

# THE WISCONSIN BAIL MANUAL



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NATIONAL  
ASSOCIATION  
OF CRIMINAL  
DEFENSE LAWYERS



NACDL  
FOUNDATION FOR  
CRIMINAL  
JUSTICE

*“Pretrial decisions determine  
mostly everything.”*

– PROFESSOR CALEB FOOTE, JOHN JAY COLLEGE OF  
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This manual began with the work of the National Association of Criminal Defense Lawyers (“NACDL”) former Director of Public Defense, Colette Tvedt, and former Public Defense Training Manager, Diane DePietro Paolo Price. It is built upon the framework developed by the authors of NACDL’s first pretrial manual, *The Colorado Bail Book*, and its second manual, *The New Jersey Pretrial Manual*. The authors wish to thank all those involved in the production of the two manuals for their efforts.

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Additionally, the authors wish to thank the Foundation for Criminal Justice, which supports NACDL’s charitable efforts to improve and preserve America’s core criminal justice values by providing resources, education, training, and advocacy tools for the public and the nation’s criminal defense bar.

At the time of the publication of this manual, NACDL has a Task Force on Risk Assessment Instruments, which is conducting an exhaustive inquiry into the potential benefits and harms stemming from the reliance on risk assessment instruments. Irrespective of whatever conclusions and policies arise from the work of that task force, risk assessments are currently being used in the context of pretrial release decisions. As a result, counsel must understand them to effectively advocate for the best interests of their clients.

The goal of this manual is to support attorneys as they work to end pretrial injustice. It is our hope that all defenders, both public and private, use this resource to aggressively and consistently challenge the bail system that punishes the accused before conviction, forces guilty pleas to obtain release, and incarcerates the poor simply because they cannot afford to post a money bond.

We attempted to be as comprehensive as possible, outlining both law and research while providing practical pointers for the courtroom lawyer. We encourage all to use our work to give voice to the incarcerated accused, who deserve dedicated and robust legal representation from the moment they are deprived of their liberty.



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*“As we speak, close to three quarters of a million people reside in America’s jail system . . . . Across the country, nearly two-thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody . . . because they simply cannot afford to post the bail required . . . .”*

**– FORMER U.S. ATTORNEY GENERAL ERIC HOLDER AT THE NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE, JUNE 1, 2011**

*“Honoring defendants’ constitutional rights, such as the presumption of innocence and the right to reasonable bail before trial, requires society to accept that pretrial release decisions might unintentionally result in harm to the public. Enhancing public safety requires us to manage release and detention based on risk. So, the question is not whether courts take risks but whether they take the right risks and measure and manage risk appropriately. The justice system’s goal is to balance defendant’s rights with the need to protect the community, maintain the integrity of the judicial process, and ensure court appearance. ”*

**– HONORABLE JUDGE JEFFREY A. KREMERS,  
MILWAUKEE COUNTY CIRCUIT COURT, JUNE 2017**

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# I. INTRODUCTION

**“Indeed, a variety of stakeholders, including judges, prosecutors, defense attorneys, and private foundations ‘have been working to determine the most legal, research-based, and cost-effective way to further the purpose of bail: to maximize the release of defendants on the least restrictive conditions that reasonably assure the safety of the public and defendants’ appearance in court.”<sup>1</sup>**

Like so much of the country, Wisconsin is in the middle of bail reform. Lawmakers and actors involved in the criminal justice system realize that not only is the State of Wisconsin keeping too many people in jail, but it is incarcerating the wrong people.<sup>2</sup> State actors are paying attention to the enormous human and economic costs exacted by the overuse of pretrial detention and the application of inappropriate conditions of release.<sup>3</sup> Finally, a growing recognition exists that meaningful bail reform will not become a reality without zealous, effective advocacy by the defense.<sup>4</sup>

The challenge for meaningful change in Wisconsin lies in the fact that currently there is a patchwork of state and locally sponsored initiatives—the most significant of which is a joint partnership between the Wisconsin Department of Justice’s Criminal Justice Coordinating Council (“CJCC”) and the National Institute of Corrections’ (“NIC”) Evidence-Based Decision Making (“EBDM”) Initiative. This project began a multi-phase pilot program that involves eight counties with an eye towards expansion.<sup>5</sup> Integral features of this undertaking are interdisciplinary collaboration and the use of validated pretrial risk assessment instruments (“RAIs”).<sup>6</sup> Promisingly, additional counties have begun incorporating at least some features of this initiative into their local bail practices.<sup>7</sup>

However, until a state-wide model is put in place, Wisconsin will remain in flux. Although the state is working toward transparency and consistency in the pretrial process, it is a work in progress. As reform efforts in the state continue in fits and starts, effective pretrial release advocacy by the defense is even more crucial. The current climate presents an opportunity to engage in

<sup>1</sup> Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV 1450 (2017) (quoting KRISTIN BECHTEL ET AL., PRETRIAL JUSTICE INST., DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH 2 (2012), available at <https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=83a253bf-e833-32f4-1392-3bc48f65777b&forceDialog=0>).

<sup>2</sup> See Streaming: Marquette University Law School, *Address at Marquette University Law School - On the Issues: The Public Safety Assessment* (May 24, 2017), available at <https://law-media.marquette.edu/Mediasite/Play/31dec82c486d4d2085b106ab1aa03e831d?catalog=de7ec70d-25b8-45ef-85e1-3b061da506ac> [hereinafter *Marquette*]; see also Hon. Jeffrey A. Kremers, *Milwaukee Moves Away from Money Bond*, WIS. LAWYER (June 2017), available at <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=90&issue=6&articleid=25667> [hereinafter Kremers].

<sup>3</sup> See CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER & LAURA AND JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION*, (2013), available at [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) [hereinafter *THE HIDDEN COSTS*].

<sup>4</sup> For example, the San Francisco Public Defenders Office has created a special bail unit to litigate bail issues. See Tamara Aparton, *Contesting Bail to Take on Racial Disparities in San Francisco Jails*, SAN FRANCISCO PUBLIC DEFENDER (Apr. 25, 2016), available at <http://sfpublicdefender.org/news/2016/04/contesting-bail-to-take-on-racial-disparities-in-sf-jail/> (citing Kamala Kelkar, *Contesting Bail to Take on Racial Disparities in San Francisco Jails*, PBS NEWS HOUR (Apr. 24, 2016), available at <https://www.pbs.org/newshour/nation/contesting-bail-to-take-on-racial-disparities-in-san-francisco-prisons/>). See also *About Our Office – Felony Early Representation Unit*, MIAMI DADE PUBLIC DEFENDER (2018), available at [http://www.pdmiami.com/our\\_office.htm](http://www.pdmiami.com/our_office.htm).

<sup>5</sup> The Wisconsin Evidence Based-Decision Making (“EBDM”) Initiative Pretrial Pilot Protocol involves the following counties: La Crosse, Eau Claire, Outagamie, Marathon, Waukesha, Milwaukee, Chippewa, and Rock. See Criminal Justice Coordinating Council, *Phase VI: Implementation* (2016), available at <https://cjcc.doj.wi.gov/initiative/nicebdmi-phasev/phase-vi> [hereinafter EBDM Initiative]. See also News Release from Brad D. Schimel, Att’y Gen., Wisconsin Moves to Implementation Phase of Evidence-Based Decision Making Initiative in State and Local Criminal Justice Systems (Oct. 3, 2016), available at [https://www.doj.state.wi.us/sites/default/files/news-media/10.3.16\\_EBDM\\_Grant.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/10.3.16_EBDM_Grant.pdf).

<sup>6</sup> EBDM Initiative, *supra* note 5.

<sup>7</sup> In 2017, Professor Michele LaVigne, one of the authors of this manual, conducted an informal poll in conjunction with the Wisconsin State Public Defender’s Office Training Division. The questions were distributed to staff attorneys around the state inquiring about bail practices. Fifty-six attorneys, representing 53 counties responded. The answers to these questions provided anecdotal information and a general sense of practices throughout the state. The responses do not rise to the level of empirical data [hereinafter SPD Poll]. Details about the poll can be obtained by contacting Professor Michele LaVigne.

meaningful conversations about bail practices and the role and goals of our pretrial justice system. Defense attorneys throughout the state are uniquely poised to be agents of desperately needed change that can have a significant and lasting impact on the lives of individual clients as well as Wisconsin's entire criminal justice system.

## A. PRESUMPTION OF RELEASE

By statute, Wisconsin defines “bail” as the “monetary conditions of release.”<sup>8</sup> Its sole purpose is to assure an individual's appearance in court. As was made clear by the 1981 modifications to the bail statute, monetary conditions of release (bail) may only be imposed “upon a finding by the court that there is a reasonable basis to believe that bail *is necessary to assure appearance in court*. In determining whether any conditions of release are appropriate, the judge shall first consider the likelihood of the defendant appearing for trial *if released on his or her own recognizance*.”<sup>9</sup>

The statute further instructs that “if bail is imposed, it shall only be in the amount found necessary to assure the appearance of the defendant.”<sup>10</sup>

The Wisconsin Constitution is equally clear and consistent with this viewpoint,<sup>11</sup> providing, “[m]onetary 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*.”<sup>12</sup>

These statutory and constitutional provisions embody two key principles: (1) judges are to begin bail decisions with the presumption of releasing individuals on their own recognizance, i.e., without having to post any monetary amount, and (2) in deciding whether a “reasonable basis” exists to believe a monetary bond is necessary, the court's

only consideration is whether the accused will appear in court. Thus, in following these principles, judges must favor the use of non-monetary release and make individualized bail determinations.<sup>13</sup> Unfortunately, a large chasm exists between these principles and actual practices in courtrooms across the state.

Until recently, little information existed about the actual bail-setting practices throughout Wisconsin. Anecdotal information gathered demonstrates that despite unambiguous statutory and constitutional provisions, county systems are driven by local custom, courthouse culture, current events, politics, and funding incentives.<sup>14</sup> These factors influence all aspects of bond decisions and help explain the wide variations seen across the state. Information from a poll of public defenders from across the state conducted by a co-author of this manual, Professor Michele LaVigne, reveals that in some counties, the statute's presumption of release is interpreted as a mandate; in others, it is treated as merely a suggestion.<sup>15</sup> Some judges and commissioners rely entirely on “the nature of the offense” in setting a high cash bond and show no regard to the individual's circumstances or what may be necessary to meet the statutory requirement to assure an accused's appearance in court; while other judges tack more closely to the letter of the law. An official in one county may believe “living in Milwaukee” necessitates release *only* upon cash despite Milwaukee being a short drive away, and in other, more distant counties, an official may determine that living in Milwaukee is a factor militating in favor of release because of the ease of interstate travel.<sup>16</sup>

In 2017, Measures for Justice (“MFJ”), a non-profit organization dedicated to developing data-driven performance measures to “assess and compare the criminal justice

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<sup>8</sup> Wis. STAT. § 969.001(1) (2010).

<sup>9</sup> Wis. STAT. § 969.01 (2010) (emphasis added).

<sup>10</sup> Wis. STAT. § 969.01(4) (2010).

<sup>11</sup> There has been legislation proposed recently seeking to amend this provision and add consideration of dangerousness as a factor in setting a monetary bail. See LEGISLATIVE COUNCIL STUDY COMM. ON BAIL AND CONDITIONS OF PRETRIAL RELEASE, WIS. STATE LEG. (2018), available at <https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/>. A bi-partisan Legislative Council Study Committee that is “directed to review Wisconsin's pretrial release system, including considerations for courts in imposing monetary bail and for denying pretrial release” is currently underway.” *Id.* This Committee also has been 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.” *Id.* At the conclusion of their work, the Committee is to “recommend legislation regarding bail and pretrial release that enhances public safety, respects the constitutional rights of the accused, considers costs to local governments, and incorporates evidence-based strategies.” *Id.*

<sup>12</sup> Wis. CONST. art I § 8(2) (emphasis added).

<sup>13</sup> Wis. STAT. § 969.07(4) (2010).

<sup>14</sup> SPD Poll, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



process from arrest to post-conviction on a county-by-county basis<sup>17</sup> conducted a state-wide survey of all stages of Wisconsin’s criminal justice process. Wisconsin was the first state to have every one of its counties analyzed in this fashion. Phase One of the MFJ study examined data for five years (2009-13) and measured 23 aspects of the criminal justice system from pretrial release to sentencing.<sup>18</sup> Consistent with anecdotal information, the MFJ data revealed significant differences from county to county.<sup>19</sup>

In fact, the most striking disparity examined by MFJ appears in the data assessing bail decisions, specifically, as it relates to the use of non-monetary release for individuals accused of nonviolent misdemeanors. When MFJ examined over 100,000 cases between 2012 and 2013, they found a significant discrepancy in practices between jurisdictions—with some counties releasing those arrested for a non-violent misdemeanor without cash bail at twice the rate of other counties.<sup>20</sup>

## B. CONDITIONS OF RELEASE

Conditions of release are yet another area where the practice varies from county to county. Release conditions can be onerous. The “restraints on [an individual’s] liberty”<sup>21</sup> can sometimes end up costing an accused as much, if not more, money than a cash bail.<sup>22</sup> Release condition violations are also the basis for one of Wisconsin’s biggest pretrial concerns: bail jumping charges.

Many counties require released individuals to pay the costs of these “services” with very few counties allowing fee waivers. The costs can also be assessed on a sliding scale based on the accused’s ability to pay, but not all

counties will permit this assessment.<sup>23</sup> As a result, the same individuals placed in jeopardy of detention because they lack the resources to pay a monetary bond face the same financial barriers to access these non-monetary conditions of release as well.

