



State of Wisconsin  
2019 - 2020 LEGISLATURE

LRB-3771/1  
MLJ:emw&kjf

## 2019 ASSEMBLY BILL 609

November 15, 2019 - Introduced by Representatives DUCHOW, HUTTON, KULP, WICHGERS, KNODL, DITTRICH, QUINN and STEINEKE, cosponsored by Senators WANGGAARD, OLSEN and JACQUE. Referred to Committee on Judiciary.

1     **AN ACT** *to repeal* 969.035 (3) (b) and 969.035 (6) (c); *to renumber and amend*  
2           969.035 (3) (a), 969.035 (3) (c) and 969.035 (8); *to amend* 757.69 (1) (b), 969.035  
3           (2) (intro.), 969.035 (2) (a), 969.035 (2) (b), 969.035 (3) (intro.), 969.035 (4),  
4           969.035 (5), 969.035 (6) (a), 969.035 (6) (b), 969.035 (7), 969.035 (9) and 969.035  
5           (10); and *to create* 969.035 (2) (c), 969.035 (3) (bm), 969.035 (6) (am), 969.035  
6           (6) (cm) and 969.035 (12) of the statutes; **relating to:** pretrial detention.

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### ***Analysis by the Legislative Reference Bureau***

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill was prepared for the Joint Legislative Council's Study Committee on Bail and Conditions of Pretrial Release. Under current law, a court may deny release to a defendant prior to trial under a procedure prescribed by statute if the defendant is accused of committing one of certain specified crimes or is accused of committing a violent crime, as defined by statute, and has previously been convicted of a violent crime. The statutory pretrial detention procedure is authorized by Article I, Section 8 (3), of the Wisconsin Constitution, which also

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prescribes many of the requirements that a statutory pretrial detention procedure must contain.

This bill makes a variety of changes to the pretrial detention procedure. These changes are described below. This bill takes effect only if an amendment to Article I, Section 8 (3), of the Wisconsin Constitution is ratified.

Court commissioners authorized to conduct pretrial detention hearings

Under current law, court commissioners may conduct initial appearances and set bail. This bill specifies that court commissioners are authorized to conduct pretrial detention hearings.

Eligibility for pretrial detention

Under current law, a person is eligible for pretrial detention if he or she is accused of committing one of certain specified crimes or is accused of committing a violent crime, as defined by statute, and has previously been convicted of a violent crime. This bill provides that a person is also eligible for pretrial detention if he or she is accused of committing any other offense and 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.

Requesting pretrial detention

Under current law, to initiate the statutory pretrial detention procedure, a district attorney is required to make certain allegations to the court and file a copy of a complaint charging commission of a crime that qualifies the defendant for pretrial detention. This bill allows a district attorney to request a pretrial detention hearing by making a motion to the court alleging that the defendant is eligible for denial of release and that no available condition 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. The bill removes the requirement that a district attorney file a copy of the complaint charging commission of a qualifying crime when moving the court to detain the defendant.

The bill also provides that a court may also hold a pretrial detention hearing, upon its own motion, with respect to defendants who are eligible for pretrial detention by virtue of being accused of "any other offense" and there is a serious risk the person poses a danger of inflicting serious bodily harm on a member of the community; the person will intimidate a witness; or there is a serious risk that the person will not appear in court as required.

Rules governing the pretrial detention hearing

Current law specifies that in a pretrial hearing "the evidence shall be presented in open court with the right of confrontation, right to call witnesses, right to cross-examination and right to representation of counsel." Current law also provides that the rules of evidence in criminal trials govern the admissibility of evidence at a pretrial detention hearing.

This bill provides that the defendant has the right to be represented by counsel and shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses, and to present information by proffer or otherwise. This bill 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

Current law provides that, at the pretrial detention hearing, the state has the burden of going forward and proving both of the following by clear and convincing

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evidence: (1) that the defendant committed an offense for which pretrial detention is available; and (2) that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses.

This bill eliminates the requirement that the state prove by clear and convincing evidence that the defendant committed the predicate offense. It replaces this with a requirement that the state shall establish probable cause that the defendant committed the offense for which he or she has been charged.

This bill 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. The standard of proof for rebutting the presumption is the preponderance of the evidence.

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 or prevent the intimidation of witnesses.

Pretrial detention time limits

Current law allows a court to detain a defendant for 10 days prior to a pretrial detention hearing if the district attorney has met the requirements for initiating the pretrial detention process and for 60 days following a pretrial detention hearing if the state makes the required showing.

This bill 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. It also provides that the court may extend this 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

This bill provides that the pretrial 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 that 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.

