



2021 Enrolled Joint Resolution 6

A proposed constitutional amendment on the eligibility and conditions for pretrial release and considerations for imposing bail



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Introduction

The 2021 Wisconsin Legislature adopted [2021 Assembly Joint Resolution 107](#) on first consideration. The assembly adopted Assembly Substitute Amendment 2 to 2021 Assembly Joint Resolution 107 on February 15, 2022, and the senate concurred in the resolution on February 22, 2022. The proposal is now eligible for second consideration by the 2023 Wisconsin Legislature.

The joint resolution, published as 2021 Enrolled Joint Resolution 6, would amend provisions of the Wisconsin Constitution to change two concepts relating to the conditions under which a defendant may be granted release before trial. The first change would affect the basis for which the court may impose conditions on a defendant being granted the release. Under the current constitution, the court may impose reasonable conditions designed to protect the community from *serious bodily harm*. Under the proposed amendment, the court may impose reasonable conditions designed to protect the community from *serious harm as defined by the legislature by law*. The second change focuses on the monetary conditions of pretrial release, commonly referred to as “bail.” Under the current constitution, the court may impose bail for pretrial release only as necessary to assure a defendant’s appearance in court. The proposed amendment would authorize the court to impose bail for pretrial release for various other reasons when the defendant is accused of a violent offense as defined by the legislature by law.

Legislative passage of a constitutional amendment on first consideration is the first step in the process of amending the constitution. Under Wis. Const. [art. XII, § 1](#), amendments to the constitution must be adopted by two successive legislatures and then ratified by the electorate in a statewide election.¹ On first consideration, a proposed amendment to the constitution is offered as a joint resolution in either the assembly or the senate. A joint resolution, unlike a bill, need not be submitted to the governor for approval but must pass both houses in identical form. If both the assembly and the senate adopt the joint resolution, the Legislative Reference Bureau must publish the proposed constitutional amendment on the Internet, no later than August 1 preceding the next general election. In the next succeeding legislature, the proposed amendment may be offered on second consideration. Once again, the proposal takes the form of a joint resolution and may be offered in either the assembly or the senate. A second consideration joint resolution proposes the identical amendment that was proposed by the first consideration joint resolution and also specifies the date of the election at which the proposed amendment will be submitted to the electorate and the wording of the question that will appear on the ballot. If both the assembly and the senate adopt the joint resolution without making changes to the proposed amendment, the proposed

1. Every Wisconsin legislature convenes in January of an odd-numbered year and adjourns in January of the next succeeding odd-numbered year.

amendment is submitted to the electorate. If the electorate ratifies the amendment, the constitution is amended.

Background

The Eighth Amendment to the U.S. Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Eighth Amendment does not address a defendant’s right to pretrial release; rather, the U.S. Supreme Court has held that the U.S. Constitution provides only that where bail is proper, it may not be excessive,² and that there are cases where bail is not proper or guaranteed.³ Instead, the availability and conditions of a defendant’s pretrial release, including bail and the conditions under which a state court may impose bail, are left to the state.

In Wisconsin, bail refers to monetary conditions set by the court for a defendant to be released before trial.⁴ Like the U.S. Constitution, the Wisconsin Constitution prohibits excessive bail under [article I, section 6](#), and does not expressly provide for a right to bail. Instead, Wis. Const. art. I, § 8 (2), establishes the right of all accused persons, before conviction, to be released “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.” A court may impose bail as a condition of release, however, only on a finding that there is a reasonable basis to believe that bail is necessary to assure the defendant’s appearance in court.⁵ There are no other factors that a court may consider when determining whether to impose bail, such as the nature of the criminal offense, the safety of the community, or the defendant’s prior criminal record. Wisconsin law thus differs from federal law and the laws of almost all other states that allow courts to consider other factors when determining whether to impose bail and the amount of bail.

The current version of Wis. Const. art. I, § 8, was ratified by the people and took effect on April 7, 1982. Days after ratification of the constitutional amendment, the legislature created Wis. Stat. ch. 969.⁶ This chapter provided for the regulation of bail and other conditions of pretrial release consistent with the constitutional changes. Chapter 969 outlines the factors a court may consider when determining whether to release a defendant without bail, when fixing a reasonable amount of bail, or when setting other conditions of release. In addition, Wis. Stat. ch. 969 provides that conditions of pretrial release, other than bail, may be imposed only for the purposes of protecting members

2. *United States v. Salerno*, 481 U.S. 739 (1987).

3. *Carlson v. Landon*, 342 U.S. 524 (1952).