Other hidden costs can also be incurred by non-monetary release conditions. For instance, individuals required to regularly meet with a pretrial officer may sustain additional costs for transportation to and from each appointment, and their employment may be compromised as their ability to work certain hours or shifts can be limited due to obligations imposed by pretrial monitoring or random drug test appointments. Further, there are the intangible costs created by the court system treating people as if they are guilty long before the accused has had a chance to present evidence, call witnesses, or argue the case.<sup>24</sup> It can leave the accused feeling vulnerable, hopeless, and distrustful toward the courts, which may cause them to be less willing to contest the charges because of a lack of faith in the system’s fairness. Likewise, the burdensome nature of release conditions may lead some to plead guilty to escape their pretrial status.

No data exists regarding the imposition of pretrial release conditions in all counties, but anecdotal evidence yet again paints a picture of radical inconsistencies.<sup>25</sup> Some courts impose release conditions beyond those in the standard bond form only after the State has met the burden of showing additional conditions are necessary. Others routinely impose a litany of conditions with little regard for whether those conditions bear a relation to the charges or the needs of the accused. For example,

<sup>17</sup> *About – Background*, MEASURES FOR JUSTICE (2018) (showing Measures for Justice is currently working to analyze Wisconsin County data for 2014-2016), available at <https://measuresforjustice.org/about/overview/>.

<sup>18</sup> *See Pretrial Release Violations Data*, MEASURES FOR JUSTICE (2018), available at <https://measuresforjustice.org/portal/exploration?l=WI&m=12&sl=WI&sm=12&fg=1&f=1&c=m&md=1&ef=12.1>.

<sup>19</sup> *Id.* The data spans cases filed in 2009-13. Certain criminal justice stakeholders have leveled criticisms against MFJ’s methodology. Specific concerns center around the fact that MFJ relies on Consolidated Court Automation Programs (“CCAP”), which often suffers from irregularities and delays in data entry. Nevertheless, even if the data is imperfect, the MFJ study shows clear patterns relating to pretrial release practices which should not be ignored.

<sup>20</sup> By MFJ’s definition, this data set included individuals arrested for non-violent misdemeanors, who had no felony charges associated with that arrest, and who had not had a violent offense conviction in the state of Wisconsin for three years preceding the arrest at issue. *Compare Nonviolent Misdemeanor Cases with Monetary Bail Data*, MEASURES FOR JUSTICE (2018), available at <https://measuresforjustice.org/portal/exploration?l=WI&m=11&sl=WI&sm=123&fg=1&f=1&c=m&md=1&ef=123.1>, with *Nonviolent Misdemeanor Cases with Nonmonetary Release (ROR)*, MEASURES FOR JUSTICE (2018), available at <https://measuresforjustice.org/portal/exploration?l=WI&m=7>.

<sup>21</sup> *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

<sup>22</sup> *See CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM* (2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [hereinafter *MOVING BEYOND MONEY*].

<sup>23</sup> SPD Poll, *supra* note 7. Note: universally it appears individuals are assessed the cost of GPS monitoring.

<sup>24</sup> In this manual, the gender pronoun “their” will be used to encompass his/her/their, “they” will be used to encompass he/she/they, and “them” will be used to encompass him/her/them.

<sup>25</sup> As a condition of their involvement with the EBDM Initiative, the eight counties participating in the pilot program keep detailed records of non-monetary conditions that are imposed. There is no indication non-EBDM counties are recording such data. *See EBDM Initiative*, *supra* note 5.

in County A, the court may not make total abstinence from alcoholic beverages a condition of release unless the prosecution provides information that alcohol was involved in the alleged offense. Meanwhile, in County B, the court may mandate that every arrestee, regardless of the nature of the offense or their background, must refrain abstain from all substances including alcohol as a condition of their release.<sup>26</sup>

The use of other pretrial release conditions—such as supervision, GPS monitoring, day reporting, and alcohol monitoring—is similarly inconsistent. Some courts routinely order these conditions, even for low-risk individuals while other counties limit the use of these more restrictive conditions to only moderate and high-risk defendants.<sup>27</sup>

### C. EVIDENCE-BASED DECISION MAKING AND RISK ASSESSMENT INSTRUMENTS

A common component of many bail reform efforts across the country is the inclusion of risk assessment instruments (“RAIs”) as a part of the pretrial release process. These tools use a variety of different types of data in an effort to provide measures relating to the likelihood an individual will suffer a “pretrial failure.” In the pretrial setting, “**pretrial failure**” is defined as either the failure to appear for a court hearing (“FTA”) being arrested on a new criminal offense (“new criminal conduct” or “NCC”) while awaiting the disposition of their case.<sup>28</sup> Risk assessment tools are seen as an attempt to inject a measure of objectivity into the bail process and reduce reliance on gut-instinct decision making. While the instruments address many issues related to pretrial decision making, concerns exist as to the extent to which the instruments can contain and perpetuate certain racial, ethnic, and socioeconomic biases.<sup>29</sup> Nevertheless, Wisconsin is part of the national trend of incorporating risk assessment tools into bail decisions, although, currently, most Wisconsin counties are **not required** to use a RAI in setting bail, and many do not.

Equally problematic, as of the writing of this manual, among those counties using RAIs, no uniformity exists as

to how those instruments are being applied. The type of instrument varies from county to county. Even counties that do use the same RAI have significant differences in the way those instruments are applied and the way the results are interpreted.<sup>30</sup>

### D. WHAT DOES THIS MEAN FOR DEFENSE COUNSEL?

Despite the seemingly infinite variety of practices among jurisdictions, all defense attorneys have the same constitutional and ethical obligation to provide effective and meaningful representation to their clients throughout the bail process. Importantly, regardless of the methods and practices used in individual jurisdictions, defense counsel has a substantial role to play in steering the discussion about bail toward constitutional and evidence-based best practices. This manual is offered as a resource for Wisconsin defense attorneys to help them advocate for bail decisions and procedures that can contribute positively to the quality of justice—decisions that will allow not only for clients’ release, but also improve clients’ opportunities for more favorable outcomes.

Because so much variability exists among counties, every idiosyncrasy that attorneys may encounter cannot be addressed here. Nonetheless, it is hoped that this manual will serve as a guide - to provide practitioners with the tools needed to improve pretrial outcomes for their clients.

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*Defense counsel has a substantial role they can play in steering the discussion about bail toward constitutional and evidence-based best practices.*

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<sup>26</sup> See SPD Poll, *supra* note 7.

<sup>27</sup> *Id.* (showing that even among the eight counties in the EBDM initiative, there is inconsistency in the imposition of non-monetary conditions).

<sup>28</sup> TIMOTHY R. SCHNACKE, “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, 195 (Apr. 2017), available at [http://www.clebp.org/images/04-18-2017\\_Model\\_Bail\\_Laws\\_CLEPB\\_.pdf](http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf) [hereinafter SCHNACKE].

<sup>29</sup> See David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, QUARTERLY JOURNAL OF ECONOMICS (forthcoming 2018), available at [https://scholar.harvard.edu/files/cyang/files/ady\\_racialbias.pdf](https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf); see also PHILLIP KNOX & PETER KEIFER, THE RISKS AND REWARDS OF RISK ASSESSMENTS, NATIONAL CENTER FOR STATE COURTS (2017), available at <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/The-Risks-and-Rewards-of-Risk-Assessments.aspx>.

<sup>30</sup> SPD Poll, *supra* note 7.

## II. THE IMPORTANCE OF ZEALOUSLY ADVOCATING FOR PRETRIAL RELEASE AND REASONABLE CONDITIONS

“Initial appearance” is defined as the time at which a client is informed of the charges and bail is set, is recognized, constitutionally, as a “critical stage” in the proceedings.<sup>31</sup> Therefore, the initial appearance activates the client’s right to counsel and with it, their right to the effective assistance of counsel.<sup>32</sup>

*The initial appearance activates the client’s right to counsel and with it, their right to the effective assistance of counsel.*

The initial appearance is also a critical stage in the human sense. The importance of helping clients achieve pretrial release under reasonable, appropriate conditions cannot be overstated. As an ethical matter, such advocacy is required by professional standards, but the real significance lies in the impact pretrial detention decisions have on clients.<sup>33</sup>

The negative consequences of pretrial detention have been recognized for decades. Fifty years ago, the Manhattan Bail Project of the Vera Institute published studies showing persons who are released following arrest have better legal and personal outcomes than those who stay in jail pending the resolution of their cases.<sup>34</sup> In 1972, in *Barker v. Wingo*, the United States Supreme Court echoed this finding, opining:

We have discussed previously the societal disadvantages of lengthy pretrial incarceration,

but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.<sup>35</sup>

In the 45 years since *Barker*, the negative effects of pretrial detention remain unchanged. In 2018, the Fifth Circuit Court of Appeals took note of the real consequences of the harsh and unconstitutional Harris County (Houston), Texas bail system recognizing:

One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, will bear the brunt of all of these handicaps simply because he has less money than his wealthy counterpart.<sup>36</sup>

Over the past decade, social scientists took a systematic look at pretrial detention around the country. Research about the effects of bail decisions became more

<sup>31</sup> *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 212 (2008).

<sup>32</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>33</sup> See NAT’L LEGAL AID AND DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 2.1 & 2.3 (2006), available at <http://www.nlada.org/defender-standards/performance-guidelines/black-letter>. See also CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-3.6 (AM. BAR ASS’N 2015), available at [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html); WIS. RULES OF PROF’L CONDUCT R. 1.1(a) (2018), available at <https://docs.legis.wisconsin.gov/misc/scr/20>.

<sup>34</sup> VERA INSTITUTE, *Manhattan Bail Project, Court transcripts Oct. 1961-June 1962*, available at <https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962>.

<sup>35</sup> *Barker*, 407 U.S. at 532-33.

<sup>36</sup> *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018). For full case history see *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1147 (S.D. Tex. 2017) (providing a comprehensive review of the district court’s factual findings), *aff’d as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff’d as modified* sub nom., *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

widespread and detailed as data collection and analysis have dramatically improved. This research has not only looked at the costs of pretrial detention, but the costs of conditions of release as well. The findings from this research are discussed below.

## A. CLIENTS WHO STAY IN JAIL GET LONGER SENTENCES

A study using data from state courts found that those detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than similar defendants released at some point pending trial. Additionally, these incarcerated individuals received significantly longer sentences. Those sentenced to jail saw their sentences increase nearly threefold over those released at some point during the pendency of their case. For clients sentenced to prison, those detained faced a sentence more than twice as long as those released prior to trial.<sup>37</sup>

## B. EVEN BRIEF PERIODS OF INCARCERATION HAVE DETRIMENTAL EFFECTS

Contrary to popular belief among many judges and prosecutors, pretrial detention does not necessarily prevent crime. Data shows that individuals who are incarcerated for as few as three days before being released on bond have statistically higher short- and long-term rates of re-arrest than their counterparts who are released within the first 48 hours. Using state-wide data from Kentucky, a study conducted by the Laura and John Arnold Foundation (“LJAF”) uncovered strong correlations between how long low- and moderate- risk defendants were detained before trial and the likelihood they would be re-arrested in both the short- and long-term.<sup>38</sup> Those held in custody for as little as two to three days, as opposed to defendants released within one day of their

arrest, were more likely to be arrested on new charges in the pretrial period.<sup>39</sup> These individuals were also more likely to be re-arrested in the two years after their cases ended than their peers who were released within one day of their arrest.<sup>40</sup>

## C. PRETRIAL SUPERVISION SHOULD BE LIMITED TO MODERATE- AND HIGH-RISK INDIVIDUALS

Pretrial supervision is an effective tool to improve pretrial outcomes when properly used. Those considered “moderate-risk” or “high-risk” individuals on the pretrial RAI who are released and placed on pretrial supervision appear for court dates at a substantially higher rate than similar risk level individuals who are released on monetary bonds without supervision. Moreover, these individuals have significantly lower rates of being re-arrested during the pretrial period than their unsupervised, medium- and high-risk counterparts.<sup>41</sup>

The same is not true, however, for individuals determined to be “low-” risk. In fact, the opposite occurs. Low-risk people who are released without the use of pretrial supervision have high rates of appearing for court dates and maintain low rates of re-arrest during the pretrial period.<sup>42</sup> When courts decide to place these low-risk individuals under pretrial supervision, significant negative consequences occur. First, the accused suffers an unnecessary restraint on their liberty.<sup>43</sup> Second, the community compromises its safety as time and resources that could be devoted to more high-risk individuals are being unnecessarily expended on low-risk individuals. Third, and most troubling, is research that demonstrates in certain circumstances the over-supervision can simply set up this class of arrestees for failure, leading to bail jumping charges.<sup>44</sup> For these individuals, the use of no more than a phone call or text message reminding them of

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<sup>37</sup> See LAURA AND JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH SUMMARY (2013), available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf) [hereinafter LJAF SUMMARY]. See also Crystal S. Yang, *supra* note 1 (suggesting that pretrial detention increases likelihood of wrongful conviction); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, J. of Law, Econ. & Org., (forthcoming 2018), available at <https://ssrn.com/abstract=2777615>.

<sup>38</sup> THE HIDDEN COSTS, *supra* at note 3.

<sup>39</sup> THE HIDDEN COSTS, *supra* at note 3, at 4.

<sup>40</sup> *Id.*

<sup>41</sup> LJAF SUMMARY, *supra* at note 37, at 6.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Barker*, 407 U.S. at 533 (“[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty. . .”).