Determining whether delay is caused by defendant

Current law provides that in calculating the time periods for which a defendant may be detained, the court shall omit any period of time found by the court to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant. Current law provides that delay is caused by the defendant only if the delay is "expressly requested" by the defendant. The bill removes the provision providing that delay is caused by the defendant only if the delay is expressly requested by the defendant.

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1           **SECTION 1.** 757.69 (1) (b) of the statutes is amended to read:

2           757.69 (1) (b) In criminal matters issue summonses, arrest warrants or search  
3 warrants, determine probable cause to support a warrantless arrest, conduct initial  
4 appearances of persons arrested, set bail, inform the defendant in accordance with  
5 s. 970.02 (1), conduct pretrial detention hearings under s. 969.035, refer the person  
6 to the authority for indigency determinations specified under s. 977.07 (1), conduct  
7 the preliminary examination and arraignment, and, with the consent of both the  
8 state and the defendant, accept a guilty plea. If a court refers a disputed restitution  
9 issue under s. 973.20 (13) (c) 4., the circuit court commissioner shall conduct the  
10 hearing on the matter in accordance with s. 973.20 (13) (c) 4.

11           **SECTION 2.** 969.035 (2) (intro.) of the statutes is amended to read:

12           969.035 (2) (intro.) ~~A circuit court may deny~~ person is eligible for denial of  
13 release from custody under this section to any of the following persons if any of the  
14 following applies:

15           **SECTION 3.** 969.035 (2) (a) of the statutes is amended to read:

16           969.035 (2) (a) ~~A~~ The person is accused of committing an offense under s.  
17 940.01, 940.225 (1), 948.02 (1) or (2), 948.025, or 948.085.

18           **SECTION 4.** 969.035 (2) (b) of the statutes is amended to read:

19           969.035 (2) (b) ~~A~~ The person is accused of committing or attempting to commit  
20 a violent crime, and the person has a previous conviction for committing or  
21 attempting to commit a violent crime.

22           **SECTION 5.** 969.035 (2) (c) of the statutes is created to read:

23           969.035 (2) (c) The person is accused of committing or attempting to commit  
24 any other offense and any of the following applies:

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1           1. There is a serious risk that the person poses a danger of inflicting serious  
2           bodily harm on a member of the community.

3           2. There is a serious risk that the person will intimidate a witness.

4           3. There is a serious risk that the person will not appear in court as required.

5           **SECTION 6.** 969.035 (3) (intro.) of the statutes is amended to read:

6           969.035 (3) (intro.) A court may proceed under this section if as follows:

7           (am) Upon motion by the district attorney alleges alleging to the court and  
8           ~~provides the court with documents~~ as follows:

9           **SECTION 7.** 969.035 (3) (a) of the statutes is renumbered 969.035 (3) (am) 1. and  
10          amended to read:

11          969.035 (3) (am) 1. ~~Alleges that~~ That the defendant is eligible for denial of  
12          release under sub. (2) (a) ~~or (b) to (c).~~

13          **SECTION 8.** 969.035 (3) (b) of the statutes is repealed.

14          **SECTION 9.** 969.035 (3) (bm) of the statutes is created to read:

15          969.035 (3) (bm) Upon its own motion if the defendant is eligible for denial of  
16          release under sub. (2) (c).

17          **SECTION 10.** 969.035 (3) (c) of the statutes is renumbered 969.035 (3) (am) 2.  
18          and amended to read:

19          969.035 (3) (am) 2. ~~Alleges that~~ That no available conditions of release will ~~not~~  
20          adequately protect members of the community from serious bodily harm ~~or~~, prevent  
21          the intimidation of witnesses, or reasonably assure the defendant's appearance in  
22          court when required.

23          **SECTION 11.** 969.035 (4) of the statutes is amended to read:

24          969.035 (4) If the court determines that the district attorney has complied with  
25          sub. (3), the court may order that the detention of a person who is currently in custody

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1 be continued or may issue a warrant commanding any law enforcement officer to  
2 bring the defendant without unnecessary delay before the court. When the  
3 defendant is brought before the court, he or she shall be ~~given a copy of the documents~~  
4 ~~specified in sub. (3)~~ and informed of his or her rights under this section and s. 970.02  
5 (1) and (6).

6 **SECTION 12.** 969.035 (5) of the statutes is amended to read:

7 969.035 (5) A pretrial detention hearing is a hearing before a court for the  
8 purpose of determining if ~~the continued detention of the defendant is justified~~  
9 whether any available conditions of release would reasonably protect members of the  
10 community from serious bodily harm, prevent the intimidation of witnesses, and  
11 reasonably assure the defendant's appearance in court when required. A pretrial  
12 detention hearing may be held in conjunction with a preliminary examination under  
13 s. 970.03 or a conditional release revocation hearing under s. 969.08 (5) (b), but  
14 separate findings shall be made by the court relating to the pretrial detention,  
15 preliminary examination, and conditional release revocation.