4. See Wis. Stat. § 969.001 (1), which defines bail to mean “monetary conditions of release.”

5. In *State v. Iglesias*, the court held that Wis. Const. art. I, § 8 (2), “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.” 185 Wis. 2d 117, 139, 517 N.W.2d 175, 182 (1994).

6. Ch. 183, Laws of 1981.

of the community from serious bodily harm or preventing intimidation of witnesses.⁷ These are the purposes specifically enumerated under Wis. Const. art. I, § 8 (2). Moreover, in Wis. Stat. § 969.001 (2), the constitutional phrase “serious bodily harm” was defined generally to mean bodily injury that causes death or creates a substantial risk of death.⁸

The origin of 2021 Enrolled Joint Resolution 6 can be traced to 2017 Assembly Joint Resolution 93, a proposed constitutional amendment authored by Representative Cindi Duchow. The 2017 resolution would have, among other things, eliminated the limitation that bail could be imposed only to assure a defendant’s appearance in court. The resolution also provided that in fixing a reasonable amount of bail, the court must take into consideration “the seriousness of the offense charged, the previous criminal record of the accused, the probability that the accused will appear in court, and the need to protect members of the community from serious harm or prevent the intimidation of witnesses.”⁹ A little more than six weeks after its introduction, the resolution was scheduled and adopted in the assembly on a 69–24 bipartisan vote¹⁰ but was never scheduled for a vote in the senate. Although the joint resolution was not adopted by both houses of the legislature, the issue secured a place on the legislative agenda.

In 2018, weeks after the close of the last general-business floorperiod, a Joint Legislative Council study committee was created to review the state’s pretrial release system. The committee, chaired by Senator Van Wanggaard, was “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.”¹¹ After months of review, a divided committee recommended the introduction of several bills relating to pretrial release and a joint resolution to amend the constitution to give the legislature greater leeway in setting conditions for pretrial release.¹² The proposed constitutional amendment did not expand the conditions under which the court could impose bail, but instead it modified the legislature’s power to authorize circuit courts to deny pretrial release. Although the legislature did not act on the bills or joint resolution, the issue of pretrial release remained on the legislative agenda.

7. Wis. Stat. § 969.01 (4).

8. The full text of Wis. Stat. § 969.001 (2) reads: “‘Serious bodily harm’ means 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.” The drafting file for Ch. 183, Laws of 1981, indicates that this definition was modeled after the definition of “great bodily harm” under Wis. Stat. § 939.22 (1979).

9. 2017 Wis. AJR 93.

10. Wis. Assembly Journal (2018) 861–62.

11. “2018 Legislative Council Study Committee on Bail and Conditions of Pretrial Release,” Wisconsin State Legislature, accessed July 18, 2022, <https://docs.legis.wisconsin.gov>.

12. 2019 Wis. SB 98; 2019 Wis. SB 99; 2019 Wis. SB 101; 2019 Wis. SJR 13; Wis. Legis. Council, “Joint Legislative Council’s Report of the Study Committee on Bail and Conditions of Pretrial Release,” JLCR 2019-09 (Madison, WI: Legislative Council, April 2, 2019), <https://docs.legis.wisconsin.gov>.

Proposed amendment

2021 Enrolled Joint Resolution 6 proposes to amend Wis. Const. art. I, § 8 (2), by (1) changing the purposes for which a court may design conditions of release for a defendant before conviction and (2) adding factors that the court may consider when determining whether to impose bail and how much bail to impose if the defendant is charged with a violent crime.

First, the amendment provides that the defendant is eligible for release before conviction under reasonable conditions designed to protect members of the community from serious harm as defined by the legislature by law, not just serious bodily harm. The current version of Wis. Const. art. I, § 8 (2), provides that a person is eligible for pretrial release “under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses.” The proposed constitutional amendment would substitute “serious harm as defined by the legislature by law” for “serious bodily harm.” If the proposed constitutional amendment is ratified, the legislature must define by law “serious harm” for the purposes of determining conditions that the court may impose. In carrying out this duty, the legislature could expand the definition of “serious harm” to include more than death or substantial risk of death or more than just bodily injuries. If the legislature so expands the definition of serious harm, the court would have greater discretion in imposing conditions on defendants who are being released pending trial.

