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Assembly Committee on Judiciary
Testimony on AJR 107
February 2, 2022

Thank you Chairman Tusler and members of the Committee for this opportunity to testify on AJR 107, relating to eligibility and conditions for release prior to conviction of persons accused of certain crimes and considerations for imposing bail. I would also like to thank Sen. Wanggaard for his leadership in crafting this proposal.

As legislators, citizens look to us to keep our communities safe and protect fundamental rights. We want to be safe in our homes and as we walk down the street, and we want to ensure the government does not have unchecked power against an individual. With this paradigm in mind, we have introduced AJR 107.

I'd like to briefly share three stories with you.

Of course, we're familiar with Darrell Brooks, charged with six counts of homicide and numerous other felonies in connection with the Waukesha Christmas parade attack. He was out on just $1,000 bail, having been charged in connection with driving over his child's mother with his vehicle.

Jetrin Rodthong has been charged with eight crimes, including three counts of bail jumping, in connection with the shooting of a Milwaukee police officer on January 27th. In a brief five-month period of time from March of 2020 through the end of August 2020, Mr. Rodthong amassed an impressive list of charges. Fleeing an officer, released on a signature bond. Operating a vehicle without consent, felony bail jumping and resisting or obstructing an officer, released on a $300 cash bond. And finally at the end of August 2020, he was charged with fleeing an officer, causing damage to property, operating a vehicle without consent, possession of narcotic drugs, and felony bail jumping. When he shot the officer and stole the police car, Rodthong was out on just $3,000 bail for those serious offenses.

On January 13th, an off-duty Milwaukee detective was shot while attempting to prevent a carjacking in the Third Ward. The criminal complaint says that one of the bullets narrowly missed the detective's heart. Keasean J. Ellis-Brown has been charged in absentia with attempted homicide and several other charges. At the time of the shooting, he was out on $1,000 bail on a case from October that included second degree recklessly endangering safety, fleeing or eluding an officer, and resisting or obstructing an officer.

These cases are recent, but do not appear to be anomalies. Since Sen. Wanggaard and I began advocating for a constitutional amendment in 2017, communities and families around Wisconsin have been devastated by other decisions surrounding bail. Just in Milwaukee in 2021, about 1 in 5 homicide suspects were out on bail for felonies. More than half of the pending cases were for violent crimes. Milwaukee ended 2021 with a record-breaking 205 homicides.

Two sessions ago, constituents in my district raised concerns regarding a sexual predator living nearby. Although the defendant confessed to molesting his grandchildren and was later convicted, the court set bail at just $75,000 while he awaited his hearing. The defendant posted the full amount. Residents of the neighborhood were reasonably concerned for the safety of the community, particularly because there was a school bus stop at the end of his driveway.

In doing some research, we discovered that considerations for setting bail is an issue judges and court commissioners struggle with every day. According to NCSL, although 48 states permit courts to consider "dangerousness' in some fashion when crafting conditions of pretrial release, Wisconsin does not. Currently, Article 1, Section 8(2) of the Wisconsin Constitution guarantees eligibility for release under conditions designed to "assure their appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses." Furthermore, the courts have interpreted "serious bodily harm" to mean "death or risk of death."

Thus, short of "death or risk of death," the danger a defendant may pose to public safety is not a consideration in determining whether to impose bail under our state Constitution. In the example I gave a moment ago, the court could not consider the defendant's proximity to the school bus stop, or the number of children that live in the neighborhood because – contrary to common sense – child molestation is not considered "serious bodily harm."

The Wisconsin Constitution does contain a provision that permits the Legislature to create a procedure that allows individuals accused of certain crimes to be detained prior to trial. However, this provision contains numerous restrictions that, in practice, have made the pretrial detention procedure not useable. In fact, my office has been told that since its adoption in the early 1980's, this pretrial detention procedure is so unworkable and impractical that it has never been used. Instead, cash bail is often used as a mechanism to ensure these individuals remain detained, even though this use of cash bail is not permitted under the state Constitution. Judges should not have to find creative workarounds to the Constitution to keep dangerous people off the streets.