<sup>44</sup> See ROGER PRZYBYLSK, COLORADO DIV. OF CRIMINAL JUSTICE, *What Works: Effective Recidivism Reduction and Risk-Focused Prevention Programs* (2008), available at <https://cdpsdocs.state.co.us/ccj/Resources/Ref/WhatWorks2008.pdf> (providing a comprehensive discussion of effective interventions in criminal justice, including reports on the research about over-supervision).

their upcoming court date can be the most effective way to assure their court appearance.<sup>45</sup>

#### D. LAWYERS MAKE A SIGNIFICANT DIFFERENCE AT PRETRIAL RELEASE HEARINGS

Research shows having counsel at the initial appearance before a judge or magistrate not only increases the accused's chances for release but also their sense of

fairness about the process. A defendant with a lawyer at first appearance is:

- Two-and-a-half times more likely to be released on recognizance;
- Four-and-a-half times more likely to have their bail significantly reduced;
- Likely to serve less time in jail (saving county jail resources while preserving the client's liberty interests); and
- More likely to feel fairly treated by the system.<sup>46</sup>

**2.5** *times more likely to be released on recognizance*



*likely to serve less time in jail or prison*

**4.5** *times more likely to have their bail significantly reduced*



*more likely to feel fairly treated by the system*



*Clients Who Stay in Jail Get Longer Sentences*



*Pretrial Supervision Should Be Limited to Moderate- and High-risk Individuals*



*Even Brief Periods of Incarceration Have Detrimental Effects*

<sup>45</sup> See Appendix 1 for full analysis of the Decision Making Framework grid.

<sup>46</sup> KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL 6 (2013) (citing Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002)).

# III. TOOLS FOR LITIGATING PRETRIAL RELEASE AND REASONABLE CONDITIONS AT THE INITIAL APPEARANCE

## KEY TOOLS FOR DEFENSE ATTORNEYS TO USE WHEN ADVOCATING FOR A CLIENT'S PRETRIAL RELEASE

- A thorough knowledge of the client gathered from a detailed initial interview;
- An in-depth understanding of the Wisconsin bail statutes and the relevant U.S. and Wisconsin constitutional provisions;
- Awareness of any risk assessment tools used in the specific jurisdiction; and
- An understanding of the Wisconsin laws regarding pretrial release.

### TOOL #1: INITIAL CLIENT INTERVIEW

A thorough knowledge of the client and their background is the most important tool a lawyer possesses when litigating for release. Conducting a detailed initial interview gives the attorney the information needed to advocate fully and builds client confidence from the first meeting. The information that a defense attorney can learn in an interview may be a rich source of material that can be used to convince a judge to release a defendant who might otherwise face detention.

Conducting a meaningful client interview before the initial appearance can be a challenge for any defender. Both time and physical space constraints can significantly impact this effort. Attorneys must do all they can to conduct an appropriate initial interview. They can accomplish this by targeting key information that can be used to advocate for the client's release, while at the same time providing a measure of humanity and compassion to the client during difficult moments.

Listed below are the National Legal Aid and Defender Association (NLADA) best practices guidelines for an initial interview.<sup>47</sup> Included are comments addressing common Wisconsin-specific practice.

#### 1. Preparation:

Prior to conducting the initial interview, the attorney should, where possible:

(a) Be familiar with the elements of the offense and the potential punishment, when the charges against the client are already known;

Even if counsel does not receive a copy of the criminal complaint until the initial appearance, jail records will show the booking charges.

(b) Obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports;

If counsel has access to the names and dates of birth of the newly arrested individuals before going into the jail, counsel should do a CCAP check. Counsel should also obtain information about any holds (probation, other forms of supervision, and/or Immigration and Customs Enforcement) placed on each individual.

(c) Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions; and

If a RAI is used in the county, obtain a copy of the report as soon as possible. Counsel should know the strengths

<sup>47</sup> *Performance Guidelines for Criminal Defense Representation - Guideline 2.2*, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (2006), available at <http://www.nlada.org/defender-standards/performance-guidelines/black-letter>.

and weaknesses of the instrument used in the county, and, generally, the strengths and weaknesses of RAIs.

(d) Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release.

Very often, counsel can anticipate the types of conditions that a court is likely to impose in a particular type of case. If the county contracts with a pretrial services organization, counsel should be aware of how that organization operates. Counsel should also be aware of the costs associated with pretrial services and monitoring and be prepared to advocate for the least restrictive conditions. When appropriate, counsel should seek waivers of any associated fees. Counsel must be prepared to discuss with the client the potential pretrial conditions and determine what impact those conditions may have on their employment, housing, education, family obligations, medical, and mental health needs.

## 2. The Interview:

(a) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, are overcome;

Ordinarily, counsel will not know of an individual's special communication needs before the interview. Once counsel becomes aware that a client will need an interpreter for the initial interview and initial appearance, all efforts should be made to obtain the services of an interpreter as soon as possible.

The initial jail interview in Wisconsin begins with an assessment of the individual's financial information to determine eligibility for public defender representation.

This often provides an excellent opportunity for counsel to make an initial assessment of any communication barriers.

All parts of the eligibility determination and bail interview should tend towards the use of open-ended questions. The quality of a client's answers may provide useful information about the client's literacy, fund of knowledge, and communication needs.

(b) Information that should be acquired includes, but is not limited to:

(i) the client's ties to the community, including the length of time they have lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

Get specific information such as:

**Demographics:** names and ages of any children and stepchildren; marital status; their current/last address; telephone number.

**Employment:** name and location of current/last employer, name and number of supervisor, length of time employed, position/job title, type of work client does.

**Benefits:** does client receive Social Security, disability, housing or food assistance benefits.

**Alternate residence:** if, because of the nature of the charges, the court is likely to impose a "no contact" order that will prevent the client from returning home, counsel should inquire about alternative living arrangements. Similarly, if a "no contact" order will interfere with (though not prohibit) the client's access to their children, counsel should discuss alternative visitation arrangements.

**Transportation resources:** does the client have a driver's license, access to a car, or other means of transportation? These are significant not only for court dates but for meeting potential pretrial service obligations.

**Immigration status:** Information regarding immigration status should be asked of all individuals by asking “where were you born?” While it will not necessarily be dispositive of the immigration issue, the client’s birth outside of the U.S. will put counsel on notice that possible immigration consequences should be explored.

(ii) the client’s physical and mental health, educational and armed services records, and immediate medical needs;

Ask about type and dosage of medication; length of time client has been taking the medication; last time the medication was taken; and names and addresses of doctors, therapists, or social workers. Additionally, it may be useful to learn about past health history including any significant injuries, operations, overnight hospital stays, or head trauma.

(iii) the client’s past criminal record, if any, including arrests and convictions for adult and juvenile offenses, and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges, whether they are on probation or parole, and the client’s past or present performance under supervision;

Review client’s CCAP records. If the information is not available from CCAP, ask client detailed, specific questions about their prior criminal history including nature of charges, disposition, FTAs, probation violations, extended supervision or parole violations, and any reasons for non-compliance.

(iv) the ability of the client to meet any financial conditions of release; and

Some of this information will be available through the E-form. Many courts consider eligibility for court-appointed counsel to be proof of inability to pay cash bail. However, in cases where cash bail is possible, counsel should also inquire about financial obligations that are not considered for indigency purposes. These include secured and unsecured loans such as car payments,

official and unofficial child support payments, rent or mortgage, family support, education payments, and any other financial obligations. Counsel should also inquire about other potential sources of assistance for bail and advise the client about the costs of pretrial services. Release advocacy related to financial conditions should include consideration of the costs associated with any pretrial release conditions.

(v) the names of individuals or other sources that counsel can contact to verify the information provided by the client. Counsel should obtain the permission of the client before contacting these individuals.

Gather names, addresses, email addresses, and cell phone numbers. Before calling these individuals get the client’s permission to talk to them, discuss what information about the criminal case can be shared with these individuals, and inquire if the individual is aware of the client’s current arrest.

In addition to social factors, attorneys should attempt to get a working understanding of the client’s version of events as early as possible to appropriately advocate for release.<sup>48</sup> This is particularly important when the client knows the alleged victim.

## **TOOL #2: WISCONSIN BAIL STATUTES<sup>49</sup>**

### **969.001 Definitions.**

In this chapter:

- (1) “**Bail**” means monetary conditions of release.
- (2) “**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.

<sup>48</sup> Attorneys should be careful to only incorporate information relevant to the bail issues when making arguments to the court. Factual arguments about the allegations should only be responsive to representations presented by the State and should be carefully limited.

<sup>49</sup> This section includes key portions of the Wisconsin bail statutes and emphasis has been added to highlight pertinent statutory language.



Proper considerations to determine bail

### 969.01 Eligibility for release.

(1) **BEFORE CONVICTION.** Before conviction, except as provided in §§969.035<sup>50</sup> and 971.14 (1r),<sup>51</sup> a defendant arrested for a criminal offense is eligible for **release under reasonable conditions** designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. Bail may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court. In determining whether any conditions of release are appropriate, **the judge shall first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance.**

other pending cases, whether the defendant has been bound over for trial after a preliminary examination, whether the defendant has in the past forfeited bail or violated a condition of release or was a fugitive from justice at the time of arrest, and the policy against unnecessary detention of the defendant’s pending trial.

Imposition of cash bail is a discretionary act that requires consideration of a number of factors relevant to each individual defendant. Under the statute there is no such thing as “typical bail.” The amount of cash should be “reasonable” and only in the amount necessary to assure the appearance of each particular client. The first factor the court should consider is the client’s financial circumstances.

Setting release conditions is similarly a discretionary act that involves multiple factors. Conditions are to be “reasonable” and tailored to the individual client and their case. Standard conditions beyond those authorized by the statute are not appropriate.

(4) **CONSIDERATIONS IN SETTING CONDITIONS OF RELEASE.** **If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant. Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses.** Proper considerations in determining whether to release the defendant without bail, fixing a reasonable amount of bail or imposing other reasonable conditions of release are: the ability of the arrested person to give bail, the nature, number and gravity of the offenses and the potential penalty the defendant faces, whether the alleged acts were violent in nature, the defendant’s prior record of criminal convictions and delinquency adjudications, if any, the character, health, residence and reputation of the defendant, the character and strength of the evidence which has been presented to the judge, whether the defendant is currently on probation, extended supervision or parole, whether the defendant is already on bail or subject to other release conditions in

### 969.02 Release of defendants charged with misdemeanors.

- (1) A judge may release a defendant charged with a misdemeanor without bail or may permit the defendant to execute an unsecured appearance bond in an amount specified by the judge.
- (2) In lieu of release pursuant to sub. (1), the judge may require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties. If the judge requires a deposit of cash in lieu of sureties, the person making the cash deposit shall be given written notice of the requirements of sub. (6).
- (2m) The clerk of circuit court may accept a credit card or debit card, as defined in §59.40 (5)<sup>52</sup> (a) and 1. and 2., instead of cash under sub. (2).

Proper considerations to determine bail

<sup>50</sup> Rule regarding pretrial detention; denial of release from custody.

<sup>51</sup> Rule regarding competency proceedings.

<sup>52</sup> Rule defining forms of payment.

(3) In addition to or in lieu of the alternatives under subs. (1) and (2), the judge may:

- (a) Place the person in the custody of a designated person or organization agreeing to supervise him or her.
- (b) Place restrictions on the travel, association or place of abode of the defendant during the period of release.
- (c) Prohibit the defendant from possessing any dangerous weapon.
- (d) Impose any other condition deemed reasonably necessary to assure appearance as required or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses, including a condition that the defendant return to custody after specified hours. The charges authorized by §§303.08 (4)<sup>53</sup> and (5)<sup>54</sup> shall not apply under this section.
- (e) If the person is charged with violating a restraining order or injunction issued under §813.12<sup>55</sup> or §813.125<sup>56</sup>, may require the person to participate in mental health treatment, a batterer’s intervention program, or individual counseling. The judge shall consider a request by the district attorney or the petitioner, as defined in §301.49 (1) (c),<sup>57</sup> in determining whether to issue an order under this paragraph.

(4) As a condition of release in all cases, a person released under this section shall not commit any crime.

(4m) Any person who is charged with a misdemeanor and released under this section shall comply with §940.49.<sup>58</sup> The person shall be given written notice of this requirement.

(5) Once bail has been given and a charge is pending or is thereafter filed or transferred to another court, the latter court shall continue the original bail in that court subject to §969.08.<sup>59</sup>

(6) When a judgment of conviction is entered in a prosecution in which a deposit had been made in accordance with sub. (2), the balance of such deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered under §973.20<sup>60</sup> and then, if ordered restitution is satisfied in full, to the payment of the judgment.

(7) If the complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned. A deposit under sub. (2) shall be returned to the person who made the deposit, his or her heirs or assigns, subject to sub. (6).

(7m) The restrictions on the application of cash deposits under subs. (6) and (7) do not apply if bail is forfeited under §969.13.<sup>61</sup>

(8) In all misdemeanors, bail **shall not exceed** the maximum fine provided for the offense.

Throughout the state, signature bond is treated as the lowest potential form of bail available, but this is a misapplication of the law. For both felonies (§969.03) and misdemeanors (§969.02) the statute expressly states an accused “may be released by the judge without bail.” Being released “**without bail**” means an individual is released without any financial obligation (either being paid up front to secure release (secured bond) or promised if there is a future violation (unsecured or signature bond). Signature bonds set an amount of cash to be forfeited upon failure to appear or other violations. As such they are in fact “monetary conditions of bail;” but are simply “unsecured.”

<sup>53</sup> Rule regarding charging certain detainees for the cost of detention.

<sup>54</sup> Rule regarding how payment to certain detainees can be disbursed.

<sup>55</sup> Rule regarding domestic abuse, restraining orders and injunctions.

<sup>56</sup> Rule regarding harrasment restraining orders and injunctions.

<sup>57</sup> Rule regarding GPS tracking for persons who violate certain orders or injunctions.

<sup>58</sup> Rule requiring the accused to agree not to participate in witness intimidation (§940.42), intimidation of victims (§940.45), or be subject to revocation of pretrial release or forfeiture of bail and arrest/remanded back into custody, regardless of if the defendant was subject to a stay away order from the court.

<sup>59</sup> Rules regarding bail, conditions of release can be reduced, increased, or revoked.

<sup>60</sup> Rule regarding restitution.

<sup>61</sup> Rule addressing forfeiture.

The statutes' second consideration is for release on an "unsecured appearance bond" (i.e. a signature bond).