Second, the amendment expands the reasons the court may impose bail when the defendant is charged with a violent crime. As previously noted, monetary bail may be imposed as a condition of release before conviction only upon a finding that there is a reasonable basis to believe that it is necessary to assure the appearance of the defendant in court. The proposed constitutional amendment creates a new category of crime—“a violent crime as defined by the legislature by law”—for purposes of imposing and setting bail. Under the amendment, if a defendant is accused of a crime that the legislature has defined as a violent crime, the court may impose bail if the court finds a reasonable basis to believe that bail is necessary based on the “totality of the circumstances.” The court could consider whether the defendant has previously been convicted of a violent crime, the probability that the defendant will fail to appear in court, the need to protect the community from serious harm as defined by the legislature by law, the need to prevent witnesses from being intimidated, and potential affirmative defenses the defendant may assert. These factors would give the court more discretion when determining whether to impose bail. For all crimes that are not defined by the legislature as a violent crime, the court would be allowed to impose bail only to assure the appearance of the defendant in court, as under the current version of Wis. Const. art. I, § 8 (2).

Proponents of the constitutional amendment argue that the measure allows courts to

take into account a person's propensity for violent crimes when deciding whether monetary conditions of release are appropriate, with the result that the public will be better protected from criminal defendants who have been released pending trial. The lead author of 2021 Enrolled Joint Resolution 6, Representative Duchow, in her testimony before the Assembly Committee on Judiciary, noted that 48 states allow courts to take into account "dangerousness" in determining conditions of pretrial release, including bail. Wisconsin is an outlier. Representative Duchow described the constitutional amendment as "a common-sense way to balance public safety and fundamental rights," arguing that courts would have more options to protect public safety. Senator Wanggaard, in his testimony, noted that under the current constitutional provision, "If a person has roots in the community, a job, a family, a home, etc. they're more likely to be released on a low cash bail, or frequently, just their word." For Senator Wanggaard, the aim of the amendment was to give judges "broader discretion" in setting pretrial release conditions and require them to set bail "based on a number of factors."¹³

Opponents to the constitutional amendment argue that the constitutional changes are flawed, will not increase public safety, and may be unconstitutional. Testifying at committee, Adam Plotkin, representing the Wisconsin State Public Defender, charged that the new term "serious harm" was ambiguous and could "encompass emotional, economic, or non-criminal behavior which, while perhaps not welcome, is not reason enough to deprive someone of their liberty through the imposition of cash bail." Plotkin further argued that the constitutional changes would increase the number of individuals, presumed innocent, who are incarcerated while awaiting trial. Moreover, he said, increasing the number of factors that courts would use in setting the amount that defendants must post for bail could result in excessive bail prohibited by the Eighth Amendment. Citing empirical studies, Plotkin charged that increasing cash bail would in no way increase public safety. Instead, he claimed, "It simply exacerbates the socioeconomic divide in the criminal legal system. Those with means can afford to post a cash bail amount, even if it is set high based on the totality of the circumstances." It is the poor who would be unable to meet the higher amounts set for cash bail.¹⁴

Other states

Wisconsin falls within the majority of the states—41 in total—that have a constitutional right to pretrial release.¹⁵ 2021 Enrolled Joint Resolution 6 would not eliminate this

13. Wis. Legis. Council, [Hearing Materials for 2021 AJR 107](#), Testimony of State Rep. Cindi Duchow, Assembly Committee on Judiciary, *AJR 107: Eligibility and Conditions for Release Prior to Conviction of Persons Accused of Certain Crimes and Considerations for Imposing Bail (first consideration)* (Feb. 2, 2022), <https://docs.legis.wisconsin.gov>.

14. Wis. Legis. Council, Hearing Materials for 2021 AJR 107, Testimony of Rep. Duchow.

15. "Statutory Framework of Pretrial Release," National Conference of State Legislatures, updated November 18, 2020, <http://www.ncsl.org>.

right. Rather, the proposed constitutional amendment would authorize courts to impose monetary conditions of pretrial release, or bail, under a broader range of circumstances. Currently, Wisconsin is one of few states wherein courts may impose bail *only* to assure the defendant’s appearance in court. And Wisconsin appears to be the sole state whose constitution expressly forecloses the courts’ authority to consider other factors in imposing bail. By contrast, other states’ laws generally permit courts to consider several factors in imposing bail, such as the nature of the crime for which the defendant is accused, the safety of the public, the defendant’s prior convictions, and the protection of witnesses.¹⁶

Under the proposed amendment, Wisconsin would be unusual in providing that the legislature define terms rather than giving the court discretion. Under their constitution, statutes, or court rules, many other states allow or require courts to consider the nature of the crime in imposing or fixing the amount of bail. However, unlike the amendment proposed in Wisconsin, other state constitutions do not direct the legislature to specify or define the types of crime for which bail may be imposed. For example, California’s constitution specifies that, in fixing bail, a court must consider, among other things, “the seriousness of the offense charged.”¹⁷ Under West Virginia statutes, “proper considerations” for fixing bail include, among other things, “[t]he nature, number and gravity of the offenses,” as well as “[w]hether the alleged acts were violent in nature.”¹⁸ Under these laws, courts exercise discretion in determining when and how the nature of a crime factors into the imposition of bail.