16 **(5m)** The pretrial detention hearing shall be commenced within 10 days from  
17 the date the defendant is detained or brought before the court under sub. (4). The  
18 defendant may not be denied release from custody in accordance with s. ss. 969.02  
19 and 969.03 for more than 10 days prior to the hearing required by this subsection.

20 **SECTION 13.** 969.035 (6) (a) of the statutes is amended to read:

21 969.035 (6) (a) The state ~~has the burden of going forward and proving by clear~~  
22 ~~and convincing evidence that the defendant committed an offense specified under~~  
23 ~~sub. (2) (a), or that the defendant committed or attempted to commit a violent crime~~  
24 ~~subsequent to a prior conviction for a violent crime~~ shall establish probable cause  
25 that the defendant committed the offense for which he or she has been charged.

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1           **SECTION 14.** 969.035 (6) (am) of the statutes is created to read:

2           969.035 (6) (am) If sub. (2) (a) or (b) applies, there is a rebuttable presumption  
3 that available conditions of release will not adequately protect members of the  
4 community from serious bodily harm, prevent the intimidation of witnesses, or  
5 assure the defendant's appearance in court when required. The standard of proof for  
6 a rebuttal of the presumption of pretrial detention is a preponderance of the  
7 evidence. If the defendant cannot establish proof to rebut this presumption, the court  
8 may order the defendant's detention in accordance with sub. (8). If the defendant has  
9 rebutted the presumption by a preponderance of the evidence or if the presumption  
10 does not apply, the state may proceed to seek pretrial detention under par. (b).

11           **SECTION 15.** 969.035 (6) (b) of the statutes is amended to read:

12           969.035 (6) (b) The state ~~has the burden of going forward and proving~~ shall  
13 prove by clear and convincing evidence that available conditions of release will not  
14 adequately protect members of the community from serious bodily harm ~~or~~, prevent  
15 the intimidation of witnesses, or assure the defendant's appearance in court when  
16 required unless the presumption under par. (am) applies and has not been rebutted.

17           **SECTION 16.** 969.035 (6) (c) of the statutes is repealed.

18           **SECTION 17.** 969.035 (6) (cm) of the statutes is created to read:

19           969.035 (6) (cm) The defendant has the right to be represented by counsel. The  
20 defendant shall be afforded an opportunity to testify, to present witnesses, to  
21 cross-examine witnesses who appear at the hearing, and to present information by  
22 proffer or otherwise. The rules concerning admissibility of evidence in criminal trials  
23 do not apply to the presentation and consideration of information at the hearing.

24           **SECTION 18.** 969.035 (7) of the statutes is amended to read:

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1           969.035 (7) If the court does not make the findings under sub. (6) (a) and (b)  
2 and the defendant is otherwise eligible, the defendant shall be released from custody  
3 with or without conditions in accordance with ~~s. ss. 969.02 and~~ 969.03.

4           **SECTION 19.** 969.035 (8) of the statutes is renumbered 969.035 (8) (a) and  
5 amended to read:

6           969.035 (8) (a) ~~If the~~ The court makes the findings may deny release if it finds  
7 probable cause under sub. (6) (a) and ~~(b)~~, finds that either the defendant has not  
8 rebutted the presumption under sub. (6) (am) or that the state has made the required  
9 showing under sub. (6) (b).

10           (b) If the court may deny bail denies release to the defendant under par. (a), it  
11 may be for an additional period not to exceed 60 days following the hearing if the  
12 defendant is accused of a misdemeanor or 90 days if the defendant is accused of a  
13 felony, except that the court may extend the period, upon its own motion or the  
14 motion of any party, if it finds that the ends of justice are best served by extending  
15 that period. An extension may not be granted under this paragraph unless the court  
16 sets forth in the record of the case, either orally or in writing, its reasons for finding  
17 that the ends of justice are best served by extending the period of confinement. If the  
18 time period passes and the defendant is otherwise eligible, he or she shall be released  
19 from custody with or without conditions in accordance with ~~s. ss. 969.02 and~~ 969.03.

20           **SECTION 20.** 969.035 (9) of the statutes is amended to read:

21           969.035 (9) In computing the 10-day periods under sub. (5) ~~(5m)~~ and the  
22 ~~60-day period and 90-day periods~~ under sub. (8) ~~(b)~~, the court shall omit any period  
23 of time found by the court to result from a delay caused by the defendant or a  
24 continuance granted ~~which that~~ was initiated by the defendant. ~~Delay is caused by~~  
25 ~~the defendant only if the delay is expressly requested by the defendant.~~