When §969.02(1) is read in combination with §969.01(1) there is a strong argument that releasing a defendant without bail should be the first consideration, especially in misdemeanors where the client has no criminal record or history of missed court appearances. Signature bonds are appropriate only if the court first finds that release without bail is insufficient and that an unsecured monetary appearance bond is necessary to assure a client's appearance. Further, the amount of the signature bond should only be in the amount necessary to assure a client's appearance.

Cash bonds are only appropriate if, and when, the court makes specific findings that a recognizance or a signature bond will be insufficient to assure a client's appearance.

Other than the condition that the defendant appear as required, not intimidate witnesses, and not commit any crimes, all other conditions must be "reasonably necessary to assure appearance as required or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses."

**969.03 Release of defendants charged with felonies.**

(1) A defendant charged with a felony may be released by the judge without bail or upon the execution of an unsecured appearance bond or the judge may in addition to requiring the execution of an appearance bond or in lieu thereof impose one or more of the following conditions which will assure appearance for trial:

- (a) Place the person in the custody of a designated person or organization agreeing to supervise the person.
- (b) Place restrictions on the travel, association or place of abode of the defendant during the period of release.
- (c) Prohibit the defendant from possessing any dangerous weapon.
- (d) Require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties. If the judge requires a deposit of cash in lieu of sureties, the person making the cash deposit shall be given written notice of the requirements of sub. (4).

Alternatives to bail/additional conditions

(e) Impose any other condition deemed reasonably necessary to assure appearance as required or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses, including a condition requiring that the defendant return to custody after specified hours. The charges authorized by §§303.08 (4) and (5) shall not apply under this section.

Alternatives to bail/  
additional conditions

(1m) The clerk of circuit court may accept a credit card or debit card, as defined in §59.40 (5) (a) 1. and 2., instead of cash under sub. (1) (d).

(2) As a condition of release in all cases, a person released under this section shall not commit any crime.

(2m) Any person who is charged with a felony and released under this section shall comply with §940.49. The person shall be given written notice of this requirement.

(3) Once bail has been given and a charge is pending or is thereafter filed or transferred to another court, the latter court shall continue the original bail in that court subject to §969.08. A single bond form shall be utilized for all stages of the proceedings through conviction and sentencing or the granting of probation.

(4) If a judgment of conviction is entered in a prosecution in which a deposit had been made in accordance with sub. (1) (d), the balance of the deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered under §973.20 and then, if ordered restitution is satisfied in full, to the payment of the judgment.

(5) If the complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned. A deposit under sub. (1) (d) shall be returned to the person who made the deposit, his or her heirs or assigns, subject to sub. (4).

(6) The restriction on the application of cash deposits under subs. (4) and (5) do not apply if bail is forfeited under §969.13.

How bail can be applied  
upon resolution

## TOOL #3: RISK ASSESSMENT INSTRUMENTS

### 1. Overview

In the current wave of bail reform, many jurisdictions are incorporating the use of RAIs into their pretrial decision making process. When discussing RAIs, the first question that always comes to mind is, “What risk?” In the pretrial context, risk refers to “pretrial failure.” “**Pretrial failure**” is defined as either the failure to appear for a court hearing (“FTA”) or being arrested on a new criminal offense (“new criminal conduct” or “NCC”) while awaiting the disposition of their case.<sup>62</sup> which generally means failure to appear and/or the commission of a new offense. In some jurisdictions, “failure” also includes technical violations of pretrial release conditions.

Using a risk assessment tool as a component of pretrial release decision making can improve standardization and transparency and help help minimize some of the sense of arbitrariness in the current process.<sup>63</sup> In a 2017 community forum discussing the use of the Arnold Foundation’s Public Safety Assessment (“PSA”) in the Milwaukee County bail process, Chief Judge Maxine White observed that in setting bail, the duty of judges and commissioners has always been “to do everything possible to get it right.” She explained, “When I started as a judge 25 years ago, the ‘getting it right’ was all in Maxine’s head and Maxine’s gut. Since that time, we’ve gotten smarter.” She credits the PSA with helping judges and commissioners get smarter.<sup>64</sup>

Risk assessment instruments may help further the criminal justice system’s goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.<sup>65</sup> As Milwaukee

County District Attorney John Chisholm noted, one of the advantages of using a RAI is the opportunity to stop expending resources on low-risk individuals and re-allocating them to where they are needed.<sup>66</sup>

The use of data, analytics, and technology is having a significant effect on the criminal justice system. Early studies of jurisdictions like Kentucky indicates that the application of evidence based decision making (“EBDM”) corresponds with the number of pretrial detainees decreasing while public safety and court appearance rates remain constant.<sup>67</sup> Other states including New Jersey and Colorado have similarly incorporated risk assessment tools into their bail procedures, with early indications showing many positive results.<sup>68</sup>

According to data from the New Jersey courts, in the year immediately following the implementation of their bail reform efforts, there was a 20% decrease in the pretrial jail population.<sup>69</sup> During that same year (January 1, 2017 to January 1, 2018), 94.2% of all people charged with a criminal offense in New Jersey were released, with 68.9% of the people released on an officer issued summons. Of those served with an arrest warrant, only 18.1% of the arrestees were detained pending trial. The other 81.9% were released. Of the 142,663 persons charged in that 12-month period, only 44 were ordered to pay a monetary bond as a condition of release.<sup>70</sup>

Of course, these types of results only hold if judges actually follow the procedure and consider the risk assessments in their determinations. Several follow-up reports from Kentucky indicate that some judges are still reluctant to abandon their gut instincts, arguing that the defense must never rest.<sup>71</sup>

This is not to suggest that RAIs are not without critics or that they are perfect. By their nature, they cannot predict

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<sup>62</sup> SCHNACKE, *supra* note 28, at 195.

<sup>63</sup> *Id.* AT 90.

<sup>64</sup> *Marquette*, *supra* note 2, at 4:41.

<sup>65</sup> LAURA AND JOHN ARNOLD FOUND. (LJAF), DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT (2013), *available at* [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf).

<sup>66</sup> *See Marquette*, *supra* note 2; SCHNACKE, *supra* note 28, at 92; Kremers, *supra* note 2.

<sup>67</sup> PRETRIAL SERVICES ADMINISTRATIVE OFFICE OF THE COURTS KENTUCKY COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 16 (2013) (“pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.”) *available at* <https://www.acluga.org/sites/default/files/pretrial-reform-in-kentucky-kentucky-pretrial-services-2013.pdf>; *see generally* SCHNACKE, *supra* note 28; *but see* Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. (forthcoming), *available at* <http://dx.doi.org/10.2139/ssrn.3016088> [hereinafter Stevenson (Kentucky)] (showing indications that the rate of pretrial detentions in Kentucky is slowly rising again because judges are ignoring recommendations from the risk assessment instrument).

<sup>68</sup> GLENN A. GRANTS, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE FOR CALENDAR YEAR 2017, *available at* <https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* *See also*, *New Jersey Court’s Criminal Justice Reform Information Center data*, *available at* <https://www.njcourts.gov/courts/criminal/reform.html>.

<sup>71</sup> Stevenson (Kentucky), *supra* note 67.

what a particular individual will do.<sup>72</sup> Not all RAIs are the same. Some are well-validated; others have only minimal study or data that does not pass scientific muster.<sup>73</sup> Perhaps the most frequent criticism of these tools is the extent to which assessments of risk directly implicates racial and socioeconomic factors.<sup>74</sup> Any tool that considers factors such as age of first arrest, conviction, or police contact—implicates race and socioeconomic status because of policing patterns that result in over-policing in minority and poor communities. Even a factor that appears neutral, like the number of prior convictions, implicates and can perpetuate racial biases because of systemic racial disparity.<sup>75</sup>

As a result, for lawyers in a jurisdiction using a RAI, it is important to understand how the instrument in the jurisdiction operates, whether and how it was validated, what its data represents, and what its limitations are. It is also important to remember that even the most well-validated RAIs represent only one tool or factor that should be considered in bail determinations.

*Even the most well-validated RAIs represent only one tool or factor that should be considered in bail determinations.*

## 2. Instruments Used in Wisconsin

Wisconsin has yet to adopt a single, standard RAI for use throughout the state. Currently, two instruments—COMPAS and the Arnold Foundation’s Public Safety Assessment (“PSA”)—are most frequently used.<sup>76</sup> A brief description of both is provided with more detailed

descriptions of their uses in Milwaukee (PSA) and LaCrosse (COMPAS) contained in the Appendices.<sup>77</sup>

### (a) Public Safety Assessment (“PSA”)

Milwaukee County has used the PSA developed by the Laura and John Arnold Foundation since 2016. The remaining seven EBDM protocol counties are hoping to use the PSA by the end of 2018. Dane County, which is not part of the EBDM protocol, is also using the PSA as part of a three-year randomized study conducted by Harvard University. Nationally, the PSA is emerging as the most widely used, validated RAI, and is likely to continue gaining additional traction at both the federal and state levels.<sup>78</sup>

The PSA relies entirely on static factors. “**Static factors**” are those that largely remain unchanged over time and typically involve historical information, such as prior FTA convictions and prior criminal convictions.<sup>79</sup> These factors have been researched on a large scale and are considered to have a high degree of validity.<sup>80</sup> Observers know the nine factors’ scores and weights. Moreover, the PSA, unlike other instruments, also answers the question, “What risk?” It provides two separate scores—one for risk of failure to appear and one for risk of arrest for a new crime. It also includes a special flag for risk of arrest for a new violent offense. This is important, especially in Wisconsin, as the relevant statutes limit the court’s consideration of community risk to two factors: witness intimidation and risk of “serious bodily harm.”

The other key segment of the PSA is the Decision Making Framework (DMF). The DMF makes recommendations for non-monetary conditions. These conditions are designed to effectively manage the potential for pretrial failure.<sup>81</sup> One of the key features of the DMF is eliminating many

<sup>72</sup> See SCHNACKE, *supra* note 28, at 103.

<sup>73</sup> JOHN-ETIENNE MYBURGH, CAROLYN CAMMIN & J. STEPHEN WORMITH, REVIEW OF PRETRIAL RISK ASSESSMENT AND FACTORS PREDICTING PRETRIAL RELEASE FACTORS 20-48 (2015), available at [https://www.usask.ca/cfbjs/research/pdf/research\\_reports/ReviewOfPTRAandRiskFactorsPredictingPretrialReleaseFailure.pdf](https://www.usask.ca/cfbjs/research/pdf/research_reports/ReviewOfPTRAandRiskFactorsPredictingPretrialReleaseFailure.pdf).

<sup>74</sup> MOVING BEYOND MONEY, *supra* note 22, at 22; see also, Eric Holder, U.S. U.S. Attn’y Gen., Address at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (August 1, 2014), available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>.

<sup>75</sup> See Julie Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), available at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see generally Streaming: NACDL, *Presidential Summit and Seminar: “Race Matters: The Impact of Race on Criminal Justice*, NACDL (September 14-15, 2017), available at <https://www.nacdl.org/2017-Race-Matters-Summit/>.

<sup>76</sup> Several Wisconsin counties use other instruments to identify individuals who would be suitable for diversion or who may have substance abuse issues. However, the instruments used are not specifically pretrial risk assessments as the term is used here, and their use in the pretrial context is questionable. The PSA is currently being used state-wide in Kentucky, New Jersey, and Arizona as well as in several large counties including: Harris County (Houston), Texas; Cook County (Chicago), IL; San Francisco County (San Francisco), CA; Mecklenburg County (Charlotte), NC; and Alleghany County (Pittsburg), PA.

<sup>77</sup> Appendices 1 and 2, *infra* contain in-depth illustrations how PSA is used in Milwaukee County and how COMPAS is used in LaCrosse.

<sup>78</sup> MOVING BEYOND MONEY, *supra* note 22, at 19; SCHNACKE, *supra* note 28.

<sup>79</sup> SCHNACKE, *supra* note 28, at 93.

<sup>80</sup> MOVING BEYOND MONEY, *supra* note 22 (noting that while there may be a high correlation between prior criminal history and pre-trial failure, the overpolicing of minority and low-income communities means that RAIs can perpetuate biases).

<sup>81</sup> *Marquette*, *supra* note 2; SCHNACKE, *supra* note 28.

conditions for low-risk individuals. This centers on the recognition that the over-supervision of these individuals results in poor outcomes for both the individual being supervised and for the community. By expending limited supervision resources on lower risk individuals, there are less resources available to supervise those with greater needs. Further, studies indicate over-supervision of low-risk individuals may increase their likelihood of pretrial “failure.”<sup>82</sup>

There are, however, several aspects of the DMF as used in Milwaukee and Dane counties that are not evidence-based and should be the subject of ongoing scrutiny and review by the defense. Specifically, the DMF used includes offenses that automatically categorize individuals as “high-risk” regardless of what the RAI results indicate.<sup>83</sup> The assumption that an individual charged with one of these enumerated offenses is inherently at “high” risk of pretrial failure cannot be based upon any reliable data because the connection between these particular charges and actual risk has never been robustly tested. In fact, some evidence shows the contrary.<sup>84</sup> Another area of significant variability is the applicability of authorized conditions. Like the “high-risk offense” list, these decisions do not appear to be based upon reliable data, but may represent local preferences.

The existence of the PSA/DMF does not eliminate the need for argument and advocacy from the defense. As should be plainly apparent, the factors used to arrive at the PSA risk scores are derived from limited sources. Where the PSA relies exclusively on administrative data—such as the charge, criminal history, and court appearance history—defense attorneys and prosecutors frequently provide additional relevant information contemplated by the statute that might convince a judge that the PSA score does not reflect the true extent of the accused’s risk. It is also important to remember that the PSA/DMF is only a recommendation; judicial officers must still exercise discretion when they decide issues of detention and conditions of release.