Under the proposed amendment, Wisconsin would join the majority of states that authorize courts to consider the safety of the public in imposing bail. The proposed amendment would allow courts to take into account “the need to protect members of the community from serious harm” and “potential affirmative defenses of the accused.” Similarly, other states authorize courts to consider the following: “the risk of harm to others or to the public at large”¹⁹ (Alabama); “the safety of the victim, any other person or the community”²⁰ (Arizona); “the safety of any person or persons or the community”²¹ (Colorado); and “[t]he nature and seriousness of the danger to any person or the community that would be posed by the person’s release”²² (Wyoming).

Likewise, if the person charged is accused of a violent crime, 2021 Enrolled Joint Resolution 6 would authorize courts to consider the person’s previous convictions in imposing bail. Various other states—Ohio, Pennsylvania, and Tennessee, to name a few—

16. Note that other states’ laws relating to bail procedures refer to courts, judges, or judicial officers. For the sake of simplicity, this publication uses “courts” to encompass all three terms.

17. Cal. Const. art. I, § [12](#).

18. W. Va. Code § [62-1C-1A](#).

19. Ala. Rules Crim. Proc. [7.2](#).

20. Ariz. Const. art. II, § [22](#).

21. Co. Rev. Stat. § [16-4-104](#).

22. Wyo. R. Prac. & P. [46.1](#).

expressly authorize courts to take into account a defendant's criminal record in imposing bail or other conditions of pretrial release.²³ Additionally, the resolution would allow courts to consider "the need to prevent the intimidation of witnesses," as is permitted in various other states, such as Arizona, Connecticut, and Delaware.²⁴

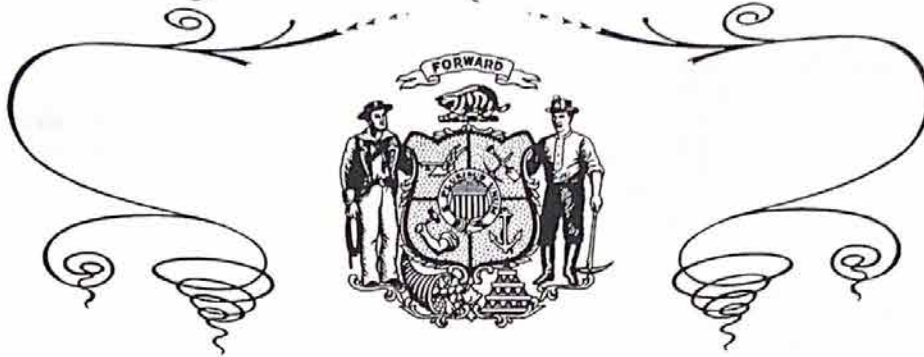
Conclusion

In sum, the constitutional amendment proposed under 2021 Enrolled Joint Resolution 6 would grant courts wider discretion to impose conditions of pretrial release, including monetary conditions of pretrial release. Accordingly, the resolution contributes to a broader national debate about whether and how conditions of pretrial release and bail serve the goals of pretrial release. Will expanding the grounds for imposing bail protect the public from potential harm, as proponents allege? Or, as opponents counter, will it crowd jails with individuals who lack the financial resources to post bail but pose little risk to public safety? If the legislature adopts an identical version of the resolution during the 2023–24 legislative session, Wisconsin voters will be asked to decide the issue. ■

23. Ohio Crim. R. [46](#); 234 Pa. Code § [523](#); Tenn. Code. Ann. § [40-11-118](#).

24. Ariz. Const. art. 2, § [22](#); Conn. Gen. Stat. § [54-64a](#); Del. Code Ann. tit. [11](#), § [2104](#).

State of Wisconsin



2021 Assembly Joint Resolution 107

ENROLLED JOINT RESOLUTION

To amend section 8 (2) of article I of the constitution; **relating to:** conditions for release prior to conviction, including the imposition of bail (first consideration).

Resolved by the assembly, the senate concurring, That:


SECTION 1. Section 8 (2) of article I of the constitution is amended to read:

[Article I] Section 8 (2) 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 as defined by the legislature by law, 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, or if the person is accused of a violent crime as defined by the legislature by law, only upon a finding that there is a reasonable basis to believe that the 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, and the potential affirmative defenses of the accused. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release.

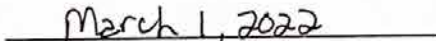
Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for three months previous to the time of holding such election.



Senator Chris Kapenga
President of the Senate



Representative Robin J. Vos
Speaker of the Assembly



Date



Edward A. Blazel
Assembly Chief Clerk