AJR 107, as amended by Assembly Substitute Amendment 1, suggests a common-sense way to balance public safety and fundamental rights. First, it would change "serious bodily harm" to "serious harm as defined by the legislature by law." Second, it would require the court to make findings based on the "totality of the circumstances," including the seriousness of the charged offense, convictions for past violent crimes, probability that the accused will fail to appear in court, the need to protect the community from serious harm as defined by the legislature, preventing witness intimidation, and potential affirmative defenses that the accused might have.

It is my hope that the Committee will support AJR 107, as amended by Assembly Substitute Amendment 1, to give judges and court commissioners the ability to consider other important factors when setting bail.

Thank you again for the opportunity to testify. I am happy to answer any questions.

# Van H. Wanggaard

Wisconsin State Senator

**TESTIMONY ON ASSEMBLY JOINT RESOLUTION 107**

Thank you committee members for today's hearing on Assembly Joint Resolution 107, which amends our state constitution so that judges can consider a multitude of factors when setting bail.

While preparing for today's hearing, I went back and read my testimony for 2017 Assembly Joint Resolution 93. Yes, you heard that correctly - Twenty Seventeen. Representative Duchow and I first proposed this change 5 years ago. I then reviewed the materials from the 2018 Legislative Council Study committee on bail and pre-trial release, of which I was chair, and Representative Duchow was a member.

I make a point of mentioning this because this is not something that is a knee-jerk reaction to a specific incident. Many people may think this proposal is because of the Waukesha parade tragedy, or the attempted murder of the off-duty law enforcement officer last week in Milwaukee. While low bail was clearly a factor in those incidents, they were not and are not the reason for AJR 107. The fact is Wisconsin's bail system has been in need of change for a long time.

Most people are shocked to learn that under Article I, Section 8, Clause 2 of Wisconsin's Constitution a bail amount, referred to as a "monetary condition of release," may only be in the amount that ensures a defendant appears for trial. Under Wisconsin's Constitution, the seriousness of the offense, the potential danger to public safety, and criminal history is not permitted to be considered when setting monetary bail. 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 years, we've seen the detrimental impacts of this law. You don't have to go far to find the impact. You can look at last week and the shooting of the police officer. You can look at last year, with the 6 people killed in the Waukesha parade. You can see it in the Fox 6 report on December 19, 2021 which found that of the 117 people charged with homicide in Milwaukee County last year, 25 of them were out on bail that ranged from a high of $10,000 down to a zero dollar signature bond. That's just Milwaukee County. If people looked at other counties, you would likely see similar issues.

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Based on feedback from legislators and interested parties, we have offered Senate Substitute Amendment 1, which you should have received this morning. This amendment focuses on Clause 2 of Article 1, Section 8. It gives judges broader discretion in setting conditions of release and requires judges to set bail, or a "monetary condition," based on a number of factors.

As we'll undoubtedly hear today, bail is a legally and constitutionally complicated subject. Therefore, changes should be carefully considered and evaluated. After 5 years, this proposal has been through the ringer, and in my opinion, threads the needle between protecting the public and victims, and preserving the presumption of release prior to conviction. Assembly Joint Resolution 107 and the public we serve to protect, deserve your support.

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Assembly Committee on Judiciary
Assembly Joint Resolution 107
Wednesday, February 2, 2022

Good morning Chair Tusler and members,

Thank you for having this hearing on Assembly Joint Resolution (AJR) 107, which proposes changes to the Wisconsin Constitution related to eligibility and conditions for release prior to conviction. The State Public Defender (SPD) is concerned that these changes will result in a significant increase in the number of people detained pretrial who are presumed innocent and do not pose a serious risk to the community. Our testimony is focused on Assembly Substitute Amendment 1 to AJR 107.

It is a fundamental principle that individuals accused of committing a crime are presumed innocent until proven guilty. As the U.S. Supreme Court has noted, "[i]n our society social liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). In determining whether to impose pretrial conditions of release under current law, a court first considers whether an individual is likely to appear at future court hearings. A monetary condition of release, bail, may be imposed only if the court finds that there is a reasonable basis to believe it is necessary to ensure the individual's appearance in court. The court may also impose any reasonable non-monetary condition of release to ensure a defendant's appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. Courts also have the ability to deny pretrial release from custody to persons accused of certain violent crimes.