Although, as of June 2018, the PSA is only being used in two counties, it has the potential for eventual statewide adoption. Even if a jurisdiction does not currently use

the PSA, understanding the design and data used by the PSA can still help bolster bail arguments. Attorneys can calculate their client’s PSA score on their own to demonstrate in court the lack of risk the individual poses. Therefore, attorneys in all counties are urged to acquire a working knowledge of the risk factors and general principles behind the PSA.

## (b) COMPAS

Among the counties that use RAIs, COMPAS is currently the most popular. COMPAS is designed by Northpointe, the same company that produces the COMPAS risk assessment instrument used in sentencing. The COMPAS pretrial instrument considers two types of factors to assess risk: static and dynamic.

“**Static factors**” are historically based factors similar to those described in the PSA section above. By contrast, “**dynamic factors**” typically refer to conditions that are more fluid relating to “community stability, such as employment or residence.”<sup>85</sup> Unlike static factors which can be obtained through court records, a determination of dynamic factors requires interviewing the accused.

Research strongly suggests that static factors boast more predictive value, though several studies found at least some predictive value in dynamic factors.<sup>86</sup> While both static and dynamic factors raise socioeconomic and racial concerns, dynamic factors—such as length of time at residence and job—will tend to be more prejudicial against those who do not have the privilege of a stable housing or employment situation. This is especially troubling as these factors appear to have no significant correlation to pretrial failure.<sup>87</sup>

Where used, the COMPAS risk assessment score is included in a pretrial report provided to the court. The score correlates to a level of risk, but unlike the PSA, the COMPAS results do not specify the type of risk, e.g., failure to appear versus re-arrest. These reports also include recommendations for conditions of release or recommendations for non-release.

Several concerns have been raised about COMPAS reports. The most notorious issue with COMPAS tools

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<sup>82</sup> See ROGER PRZYBYLSK, *supra* note 44.

<sup>83</sup> See *Marquette*, *supra* note 2.

<sup>84</sup> SCHNACKE, *supra* note 28, at 97.

<sup>85</sup> *Id.* at 93-95.

<sup>86</sup> *Id.*

<sup>87</sup> See *Marquette*, *supra* note 2.

and their creator, Northpointe, is the lack of transparency.<sup>88</sup> Additionally, the review and validation process does not appear as rigorous as that required by PSA. Some studies report COMPAS is just “somewhat more accurate than a coin flip,” having a 61% accuracy rate in predicting re-arrest and is especially biased against certain communities—rating black defendants as likely to commit new offenses about twice as often as white defendants.<sup>89</sup>

The supervision level recommendations from COMPAS are also problematic in that they have not been validated or standardized and result in varying recommendations from county to county.<sup>90</sup> Another important problem with COMPAS reports is that when the instrument recommends a cash bond, the report may recommend a fixed amount based upon risk level, contradicting Wisconsin’s statutory requirements that courts make individualized determinations of an arrestee’s ability to pay.<sup>91</sup>

Despite its shortcomings, it is anticipated Wisconsin courts will continue to use COMPAS, at least in the short-term. As a result, in counties using COMPAS, counsel should be familiar with the strengths and weaknesses of this instrument.

#### TOOL #4: RELEVANT WISCONSIN CASE LAW

Wisconsin has long upheld the principle of reasonable bail and a presumption of release. In 1967, the Wisconsin Supreme Court affirmed in *State v. Whitty* that “[an] accused has a constitutional right to reasonable bail and the amount thereof should be determined solely in reference to the purpose of bail, namely, to assure the appearance of the accused.”<sup>92</sup> In this case, Mr. Whitty’s bail was reduced in exchange for a waiver of his preliminary examination, a practice the court “condemn[ed],” noting, “[t]he fixing of bail should not be a matter of bartering or negotiating, or be conditioned upon the waiver of other rights. Nor should the denial

of reasonable bail be used as a punishment or retaliation prior to conviction.”<sup>93</sup> In attempting to establish prejudice, Mr. Whitty presented Manhattan Bail Project studies showing defendants at liberty pretrial “tend[ed] to fare better at trial than those who cannot make bail.” The court declared these studies to be “most interesting” and acknowledged, “it may be true the greater percentage of convictions is of those defendants who cannot make bail before trial.”<sup>94</sup> Although the court declined to find prejudice based on the studies, this case serves as a reminder that the hidden costs of pretrial detention have been long recognized, as has the need to assure bail amounts are set so that they favor liberty over detention.

A recurring theme in Wisconsin case law on bail is discretion.

The term “**discretion**” contemplates a reasoning process that depends on the facts in the record and yields a conclusion based on logic and founded on a proper legal standard. Coming to the same conclusion for the same blanket reason in every case despite the facts of each case does not satisfy this definition.<sup>95</sup>

The bail decision is always a discretionary act. This means that in every case, a trial court must “show its work” by articulating the relevant factors used to reach its decision. The judge cannot simply rely on broad categories in setting bail such as “the nature of the case” or that such a decision is “standard practice” in the jurisdiction. Moreover, the court cannot simply state a factor, rather it must show how the factor applies to the circumstances of the individual case.<sup>96</sup>

*State v. Wilcenski* is the most recent case to discuss discretion in the context of bail.<sup>97</sup> In that case, the Court of Appeals rejected Waukesha County’s blanket policy of requiring anyone charged with OWI as a second or subsequent offense to go to alcohol/drug treatment as a condition of bail. In so ruling, the Court reminded trial

<sup>88</sup> *Machine Bias*, *supra* note 75; see also Jason Tashae, *Risk Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, ABA JOURNAL (March 2017) (detailing some of the issues raised with COMPAS in the Wisconsin case, *State v. Eric Loomis*, which challenged the use of COMPAS in Loomis’ sentencing hearing), available at [http://www.abajournal.com/magazine/article/algorithm\\_bail\\_sentencing\\_parole/](http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/).

<sup>89</sup> *Risk Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, *supra* note 88.

<sup>90</sup> See *infra* Appendix 2 (comparing the grids from two counties that employ COMPAS, LaCrosse and Outagamie Counties).

<sup>91</sup> Wis. STAT. § 969.01 (2010).

<sup>92</sup> *Whitty v. State*, 34 Wis. 2d 278, 286 (1967).

<sup>93</sup> *Id.* at 286.

<sup>94</sup> *Id.* at 286-87.

<sup>95</sup> *Melone v. State*, 240 Wis. 2d 451, 456 (2000).

<sup>96</sup> *Id.*

<sup>97</sup> *State v. Wilcenski*, 346 Wis. 2d 145 (2013), *petition for review denied*, 353 Wis. 2d 430 (2013).

judges that “while the bail statutes grant a great deal of discretion to circuit courts . . . we require that courts make findings on the record or point to evidence supporting those conditions they choose to impose.”<sup>98</sup> The *Wilcenski* court took note of the extensive list of statutory factors detailed in Wis. Stat. § 969.01(4) that a court should consider when setting conditions. Imposition of conditions “based on only one factor (the nature of the offense) without making an individualized determination that the imposed condition is appropriate *in this particular case for this particular defendant*, represents an erroneous exercise of discretion.”<sup>99</sup>

The court further noted, “[w]e cannot, and should not, move to a system of pretrial justice that dispenses with an examination of the appropriate release conditions for those charged with crimes in our communities.”<sup>100</sup> The *Wilcenski* court resolved all doubt when it said “[a] bail-setting program that operates as a ‘one size fits all’ system is a

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*“We cannot, and should not, move to a system of pretrial justice that dispenses with an examination of the appropriate release conditions for those charged with crimes in our communities.”*

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system preordained to fail the criminal justice system.”<sup>101</sup>

While *Wilcenski* specifically dealt with non-monetary conditions of release, the court’s reasoning and language is equally applicable to the question of and use of cash bail.

Although Wisconsin courts have not yet addressed the use of RAIs in the pretrial phase, there has been a challenge to the use of them in sentencing. In *State v. Loomis*, which challenged the use of COMPAS in sentencing, the Wisconsin Supreme Court indicated its general approval of EBDM and RAIs, in particular, as tools for guiding courts’ exercise of discretion.<sup>102</sup>

The Court did recognize that,

[t]he concerns we address today may very well be alleviated in the future. It is incumbent upon the criminal justice system to recognize that in the coming months and years, additional research data will become available. Different and better tools may be developed. As data changes, our use of evidence-based tools will have to change as well. The justice system must keep up with the research and continuously assess the use of these tools.<sup>103</sup>

Importantly, the ruling acknowledged that a RAI by its nature, assesses risk based on characteristics a person shares with one or more groups and that such a classification, if improperly used, runs afoul of the statutory mandate for individualized sentencing.<sup>104</sup> When properly used in the exercise of discretion however, the instrument can enable a “judge to more effectively evaluate and weigh several express statutory . . . considerations.”<sup>105</sup> Obviously, one can make similar arguments for the appropriate use of RAIs in the pretrial context.

## TOOL #5: UNITED STATES CONSTITUTIONAL PROVISIONS AND CASE LAW

### 1. United States Constitutional Provisions

#### (a) The Excessive Bail Clause

The Eighth Amendment prohibits “excessive bail.” According to the U.S. Supreme Court ruling in *Salerno*, this language does not actually create a right to bail:

The Eight Amendment addresses pretrial release by providing merely that “[e]xcessive bail shall not be required.” This Clause, of course, says nothing about whether bail shall be available at all.<sup>106</sup>

The *Salerno* Court quoted from an earlier Supreme Court case to support its position:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England

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<sup>98</sup> *Id.* at 157.

<sup>99</sup> *Id.* at 158 (emphasis added).

<sup>100</sup> *Id.* at 159 (concluding that the condition of alcohol treatment was acceptable in Mr. Wilcenski’s case, but only because on review the trial court had made individualized findings).

<sup>101</sup> *Id.*

<sup>102</sup> *State v. Loomis*, 371 Wis. 2d 235 (2016).

<sup>103</sup> *Id.* at 242

<sup>104</sup> *Id.* at 252-53

<sup>105</sup> *Id.* at 267 (quoting *Malenchik v. State*, 928 N.E.2d 564, 574 (Ind. 2010)).

<sup>106</sup> *United States v. Salerno*, 481 U.S. 739, 752 (1987).



that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the class of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.<sup>107</sup>

In *Salerno*, the Supreme Court considered a challenge to the constitutionality of the Bail Reform Act of 1984. That Act permitted a federal court to detain an arrestee without bail if “the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ‘will reasonably assure . . . the safety of any other person and the community.’”<sup>108</sup>

In response to Salerno’s Eighth Amendment challenge, the Court recognized that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>109</sup> But the Court concluded that “the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception.”<sup>110</sup> “We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.”<sup>111</sup>

The ruling in *Salerno* also outlined the right of an accused to certain procedural safeguards that mirror those provided for in *Wisconsin*, including the right to counsel at a detention hearing, the right to present evidence, cross-examine witnesses, and the necessity that the trial judge provide reasons for his decision to set or deny bail.<sup>112</sup>

### (b) The Due Process Clause

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>113</sup> This provision applies to *federal* government actions. The Fourteenth Amendment prohibits a *state* from “depriv[ing] any person of life, liberty, or property, without due process of law.”<sup>114</sup>

Two types of due process exist—substantive due process and procedural due process. “**Substantive due process**” prevents the government from engaging in conduct that “shocks the conscience.”<sup>115</sup> It also prevents the government from engaging in conduct that interferes with rights “implicit in the concept of ordered liberty.”<sup>116</sup>

“**Procedural due process**” prevents the government from depriving persons of life, liberty, or property in an unfair manner.<sup>117</sup> Thus, even if government action depriving a person of life, liberty, or property does not violate substantive due process, the way in which it is carried out may violate procedural due process.

As noted above, the defendant in *Salerno* challenged the constitutionality of the Bail Reform Act of 1984 on the basis of the Eighth Amendment Excessive Bail Clause. But this was not the defendant’s only constitutional challenge. He also asserted that the Bail Reform Act violated both substantive and procedural due process.

Salerno argued there was a substantive due process violation because the act’s authorization of pretrial detention (a liberty deprivation) constituted impermissible punishment before trial.<sup>118</sup> In ruling against Salerno, the Supreme Court recognized that pretrial detention *could* constitute impermissible punishment if the legislative intent of the statutorily authorized detention was to punish the defendant. The Court, however, found

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<sup>107</sup> *Id.* at 754 (quoting *Carlson v. Langston*, 342 U.S. 524, 545-46 (1952)).

<sup>108</sup> *Id.* at 741.

<sup>109</sup> *Id.* at 755.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 754-55.

<sup>112</sup> *United States v. Salerno*, 481 U.S. 739, 751-52 (1987).

<sup>113</sup> U.S. CONST. amend. V.

<sup>114</sup> U.S. CONST. amend. XIV.

<sup>115</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>116</sup> *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937); *see also Rochin v. California*, 342 U.S. at 169.

<sup>117</sup> *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>118</sup> *Salerno*, 481 U.S. at 745.

the intent of the act was not punishment but rather to prevent danger to the community. As a result, Salerno's substantive due process challenge failed.

Although Salerno's substantive due process argument did not prevail, the case shows that substantive due process is a relevant constitutional consideration in the bail context.

Salerno also argued that the Bail Reform Act violated procedural due process. Ruling against him on this ground, the Supreme Court found the procedures adequate on their face.

Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily-enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of the reasons for a decision to detain.<sup>119</sup>

Although Salerno also failed in his procedural due process argument, procedural due process is nevertheless relevant when it comes to bail.

