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Assembly Joint Resolution 107
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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)).

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