AJR 107 as amended makes several changes that run counter to the 5th and 8th amendments to the United States Constitution.

First, the resolution would add language to Article I of the Wisconsin Constitution requiring that judges consider four new factors in determining the amount of monetary bail imposed. These factors--the seriousness of the offense charged, a previous conviction for a violent crime, and the need to protect members of the community from serious harm or prevent the intimidation of witnesses--are appropriate when setting conditions of release, but are not appropriate considerations in determining how much money an accused person must post to be released pretrial. These four new factors are prefaced with the language that the judge or court commissioner can consider the "totality of the circumstances." This broad phrase would seem to indicate that Judges are free to use whatever factors they want to consider when setting cash bail. There is also a fifth factor included on page 2, line 14 regarding the "potential affirmative defenses of the accused." Practically, this is not a factor that anyone, including the client and their attorney, would know at the hearing to set bail. Including this as a factor to consider when setting bail is neither practically feasible nor constitutionally permitted. Adding these considerations to the Constitution creates the likelihood that judges will set bail that violates the "excessive bail" prohibition under the 8th Amendment to the U.S. Constitution.

The second change to Article I suggested by the resolution, amending "serious bodily harm" to "serious harm" creates an ambiguity that is unworkable. The vague term "serious harm" would seem to 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. Given this overly broad standard, it is likely that far more people will be detained pretrial than under our current standards.

The anticipated effect of this language is that Wisconsin will see an increase in the number of people who are presumed innocent, and unnecessarily incarcerated while they await trial. This is also bound to result in lengthy, and costly litigation.

In addition, this proposal runs counter to what many other states are looking at when considering the future role of bail and monetary conditions in the criminal justice system.

The State Public Defender (SPD) is a member of the Statewide Criminal Justice Coordinating Council (CJCC), a group formed by the Governor and co-chaired by the Attorney General and Department of Corrections Secretary. One of the most significant initiatives of the CJCC has been to work on the implementation of Evidence-Based Decision Making in the criminal justice system; the role of monetary bail versus a "preventive detention" model has been given high priority. At a joint meeting of the Assembly Corrections and Senate Judiciary committees in October 2017, the CJCC provided background on its work in this area.

A better model to consider is a preventive detention system that significantly disincentivizes the role that money plays in this system by instead primarily determining pretrial release on a case-by-case basis through the use of a risk assessment tool combined with judicial discretion. Persons are either determined to be of sufficient risk to be held in custody pretrial or are released with non-monetary conditions pending future court proceedings. This is an improvement over the current process, which allows people with access to money, though potentially high-risk, to be released before trial, while people who are low-risk, but who are unable to post even modest amounts of cash bail, often remain in custody.

Currently, more than 22 states and the federal courts use a preventive detention system rather than monetary bail. These systems have shown success in both protecting public safety (fewer crimes committed by persons released pretrial) and in reducing incarceration costs (fewer low-risk individuals in custody). A risk-based system that removes money as the primary determinant for pretrial release is both more fair and more protective of public safety than the current system in Wisconsin.

A recent overview of preventive detention in the United States prepared by the National Center for State Courts' Pretrial Justice Center can be found at:
https://www.ncsc.org/__data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf

In addition, there are empirical studies that demonstrate that the length of time someone is held pretrial has a measurable impact on future criminal activity. This is based on the principle that detaining both low and high-risk offenders in the same facility increases the likelihood of the low-risk offender engaging in future criminal behavior. When a low-risk defendant is held more than 2-3 days, they are 40% more likely to commit another crime after obtaining pretrial release. Being held 8-14 days pretrial increases the likelihood 51% that a low-risk defendant will commit another crime within two years after the completion of their case.

Cash bail is not an adequate measure of protecting public safety. 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. Those who are poor will often be held on cash bail amounts as low as $200 which, as the data above shows, actually increased the risks of future recidivism.