In fact, in the recent federal lawsuit challenging detention practices in Harris County, Texas, *ODonnell v. Harris County*,<sup>120</sup> the federal district court found Harris County "must provide the procedures necessary . . . under the Due Process . . . Clause[] . . . for setting bail and for ordering detention for indigent misdemeanor defendants unable to pay secured money bail."<sup>121</sup> The *ODonnell* Court explained:

Under the federal case law defining due process for detention orders in general, as well as the case law defining due process for state-created liberty interests, the court concludes that Harris County,

in order to detain misdemeanor defendants unable to pay a secured financial condition of pretrial release, must, at a minimum, provide: (1) notice financial and other resource its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.<sup>122</sup>

The Court went on to conclude that Harris County was not following these procedures and was thereby violating the Due Process Clause.<sup>123</sup>

### (c) The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court declared that the concept of equal protection also applies to the federal government via the Fifth Amendment's Due Process Clause.<sup>124</sup>

The concept of equal protection applies in the bail context. In *ODonnell*, the U.S. District Court considered Harris County's practice of imposing secured money bail on indigent misdemeanor defendants.<sup>125</sup> The plaintiffs asserted "detaining misdemeanor defendants before trial solely because of their inability to pay violates the Equal Protection Clause, because defendants with similar histories and risks but with access to money are able to purchase pretrial release."<sup>126</sup>

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<sup>119</sup> *Id.* at 751-52.

<sup>120</sup> *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

<sup>121</sup> *Id.* at 1147.

<sup>122</sup> *Id.* at 1145.

<sup>123</sup> *Id.* at 1147.

<sup>124</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>125</sup> *ODonnell*, *supra* note 120, at 1130-31.

<sup>126</sup> *Id.* at 1067.

# IV. ADVOCATING FOR THE CLIENT: BEFORE, DURING, AND AFTER THE INITIAL APPEARANCE

## A. BEFORE THE HEARING

Advocacy at initial appearance presents many challenges for defense attorneys, but the issues that arise in the less-than-perfect conditions in the initial appearance courtroom can be compounded by what comes before the hearing.

The conditions under which the defenders are asked to “prepare” for the initial appearances and gather information can range from uncomfortable to even atrocious. Some of the reported conditions from around the state include:

- Lack of pre-court access to clients because the jail does not allow pre-hearing access to the clients.
- Needing to leave the court between hearings to go to the jail to see clients.
- Lack of coordination among court calendars, creating conflicting appearances for counsel.
- Extensive travel for attorneys covering multiple counties. An intake attorney may have hearings in one county in the morning and then must drive 50 miles for afternoon intake in another county.
- Lack of privacy as attorneys are forced to meet with clients in cell blocks or bullpens with others present.

- Lack of contact with the client because the jail lacks interview rooms leaving attorneys to try building a relationship with a client using a phone and seeing them through a Plexiglass window.
- Lack of communication as courts fail to notify defenders about which cases will appear before the court, sometimes leaving the attorney to gather information in the same moments the attorney and client are standing before the judge.

These circumstances place attorneys in untenable situations, and any attempt at bail reform must include removing these fundamental barriers to client communication and representation. This type of systemic reform requires all stakeholders—judges, court staff, jail personnel, prosecutors and defenders—to commit to the basic principle that attorneys who are better prepared at intake will better serve the interests of their clients, the community, and the criminal justice system.<sup>127</sup> Depending on the culture and politics of the county, this may require litigation, collaborative problem solving, or both. However, defenders should not allow these conditions to continue in the name of expediency or tradition.

### POINTERS TO PREPARE FOR THE INITIAL APPEARANCE

- Know the client’s risk assessment score (if applicable) and understand its meaning;
- Review the complaint and any other information regarding the charges available;
- Understand the defendant’s criminal history;
- Understand the defendant’s prior FTA(s);
- Check for any prior pretrial misconduct and for prior pretrial successes;
- Know if the defendant has family or friends who can support them;
- Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is relevant to and supports release;
- Consider the strength of the case as well as its severity;
- Consider the likely outcome of the case (e.g., whether the defendant likely will get a non-custody sentence); and
- Know the local pretrial program and what services it offers.

<sup>127</sup> As part of the research conducted for this manual, Professor LaVigne traveled throughout the state and participated in court watching and conversations with attorneys. See *Marquette*, *supra* note 2; EBDM Initiative, *supra* note 5.

## B. DURING THE HEARING

Advocacy during initial appearances is a specialized art form that requires resilience, patience, perseverance, quick wittedness, and a sense of humor. At any given time and place, an attorney may have two or three clients or two or three dozen clients. Hearings are frequently chaotic. It is not unusual for the presiding judicial officer to ask a perplexed defendant, “Who are you?”<sup>128</sup> Even the most prepared public defender should expect to confront at least a few surprises.

In most pretrial release arguments, counsel should begin by advocating for release without bail and address the conditions that will meet any appropriate concerns. Defenders should make the court aware of the research about the lack of connection between paying a monetary or secured bail and public safety or court appearance rates.<sup>129</sup>

When dealing with lower-risk clients, attorneys should remind the court about research showing pretrial supervision is not necessary, does little if anything to impact either rates of appearance or rates of new arrests for this group of individuals, and compromises public safety as it diverts resources away from supervising truly high-risk defendants.<sup>130</sup> For defenders, this may be the moment to advocate for release without bail, as described in the statute, and to discuss the effectiveness of something as simple as a phone call or text reminder about upcoming court dates for these individuals.<sup>131</sup>

Argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary conditions of bond or onerous non-monetary conditions unworkable for the client.

When a judge sets a monetary bail that the client cannot afford, defenders should press the judge to rationalize the particular money bail. When applicable, defense attorneys should highlight the support the client will get from family and other persons. It may also prove helpful to describe why the services offered by pretrial services will adequately secure the client’s appearance in court and protect public safety.

Defenders should always know the judge. Judges frequently maintain specific condition-setting proclivities and/or biases that defenders should try to address with information about the client, the case, and/or the resources available. Defenders should succinctly and accurately make a record, but not at the expense of zealous advocacy.

### Pointers for Pretrial Release Arguments

- Know your judge.
- Highlight that there is no connection between monetary bail and public safety or court appearance rates.
- Make individualized arguments on behalf of the client.
- When bail is set above the amount a client cannot afford, press the judge to provide a justification for the amount.
- Challenge conditions that are not specifically relevant to the case or the client.
- Incorporate case law, statutory, and constitutional authority and arguments.
- Be aware of and use relevant research.

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever courts set conditions, release terms, or bail amounts that are unfair, unreasonable, irrational, or arbitrary, defenders should invoke the Due Process Clause of the Fourteenth Amendment. For example, one may argue that unnecessarily burdensome conditions represent punishment without trial in violation of the client’s substantive due process rights or that monetary bail violates the Equal Protection Clause when it is set without consideration of the defendant’s actual financial resources.

<sup>128</sup> As part of the research conducted for this manual, Professor LaVigne traveled throughout the state and participated in court watching and conversations with attorneys.

<sup>129</sup> See, e.g., MICHAEL R. JONES & PRETRIAL JUSTICE INSTITUTE, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 13 (2013) (reviewing bail setting practices in Colorado and extrapolating likely results in other jurisdictions).

<sup>130</sup> See *supra* Section II(C).

<sup>131</sup> See Abigail Becker, *Court date reminder text messages may be reducing failure to appear rates*, THE CAPS TIMES (Sept. 16, 2016), available at [https://host.madison.com/ct/news/local/govt-and-politics/court-date-reminder-text-messages-may-be-reducing-failure-to/article\\_af2e9a9f-d77f-57c6-a793-9aa37cb2c9a6.html](https://host.madison.com/ct/news/local/govt-and-politics/court-date-reminder-text-messages-may-be-reducing-failure-to/article_af2e9a9f-d77f-57c6-a793-9aa37cb2c9a6.html). See also ROGER PRZYBYLSK, *supra* note 44.

Always remind the court: Bail is meant to assure a person's appearance, not their detention.

Defenders must walk the fine line between alienating a judicial officer and zealous advocacy, but it is important to remember that for many clients, the initial appearance will be the first time they see their new attorney in action, and first impressions matter.

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*Bail is meant to assure a person's appearance, not their detention.*

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### C. AFTER THE HEARING

Wisconsin Statute §969.08(1) gives the defense the opportunity to have bail and conditions reviewed after the initial appearance. Attorneys should take advantage of this process as often as possible. The first review occurs 72 hours after the initial appearance. Thus, anyone held on cash bail is *entitled*, 72 hours after their initial appearance “to have the conditions reviewed by the judge of the court before whom the action is pending.”<sup>132</sup> Such a review should be standard practice. The statute does not state whether the request must be in writing, only that reasonable notice of the petition is provided to the state, thus it is important to be aware of local practices.

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*Anyone held on cash bail is entitled, 72 hours after their initial appearance “to have the conditions reviewed by the judge of the court before whom the action is pending.”*

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The statute further provides both parties can make a petition and “the court before which the action is pending may increase or reduce the amount of bail or may alter other conditions of release or the bail bond, or grant bail if it has been previously been revoked.”<sup>133</sup> These hearings are commonly used when a complaining witness (often in

domestic cases) seeks to remove a no-contact provision, but they can be used to accomplish much more. They provide a forum for more fully developed arguments about both monetary and non-monetary conditions. In a short period, counsel can lay out for the court the relevant research and its implications. Moreover, a condition that may have been appropriate or desirable at the initial appearance may not make legal or practical sense weeks or months later. For example, a moderate-risk individual may no longer need GPS and day reporting if they have a two-month track record of compliance. Given the on-going concerns about bail jumping, defenders should pursue the removal of unnecessary, unfair, or unreasonable non-monetary conditions as soon and as often as possible.

In making this recommendation, the authors are aware of the obstacles defenders face.<sup>134</sup> One of the more disturbing challenges is some courts' refusal to schedule bail review hearings after they were properly requested. When this is an issue, attorneys are urged to argue that both the statute and the U.S. Constitution afford detained individuals the right to meaningful and timely review of their bail and release conditions. Attorneys may also want to make a record, when appropriate, of the courts' willingness to schedule bail modification hearings *requested by the state* as a point of comparison. In extreme situations, counsel should consider filing habeas motions or writs of mandamus when courts refuse proper requests for bail review hearings.

The authors understand litigating bail modification does nothing to relieve the press of business in the multitude of other open cases in a defender's caseload. The data shows, however, that securing the release of incarcerated clients and modifying or eliminating onerous and unnecessary release conditions helps improve case outcomes for the clients. Zealous and persistent pretrial advocacy improves attorney-client relations and fosters client confidence in counsel. Giving courts repeated experiences with bail reform serves to further the goal of reforming Wisconsin's bail practices.

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<sup>132</sup> Wis. STAT. § 969.08(1) (2010) - “Upon petition by the state or the defendant, the court before which the action is pending may increase or reduce the amount of bail or may alter other conditions of release or the bail bond or grant bail if it has been previously revoked. Except as provided in sub. (5), a defendant for whom conditions of release are imposed and who after 72 hours from the time of initial appearance before a judge continues to be detained in custody as a result of the defendant's inability to meet the conditions of release, upon application, is entitled to have the conditions reviewed by the judge of the court before whom the action against the defendant is pending. Unless the conditions of release are amended and the defendant is thereupon released, the judge shall set forth on the record the reasons for requiring the continuation of the conditions imposed. A defendant who is ordered released on a condition which requires that he or she return to custody after specified hours, upon application, is entitled to a review by the judge of the court before whom the action is pending. Unless the requirement is removed and the defendant thereupon released on another condition, the judge shall set forth on the record the reasons for continuing the requirement.”

<sup>133</sup> *Id.*

<sup>134</sup> SPD Poll, *supra* note 7.

# V. SPECIFIC PROBLEM AREAS

## A. NON-MONETARY CONDITIONS

Wisconsin's bail statute, the state constitution, and the federal constitution prohibit blanket conditions based on case type.<sup>135</sup> The statute requires the court to consider several client- and case-specific factors in setting non-monetary conditions. The conditions must be individual and reasonable; they must always be relevant to the case and relevant to the individual client.<sup>136</sup>

Non-monetary conditions can be a source of pretrial success for many clients and can be a contributing factor to a positive outcome in their cases. However, for many clients, the overuse and misuse of non-monetary conditions can create a host of personal and legal problems.

### 1. Over-conditioning

Over-conditioning can take several forms and affects countless clients. One form is unnecessary conditions, particularly pretrial supervision, imposed on low-risk individuals. Research shows conditions, such as reporting or monitoring, serve no purpose with low-risk clients. They are already highly likely to appear for court either on their own or with a simple text reminder.<sup>137</sup> They are also highly unlikely to commit an offense while their cases are pending.

Many in the court system may believe no harm exists in having supervision or monitoring and that it is better to be safe than sorry. Research shows the opposite is true.<sup>138</sup> Unnecessary conditions can create risks where none previously existed. Research demonstrates over-conditioning low-risk individuals leads to increases in both their rates of non-appearance and new criminal

activity. Although the research does not specifically identify why this occurs, it is not difficult to imagine the downstream effects of having to take additional time off work and incur additional transportation costs, issues pretrial supervision typically generates. Moreover, these conditions are an unjustified restraint on an individual's liberty. More subtly, pretrial conditions often mirror and, in some instances, exceed the punishment an individual may face if convicted—communicating to the client that they have been found guilty before they ever had a trial.

For moderate- and high-risk clients, non-monetary conditions must still remain relevant and reasonable. Blanket conditions based solely on the type of charge are not permissible.<sup>139</sup> Conditions, such as absolute sobriety or no contact, must relate to the individual case and client's circumstances. Supervision should not exceed what is justified by the individual's risk level. Once again, more is not necessarily better. The fact that a county possesses GPS devices does not mean that everybody needs one.<sup>140</sup>

### 2. Costs of pretrial services

Pretrial services like supervision, monitoring, and testing all cost money. Most counties shift these often substantial costs to clients.<sup>141</sup> This is an ongoing issue throughout the country and attorneys for indigent individuals must develop a strategy for both litigation and collaborative negotiation.

The initial question is whether this type of cost shifting is legal. Challenges to these practices include: assessing such fees before an individual is convicted violates the

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<sup>135</sup> MOVING BEYOND MONEY, *supra* note 22.

