Release: State Law and Legislation*, by Amber Widgery, senior policy specialist, National Conference of State Legislatures.
- Staff Brief 2018-06, *Study Committee on Bail and Conditions of Pretrial Release*, (August 9, 2018).

September 17, 2018 Meeting

- Presentation, by Carlo Esqueda, Dane County Clerk of Circuit Court.
- Handout, *Frequency of Signature Bonds in Dane County Criminal Cases: 2012-2016*, distributed by Carlo Esqueda, Dane County Clerk of Circuit Court.
- Presentation, Daniela Imig, Wisconsin community services administrator and Nick Sayner, co-founder, JusticePoint, Inc.

October 16, 2018 Meeting

- LC Study Memorandum, *Discussion Items Related to Pretrial Detention Procedure*, (October 9, 2018).

- LC Study Memorandum, *Topics for Committee Discussion*, (October 9, 2018).
- Presentation by Spurgeon Kennedy, vice president, National Association of Pretrial Services Agencies.
- Presentation, by Constance Kostelac, director, Bureau of Justice Information and Analysis, Wisconsin Department of Justice.

November 13, 2018 Meeting

- LRB-0502/P2, relating to release prior to conviction of a person accused of a crime (first consideration).
- LRB-0503/P2, relating to release prior to conviction of a person accused of a crime (first consideration).
- LRB-0506/P2, relating to bail jumping and providing a penalty.
- LRB-0507/P2, relating to imposing bail in a criminal action.
- LRB-0508/P2, relating to the use of a pretrial risk assessment when setting conditions for pretrial release.
- LRB-0509/P3, relating to pretrial detention.

December 11, 2018 Meeting

- LRB-0850/1, relating to release of a person accused of a crime prior to conviction (first consideration).
- LRB-0852/P2, relating to pretrial detention.
- LRB-0864/P2, relating to bail jumping and providing a penalty.
- LRB-0866/P2, relating to bail jumping and providing a penalty.
- LRB-0923/P2, relating to the factors to consider when setting conditions for pretrial release.

January 29, 2019 Meeting

- Letter, submitted by Representative Evan Goyke (January 17, 2019).
- LRB-1225/P1, relating to modification of bail in a criminal action, submitted by Representative Evan Goyke.
- LRB-0850/2, relating to release of a person accused of a crime prior to conviction (first consideration).
- LRB-0852/1, relating to pretrial detention.

- LRB-0923/1, relating to the factors to consider when setting conditions for pretrial release.
- LRB-1261/1, relating to county study of policies and practices related to prosecutions for bail jumping.