To reiterate the principles spelled out in the *Salerno* decision, bail should be the carefully limited exception, not the norm. Changing the constitution to make cash bail more pervasive in the criminal justice system makes changes that affect the vast majority of people arrested for low level crimes to try and predict public safety for the minority of those arrested. A comprehensive report on cash bail was released by the United States Commission on Civil Rights in January. It highlights a significant amount of data that shows the negative impact of cash bail without a corresponding increase in community safety. One national statistic highlighted was that nationwide in 2016, 5% of all arrests were for violent offenses, 83% were for low level offenses. In 2018 in Wisconsin, there were 247,794 arrests. 3.2% were for violent crime. Even adding in serious crimes that aren't necessarily violent, that number is 13.8%.

Thank you for the opportunity to testify on Assembly Joint Resolution 107. We urge the committee to strongly consider whether the resolution is the answer to a perceived problem or whether a more comprehensive discussion by all criminal justice system partners should be held before amending the Constitution. As the U.S. Supreme Court has explained, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)).

Submitted by:
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## Moore, David

**From:** Rep.Tusler
**Sent:** Wednesday, February 02, 2022 9:08 AM
**To:** Rep.Cabrera; Rep.Hebl; Rep.Horlacher; Rep.Kerkman; Rep.Ortiz-Velez; Rep.Ramthun; Rep.Sortwell; Rep.Thiesfeldt; Rep.Tusler
**Cc:** Schmidt, Melissa; Moore, David
**Subject:** FW: Please Oppose AJR 107

Good Morning Members,
Please find a message below regarding AJR 107.

Best Regards,
Kathryn E. Heitman
Committee Clerk
Assembly Committee on Judiciary
608-237-9363

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**From:** James Connolly <connollylaw@prodigy.net>
**Sent:** Tuesday, February 1, 2022 5:02 PM
**To:** Rep.Tusler <Rep.Tusler@legis.wisconsin.gov>; Rep.Kerkman <Rep.Kerkman@legis.wisconsin.gov>
**Cc:** Rep.Andraca <Rep.Andraca@legis.wisconsin.gov>
**Subject:** Please Oppose AJR 107

Dear Representative Tusler and Kerkan:

I write to you, respectively, as Chairperson and Vice Chairperson of the Assembly Judiciary Committe, with a copy to my District's Representative, Ms. Andraca. I respectfully urge you to oppose AJR 107, which calls for amending the bail provision of the Wisconsin Constitution.

The amendment proposal represents an overreaction to the infamous November 2021 Waukesha parade attack and recent shootings of Milwaukee Police Officers. It would also be antithetical to the longstanding notion of a free society in which people are presumed innocent of *pending charges* unless and until proven guilty beyond a reasonable doubt.

Every reasonable law abiding person was greatly upset to hear of the parade attack and news that MPD Police Officers were shot in the line of duty. An unprecedented and unforeseeable attack by a lone driver and a cluster of recent shootings of Police, however, is not a reason to suddenly throw away a constitutional principle. There have been 66 City of Milwaukee Police Officers killed in the line of duty in the last 138 years. (Fortunately, the 3 recent Officer shootings did not result in death and each Officer has already been released from hospital.) The first Officer death, back in 1884, was by gunfire. 28 other Officers have since then died by gunfire and 9 died as the result of a single bomb explosion, more than 100 years ago, in 1917. See https://www.odmp.org/agency/2509-milwaukee-police-department-wisconsin and https://city.milwaukee.gov/police/About-MPD/Memorial-Page/1917-Bombing . The shocking Waukesha parade attack was as *unprecedented* and *unforeseeable* as the 1917 bombing was. There is no reason to believe that anyone will commit similar offenses soon.

Setting an amount of cash bail *to assure that people accused of crimes appear for court proceedings* has always been appropriate. After 174 years of statehood, however, WI does not suddenly need to abandon Due Process

and start sytematically pre-emptively jailing people, as too dangerous to release, because they have been accused of a crime which is not yet proven.

Thank you for your kind attention.

James J. Connolly

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# Wisconsin Justice Initiative

January 31, 2022

Assembly Judiciary Committee
Rep. Ron Tusler, Chair
Room 22 West
State Capitol
P.O. Box 8953
Madison, WI 53708

Re: Assembly Joint Resolution 107

Dear Chair Tusler and Committee Members:

Thank you for the opportunity to provide comments on Assembly Joint Resolution 107. I offer these written remarks on behalf of the Wisconsin Justice Initiative, whose mission is to improve the quality of justice in Wisconsin by educating the public about legal issues and encouraging civic engagement in and debate about the judicial system and its operation.