<sup>136</sup> *Wilcenski*, *supra* note 97 at 154, 158-59.

<sup>137</sup> *See* Abigail Becker, *supra* note 131.

<sup>138</sup> *See* ABA CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE, AMERICAN BAR ASSOCIATION, (3d ed. 2007), *available at* [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf); *see also* ROGER PRZYBYLSK, *supra* note 44.

<sup>139</sup> *See Wilcenski*, *supra* note 97 at 150.

<sup>140</sup> MOVING BEYOND MONEY, *supra* note 22, at 17.

<sup>141</sup> SPD Poll, *supra* note 7.

basic presumption of innocence and that such actions constitute improper punishment before adjudication.<sup>142</sup>

This type of “offender-funded” intervention also goes against recommended pretrial policy.<sup>143</sup> Expensive and onerous “conditions of release may create harms that mirror the injustices associated with money bail.”<sup>144</sup> One possible approach for indigent clients is to seek an ability-to-pay hearing and request fee waivers when appropriate. Another approach is to move for the court to only assess pretrial fees upon conviction and then, when doing so, the court consider the client’s ability to pay.

If fees are imposed on pretrial defendants, it is critical that defendants are not detained simply because of their inability to pay such fees.<sup>145</sup> In *Bearden v. Georgia*<sup>146</sup>, the U.S. Supreme Court held that a probationer cannot have their probation revoked and be sentenced to a term of incarceration for non-payment of fines and restitution absent evidence that they had the means to pay such fees and that other alternative forms of punishment were inadequate.<sup>147</sup> In finding it was improper to imprison Bearden simply because he lacked the means to pay his financial obligations, the Court pointed out that the sentencing court had already determined that the state’s penological interests were met without incarceration. By analogy in the pretrial context, by directing the release of an individual, a court has already determined community safety and efforts to assure the defendant appears for trial can be met without detaining them, thus their inability to

pay the fees associated with pretrial release should not be a reason to incarcerate them pretrial.<sup>148</sup>

## B. BAIL JUMPING

Another criticism of the criminal justice system is its proclivity towards excess. Police over-arrest and the state over-imprisons; commentators denounce “the challenge of over-criminalization; over-incarceration; and over-sentencing.” Wisconsin does not shy away from this and nowhere is this more apparent than in prosecutions for bail jumping.<sup>149</sup> Its excessive use is inextricably bound to the non-monetary conditions of bond imposed by courts. This statute and its application and interpretation are why effective, zealous advocacy about non-monetary conditions is essential.

The problem with bail jumping can be traced directly to the Wisconsin Supreme Court’s 1998 decision in *State v. Anderson*.<sup>150</sup> In *Anderson*, the Court held prosecutors could charge a defendant with multiple counts of bail jumping for a single, non-criminal act that violated multiple conditions of bond. In her dissent, Justice Janine Geske prophetically pointed out that under the majority’s ruling, a defendant with a single bond could face multiple bail jumping charges with the resulting sentence easily exceeding any possible sentence for the underlying offense.<sup>151</sup> Numerous cases since affirmed the prosecution’s seemingly unbridled discretion when it comes to charging bail jumping, and upheld bail jumping sentences

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<sup>142</sup> An argument can be made that at least, in theory, when an individual has a monetary bail, they could opt to pay 100% of it in cash and receive a full refund of their money upon the conclusion of their case, regardless of its outcome. By contrast, fees paid for supervision are unable to be recovered if the client is acquitted or the charges are dropped prior to trial. There is no viable substitute for the payment of supervision fees unless the court or pretrial services are going to refund those fees if the individual is not convicted.

<sup>143</sup> See MOVING BEYOND MONEY, *supra* note 22, at 17.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983).

<sup>147</sup> *Id.* at 670.

<sup>148</sup> Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L. J. 1381, 1382 (2018) (internal quotations omitted).

<sup>149</sup> WIS. STAT. §946.49 (2010).

<sup>150</sup> *State v. Anderson*, 219 Wis. 2d 739 (1998).

<sup>151</sup> *Id.* at 759-60.

for non-criminal acts that greatly exceed the sentence for the underlying offense.<sup>152</sup>

Defense attorneys have long maintained that prosecutors use bail jumping charges, especially multiple counts, to force guilty pleas. Occasionally, prosecutors will even admit it. In 2017, two sources of data emerged that confirmed this fact, showing the symbiotic relationship between guilty pleas and bail jumping charges.

In a study published recently, the Wisconsin Justice Initiative (WJI) analyzed felony bail jumping charges filed in 2015 in all counties around the state.<sup>153</sup> The data revealed that bail jumping was the most common type of felony charged. Prosecutors filed 7,034 felony bail jumping charges that year. Importantly, this charge also had the highest dismissal rate, with jury trials on the charge being a rarity. This can be interpreted as an indicator that these charges were used as a means to coerce guilty pleas for underlying offenses.<sup>154</sup>

The second study, published in the Wisconsin Law Review in 2018, is an in-depth, sophisticated analysis of misdemeanor and felony bail jumping charges and their dispositions *vis a vis* the original charges.<sup>155</sup> The data showed misdemeanor and felony bail jumping charges increased 151% between 2000 (when it represented 6.83% of the charges filed) and 2016 (when it represented 17.14% of charges filed).<sup>156</sup> Consistent with the felony-case investigation in the WJI review, the 2018 study found bail jumping (misdemeanor and felony) is currently the most frequently charged crime in the state, far surpassing disorderly conduct (the most frequently charged crime in 2000.)<sup>157</sup> The 2018 study also corroborated the correlation between bail jumping and coercive guilty pleas. For example, despite having a significantly lower crime rate and fewer cases, in 2016, Dane County filed more bail jumping charges in **absolute numbers** than Milwaukee County.<sup>158</sup> The research also corroborated the anecdotal information that it was common to file multiple bail

jumping charges against a single defendant. One notable case in Kenosha involved 44 bail jumping charges leveled against a single defendant.<sup>159</sup> (He later pled guilty to two counts of bail jumping, as well as the underlying charge.)

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### *Bail jumping is the most frequently charged crime in Wisconsin.*

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In establishing the interconnection between bail jumping charges and guilty pleas, the 2018 study used a “leverage analysis.” Between 2000 and 2016, the state-wide “leverage percentage” (cases in which bail jumping charges appear to have been used to extract a plea) increased from 59.39% to 64.33%. This rise shows bail jumping was not only a tool of plea leveraging since before the Anderson decision (1998), but that the rate is increasing. In absolute numbers, the increase was magnified several times with an explosion in the number of bail jumping charges filed between 2000 and 2016. Several counties analyzed showed leverage potentials exceeding 80%.<sup>160</sup>

The end lesson for defenders is that conditions matter. The more conditions a client has, the more exposure they have to multiple bail jumping charges. In addressing the issue, one prosecutor publicly responded by suggesting defendants “could just follow conditions of bond and not face those charges.”<sup>161</sup> This comment ignores the fact that conditions may be unreasonable, unnecessary, unfair, or unconstitutionally broad as reported bail conditions have included “stay out of every library ‘in the world’” and “stay out of all Walmarts.”<sup>162</sup>

Even when a prosecutor does not deliberately use bail jumping to force a plea or is judicious in charging, bail jumping convictions lead to longer sentences. When those convictions arise from conditions that should not have been imposed to begin with, the injustice is palpable. Bail jumping charges are another reason that attorneys must

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<sup>152</sup> See, e.g., *State v. Eaglefeathers*, 762 N.W.2d 690 (Wis. Ct. App. 2007).

<sup>153</sup> Gretchen Schuldt, *Bail Jumping Charges Need Reform*, URBAN MILWAUKEE (Mar. 23, 2017), available at <https://urbanmilwaukee.com/2017/03/23/court-watch-bail-jumping-charges-need-reform/>.

<sup>154</sup> *Id.*

<sup>155</sup> Amy Johnson, *The Use of Wisconsin's Bail Jumping Statute; A Legal and Quantitative Analysis*, 3 WIS. L. REV. 101 (2018).

<sup>156</sup> *Id.* at 115.

<sup>157</sup> *Id.* at 127.

<sup>158</sup> *Id.* at 120.

<sup>159</sup> *Id.* at 135.

<sup>160</sup> *Id.* at 130-31.

<sup>161</sup> *Bail Jumping Charges Need Reform*, *supra* note 153.

<sup>162</sup> SPD Poll, *supra* note 7.



vigilantly litigate against the imposition of unnecessary conditions at the initial appearance and in subsequent modification hearings.

### C. VIDEO BOND HEARINGS

In certain counties, initial appearances are conducted by video. Video conferencing, while having the appearance of convenience, is a poor substitute for in-person hearings where the client and their attorney stand together directly before the judge. Some problems arise from shoddy equipment, but others are inherent in the nature of video conferencing itself. This style of hearing is more impersonal and gives a feeling of separation and distance regardless of whether the jail is miles away or one floor below. Beyond the negative impacts that can arise from this impersonal method, video conferencing fundamentally affects the accused's access to counsel and his presentation of evidence. This can sometimes manifest itself when the video process is set up such that everyone but the accused (including the prosecutor, judge, witnesses, family members and even the defense attorney) is in the courtroom, and the accused is alone at the detention facility. The other model is one in which the attorney and client are together in one location (the jail), while all the other system participants and the public are in the courtroom.

If the lawyer is located with the client, the lawyer should ask the client if any family members or supporters might be in the courtroom for the hearing, and, if so, the attorney should attempt to contact the family prior to the hearing to see if they will support an argument for release. Lawyers should caution both clients and family members to avoid making any statements about the factual allegations of the case. If the client is charged with an offense that might trigger a no-contact order, such as in a domestic violence case, the attorney should try to determine if the complaining witness is in the courtroom and attempt to interview that witness before the hearing to determine if the witness supports or opposes a no-contact order. The attorney should also take the time to explain to the client what is occurring in the courtroom.

When practicing in a county where the lawyer is in the courtroom and the client is at a remote location, attorneys should ensure that they have had enough time to interview the client before the hearing. Additionally,

lawyers should insist on having the opportunity for confidential communication with the client during the hearing in the event the client has any questions. This will require special equipment that the county must provide. Defenders should be especially aware of concerns regarding confidentiality of attorney-client communications in transmissions made via video or phone during proceedings.

### D. SHACKLING

In many counties, all defendants appearing at initial appearances are shackled. This is usually at the request of the sheriff with the agreement of the court and is rarely challenged. However, in June 2017, the Ninth Circuit held that the right to be free of shackles and handcuffs—which, until then, had been applied only to jury trials—“applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without.”<sup>163</sup> The Court went on to require that “[b]efore a presumptively innocent defendant may be shackled, the [trial] court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom.”<sup>164</sup> The court reasoned that the accused “has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”<sup>165</sup> In May 2018, the United States Supreme Court vacated that decision on the grounds of mootness.<sup>166</sup> Nevertheless, attorneys are urged to continue raising the issue, using the language and reasoning of the Ninth Circuit opinion. In addition to litigation, defense counsel should seek collaborative efforts with the judges, the sheriff's department, and other stakeholders to try to reach a resolution.

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*The right to be free of shackles and handcuffs—which, until then, had been applied only to jury trials—“applies whether the proceeding is pretrial, trial, or sentencing. . . .”*

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### E. OVER-USE AND MISUSE OF SIGNATURE BONDS

In many counties, signature bonds are viewed as the only alternative to cash bail. This belief is incorrect. As noted

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<sup>163</sup> *United States v. Sanchez-Gomez*, 859 F.3d 640, 661 (9th Cir. 2017).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *United States v. Sanchez-Gomez* 138 S. Ct. 1532 (2018), vacated as moot on remand.

previously, Wis. Stat. §§969.03(1) and 969.04(1) clearly state a court may release a defendant without bail. While a signature bond allows courts to release defendant without actually posting cash, it does impose a monetary amount the defendant will be required to pay if they fail to comply with any of the conditions of release.<sup>167</sup>

For a long time, it did not matter that signature bonds were used as *de facto* recognizance bonds. The amount of that bond did not matter either. In fact, attorneys who argued about the amount of the signature bond were considered naïve because, whether the amount was high or low, the results were the same: the defendant signed the bond and if they failed to appear or violated another non-monetary condition, the bond was simply revoked or modified. Unlike cash bonds, no historic attempts to recover the amount of the signature bond when noncompliance occurred exist.

This, however, is changing. Several counties have started forfeiture actions against defendants for the signature bond and are getting civil judgments, often in astronomical amounts, that clients have no hope of paying.<sup>168</sup> This trend seems to be spreading, which means defense attorneys must fashion effective arguments about whether a signature bond—as opposed to release without bail—is even warranted and, if so, in what amount.<sup>169</sup>

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*Bail is not intended as a revenue stream or weapon in the prosecution’s arsenal.*

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Undoubtedly, opposition to increased use of the “release without bail” provision will arise. First, anecdotal evidence suggests that at least some counties see collection of forfeited signature bonds as a significant source of revenue.<sup>170</sup> Second, and very importantly, release without bail precludes the filing of bail jumping charges.<sup>171</sup> Prosecutors will not lightly abandon this potential weapon. Nonetheless, bail is not intended as a revenue stream or weapon in the prosecution’s arsenal. When the

court is considering bail for a low-risk individual who is appropriate for minimal conditions such as an automated phone call or a text message, release without bail should be the first stop in any bail argument. Given that signature bonds as used in Wisconsin are in fact money bonds—albeit unsecured—courts should only impose a signature bond if that kind of promise or threat is required to assure appearance in court.<sup>172</sup> In setting a signature bond, courts must set only an amount “necessary to assure the appearance of the defendant.”<sup>173</sup> A defender could make the case that, in misdemeanors at least, the amount of a signature bond should never exceed the amount set in the Uniform Bail Schedule.