Bail and pretrial release are important public policy areas that deserve careful attention. Recent violence at the Waukesha Christmas parade and in other incidents has sent shockwaves through our state. These incidents have now prompted an examination of our bail laws. I write today to highlight certain principles that should be kept in mind as the debate on these important questions moves forward.

First and foremost, it's important to understand that good bail decisions are made by relying on evidence. The problem that led to the tragedy in Waukesha was NOT that the evidence supported the decision to recommend a risky and dangerous person for release, the problem is that the evidence that was available – evidence that flagged the risk for violence and the risk for flight – was ignored.

The process of setting bail in Milwaukee County (and other jurisdictions) is assisted by a risk tool called the Public Safety Assessment (PSA). Each defendant who is arrested on new charges receives a risk score, and the results are available for prosecutors and

defense attorneys who make bail recommendations, and to court commissioners and judges, who make the ultimate bail decisions. Among the factors that the PSA "scores" are a person's prior record of convictions, the type of offense they are currently facing, their history of missing court, their history of violence, their age, and their record of prior incarceration.

Assembly Joint Resolution 107 is a proposed amendment to the Wisconsin Constitution that will allow courts to consider additional factors (beyond the likelihood to appear) in setting bail. These additional factors are set forth in the amendment and include the seriousness of the offense and the need to protect the public. However, many of these factors are already listed in chapter 969 of the statutes as appropriate considerations in setting the amount of bail, see § 969.01(4): Considerations in Setting Conditions of Release, but they are appropriately premised on an initial finding on likelihood to appear. These factors are also part of the risk assessments used in many jurisdictions. It is arguably unnecessary to include them in the Constitution.

Another concern with the proposal is that it changes the current reference to protection from "bodily harm" to "harm as defined by the legislature," which opens the door to confusion. What type of harm might be included in the future? How will it be defined with precision?

The statutes currently outline a process for detaining a defendant without bail under certain circumstances, consistent with the "public safety" approach to bail decisions – see § 969.035. If that provision as it currently exists is unworkable, the better alternative to amending the Constitution would be seeking agreement among justice system stakeholders and the public on an appropriate amendment to that statute. Such an amendment should protect the public while at the same time safeguarding the due process rights of those accused of crimes.

It is important to keep in mind, when considering this important topic of public policy, the findings of the United States Commission on Civil Rights in a report issued earlier this month ("The Civil Rights Implications of Cash Bail" – available at https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail). The report found stark racial and gender disparities when it comes to imposing cash bail. People of color and males had higher pretrial detention rates and financial conditions of release compared to other demographic groups. As the Commission noted in releasing the report, numerous negative

consequences of cash bail were documented, "including an increased likelihood of being convicted, an increased likelihood of housing insecurity, detrimental effects on employment, and an increased likelihood to engage in criminal conduct in the future." We must remember that unnecessary pretrial detention has societal costs and creates a two-tiered justice system – one for the rich, and one for the poor. A cash bail of $5,000, for example, would have a greater impact on a person working part-time at minimum wage than a wealthier person with the money easily available.

Respectfully, I submit that well-informed bail decisions do not result from "one-size fits all" bail laws. Well-informed bail decisions are made by experienced prosecutors, defense counsel and judges – *when* they rely on the evidence in each case. The key is following the evidence, meaning appropriate high cash recommendations when a person's history includes pending violent offenses, an extensive record of convictions, and a demonstrated history of missing court, as was the case with the defendant in the Waukesha Christmas parade incident. It also means release on recognizance even in some serious cases, IF the evidence shows a person is not high-risk.

It is important to remember the teaching of the United States Supreme Court from the case of *Salerno v. United States*, 481 U.S. 739 (1987), that "(i)n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Any law that violates this premise will undoubtedly face challenges under the federal constitutional standard.

Sincerely,

Craig R. Johnson
Board President