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*Given that signature bonds as used in Wisconsin are in fact money bonds—albeit unsecured—courts should only impose a signature bond if that kind of promise or threat is required to assure appearance in court.*

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While it may seem silly or futile to argue over whether release should be by way of a signature bonds, release without bail, or the amount set on the signature bonds, the current trend makes it imperative that attorneys enter the fray. Clients already face an onslaught of costs and fees. The last issue they need is the threat of a large civil judgment for a cavalierly and improperly imposed signature bond.

If a client has a forfeited signature bond and less than 30 days have passed, the attorney should immediately file a motion to vacate the forfeiture and reinstate the signature bond. If a judgment was entered, the attorney should file a motion to vacate the judgment of bail forfeiture pursuant to Wis. Stat. §806.07.<sup>174</sup>

## F. RESISTANCE AND RISK AVERSION

Counsel should not expect that all—or even most—judges and prosecutors will welcome bail reform and its changes. Bail reform represents a different way of thinking. Like

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<sup>167</sup> Wis. STAT. §967.02(4) (2010).

<sup>168</sup> The authority for these actions can be found Wis. STAT. §969.13(3).

<sup>169</sup> SPD Poll, *supra* note 7.

<sup>170</sup> See Wayne Logan and Ronald F. Wright, *Mercenary Criminal Justice*, ILL. L. REV. 1175 (2014) (suggesting that criminal justice employees have become mercenaries “in effect working on commission”).

<sup>171</sup> *State v. Dawson*, 536 NW 2d 119, 122 (Wisc. Ct. App. 1995).

<sup>172</sup> Wis. STAT. §969.001 (2010).

<sup>173</sup> Wis. STAT. §969.04 (2010).

<sup>174</sup> See Appendix 3 for additional details regarding forfeiture and reinstatement.

Chief Judge Maxine White noted, countless judges and prosecutors long assumed that they could rely on their “head” and “gut” to lead them to the right decision—or what they believed was the right decision.

The sea change in bail-reform is the sense of risk perceived in moving from money-based release to non-monetary release decisions. Many actors in the criminal justice system fear that an individual released on bail will commit a serious offense.<sup>175</sup> As a result, many prosecutors and judicial officers err on the side of charge-based detention under the belief that this action mitigates risk.<sup>176</sup> This is not true. As experts in pretrial risk management like to observe, the most effective way to guarantee public safety and court appearance is to detain every single person charged with a crime, a solution that is neither practical nor constitutional. As Judge Kremers notes, we cannot detain our way out of risk.<sup>177</sup>

Stakeholders and experts who have been involved in bail reform education have found that both judges and prosecutors continue to believe that their experience (another name for head and gut) is a better gauge of risk, and resist the notion that data might be helpful. A study of Kentucky bail statistics after four years of state-wide use of the PSA found that many judges reverted to following their own instincts and ignored the PSA’s recommendations.<sup>178</sup> The author of the study suggested that “nurturing a culture change among judges” could be a potential, though difficult, solution—especially in a state like Wisconsin (and Kentucky) where judges are elected.<sup>179</sup>

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*Decision makers need to understand no one is trying to replace their discretion with a risk assessment instrument. Rather, the use of data can better inform the exercise of discretion.*

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This is where the defense can play a significant role through education, collaboration, and litigation. The conversation must change. First, decision makers need to understand no one is trying to replace their discretion

with a risk assessment instrument. Rather, the use of data can better inform the exercise of discretion than the rote reliance upon experience and intuition. A well-conceived RAI is a tool—nothing more, nothing less. Yet it is a tool that we cannot disregard.

Second, decision makers need to rethink risk. Myriad studies prove that unnecessary pretrial detention *increases* the risk of re-arrest long-term. That fact must be included in the calculation, as should the social and economic harm pretrial detention does to individuals and communities.<sup>180</sup> Current bail practices are doing short- and long-term damage with minimal benefit. This cannot be what anybody had in mind.

Ultimately, setting bail is a complicated balancing act, one with no simple fixes. Milwaukee Circuit Court Judge Jeffrey Kremers neatly summed it up this way:

Honoring defendants’ constitutional rights, such as the presumption of innocence and the right to reasonable bail before trial, requires society to accept that pretrial release decisions might unintentionally result in harm to the public. Enhancing public safety requires us to manage release and detention based on risk. So, the question is not whether courts take risks but whether they take the right risks and measure and manage risk appropriately. The justice system’s goal is to balance defendant’s rights with the need to protect the community, maintain the integrity of the judicial process, and ensure court appearance.<sup>181</sup>

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<sup>175</sup> Indeed, a commissioner in Waukesha told a defendant who had been released on bond in Milwaukee and was then charged with a serious offense in Waukesha that he was “everyone’s worst nightmare.” *Everyone’s worst nightmare: ‘Felon with 4 OWIs accused in deadly I-94 crash*, WISN-ABC (Jul. 10, 2017, 7:21 PM CDT), available at <http://www.wisn.com/article/interstate-94-crash-delafield-frank-schiller-peter-enns/10285531>.

<sup>176</sup> Kremers, *supra* note 2.

<sup>177</sup> *Id.*

<sup>178</sup> Stevenson (Kentucky), *supra* note 67, at 60.

<sup>179</sup> *Id.*

<sup>180</sup> Crystal S. Yang, *supra* note 1.

<sup>181</sup> Kremers, *supra* note 2.

# APPENDIX 1 – THE MILWAUKEE MODEL: PUBLIC SAFETY ASSESSMENT (PSA)

Milwaukee was the first county in the EBDM pilot to use the PSA and as of June 2018, it is still the only county in the project using the instrument.

As described in Tool #3: Risk Assessment Instruments (“RAIs”), the Arnold Protocol includes a Decision Making Framework (DMF) in addition to the PSA risk assessment. Justice Point, the pretrial services provider in Milwaukee County, completes a PSA and DMF on every individual arrested on new charges and completes a report which

is available to all parties prior to initial appearance. As noted earlier, the PSA/DMF does not employ an interview, but is based solely on static factors available from records such as CCAP and NCIC. The following is a brief description of PSA/DMF and some of the guiding principles and methods used in Milwaukee. A comprehensive description is provided as part of the training given when a county begins using the PSA.

## A. ASSESSING RISK

The PSA contains nine factors that assess the risk of three potential pretrial failures: failure to appear (using a six-point scale), new criminal activity (using a six-point scale), and new violent criminal activity (using a “flag” to indicate an elevated risk of violence).

### THE NINE FACTORS THE PSA EXAMINES ARE:

- 1) Age at current arrest;
- 2) Current violent offense;
  - a. Current violent offense and 20 years old or younger;
- 3) Pending charge at the time of the offense;
- 4) Prior disorderly persons conviction (does not include ordinance violations or petty disorderly persons offenses);
- 5) Prior indictable convictions (degrees one to four)
  - a. prior conviction;
- 6) Prior violent offense conviction;
- 7) Prior failure to appear at a pre-disposition court date in the last two years (not including ordinance violations, traffic offenses, or petty disorderly persons offenses);
- 8) Prior failure to appear at a pre-disposition court date more than two years ago (not including ordinance violations, traffic offenses, or petty disorderly persons offenses); and
- 9) Prior sentence to incarceration of 14 days or more.

The factors are weighted, as some are considered stronger indicators of pretrial risk of failure than others. The weighting and scoring for the PSA and the corresponding DMF are explained on the next page.

## B. FAILURE TO APPEAR

To calculate the risk of Failure to Appear (FTA), the PSA considers four factors:

FACTOR	POINT VALUE	SCORE
1) Pending charge at the time of the offense	1 point	
2) Have at least one prior conviction	1 point	
3) Failed to appear with the past two years:		
a. One prior FTA	2 points	
b. Two or more prior FTAs	4 points	
4) Have at least one fail to appear more than two years ago	1 point <sup>182</sup>	
		<b>TOTAL=</b>

The defendant's raw score, which will be between zero and seven is then converted into a six-point scale as shown in the chart.<sup>183</sup> Each point on the six-point FTA scale corresponds to a different likelihood of failing to appear.<sup>184</sup>

FTA SCORE CONVERSION	
Raw Score	Six Point Scale
0	1
1	2
2	3
3-4	4
5-6	5
7	6

<sup>182</sup> LAURA AND JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 3 (2016), available at <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> [hereinafter RISK FACTORS AND FORMULA].

<sup>183</sup> *Id.* at 4.

<sup>184</sup> RISK FACTORS AND FORMULAS, *supra* at note 182, at 4.

### C. NEW CRIMINAL ACTIVITY

To calculate the risk that a defendant will commit new criminal activity (NCA) while on release, the PSA examines seven factors:

FACTOR	POINT VALUE	SCORE
1) Defendant is 22 or younger at the time of arrest	2 points	
2) Has a pending charge at the time of arrest	3 points	
3) Has one or more prior disorderly persons offense conviction	1 point	
4) Has one or more prior convictions for indictable offenses	1 point	
5) Violent crime conviction(s):		
a. One or two prior convictions	1 point	
b. Three or more prior convictions	2 points	
6) Has a failure to appear within the past two years:		
a. One prior FTA	1 point	
b. Two or more prior FTAs in the past two years	2 points	
7) Previously sentenced to 14 days or more of incarceration	2 points <sup>185</sup>	
		<b>TOTAL=</b>

The resulting raw score, which will be between zero and thirteen, is then converted to a six-point scale as shown in the chart.<sup>186</sup> The failure rate in the NCA 6-point scale corresponds to the likelihood that the individual, if released, will be arrested for a new crime while the current case is pending. Unsurprisingly, those scoring higher have an increased risk of being involved in new criminal activity if released pending trial.

NCA SCORE CONVERSION	
Raw Score	Six Point Scale
0	1
1-2	2
3-4	3
5-6	4
7-8	5
9-13	6

<sup>185</sup> RISK FACTORS AND FORMULA, *supra* note 182, at 3.

<sup>186</sup> *Id.* at 4.

## D. NEW VIOLENT CRIMINAL ACTIVITY

In approximately 11% of the cases in which an accused is considered for release the PSA also flags defendants as posing an elevated risk of New Violent Criminal Activity (NVCA) during the pretrial release period. To calculate the NVCA score, the PSA examines five factors:

FACTOR	POINT VALUE	SCORE
1) Current offense is a violent crime	2 points	
2) If the defendant is under 21 years old and the current charge is a violent offense	1 point	
3) Has a pending charge	1 point	
4) Has a prior conviction for any offense	1 point	
5) Has convictions for prior violent crimes:		
a. One or two prior violent convictions	1 point	
b. Three or more	2 points <sup>187</sup>	
		<b>TOTAL=</b>

The resulting raw score is calculated. Individuals scoring four to seven points receive a NVCA flag.<sup>188</sup> This flag, which will be based on both the nature of prior criminal convictions and the current charge, will make release less likely. Those clients who are released after receiving a flag will be released under more onerous conditions.

## E. THE DECISION MAKING FRAMEWORK

The PSA scores are only the beginning of the decision making process regarding pretrial release. While the PSA measures risk, Milwaukee, like other jurisdictions using the PSA, also uses a Decision Making Framework (DMF) to help manage risk. Taking into account the current charge and the PSA results, the DMF makes a recommendation for a judge about conditions of release or for detention.

The purpose of these recommendations is to assign appropriate conditions based on risk level. The benefit of this approach is that it discourages unnecessary conditions being imposed on low-risk individuals. The DMF also includes extra risk points assigned to defendants with certain charges or certain circumstances. These are charges “in which a majority of the time a recommendation of ‘if released then maximum conditions apply and cash’ would be appropriate regardless of the risk assessment results.”<sup>189</sup> These are *not* based on the PSA results but are set by the locality.

The decision as to the particular conditions assigned to the various classifications are set by the locality, not by LJAF or by the PSA itself. Additionally, the quantity of supervised conditions imposed at Level 3 and above is not standardized but is left to the discretion of the judicial officer or more commonly, the pretrial services provider. In Milwaukee an inter-departmental universal screening committee meets every other week to review bail decisions and conditions. The EBDM protocol requires that any participating county have such a committee.

In the first half of 2017, commissioners and judges<sup>190</sup> in Milwaukee deviated up or down from the PSA/DMF recommendations in about fifteen percent of the cases because of information provided by the parties.<sup>191</sup>

<sup>187</sup> *Id.* at 3.

<sup>188</sup> *Id.* at 4.

<sup>189</sup> This type of “add on” will be standard among the EBDM protocol counties.

<sup>190</sup> Bail hearings are held before a court commissioner who regularly handles “intake court. However, judges in Milwaukee are frequently asked to review the decisions, and judges are available for bail review hearings within 24 hours of the initial bail determination. The Universal Screening Committee meets every two weeks and receives a report on “overrides” and “underrides” - decisions to deviate upwards or downwards from the recommendations of the PSA and DMF.

<sup>191</sup> *Marquette*, *supra* note 2; *Kremers*, *supra* note 2. It appears that the percent of deviations is more consistent in Milwaukee than in LaCrosse since intake in Milwaukee is generally the province of a single court commissioner as opposed to rotating judges.

## WISCONSIN PRETRIAL RELEASE CONDITIONS MATRIX - VERSION 2 (08/06/2018)

FAILURE TO APPEAR SCORE	NEW CRIMINAL ACTIVITY SCORE					
	NCA 1 (90%)	NCA 2 (85%)	NCA 3 (77%)	NCA 4 (70%)	NCA 5 (52%)	NCA 6 (45%)
FTA 1 (90%)	Level 1	Level 1				
FTA 2 (85%)	Level 1	Level 1	Level 1	Level 2	Level 4	
FTA 3 (80%)		Level 1	Level 1	Level 2	Level 4	Level 4
FTA 4 (69%)		Level 1	Level 2	Level 3	Level 4	Level 4
FTA 5 (65%)		Level 1	Level 2	Level 3	Level 4	Level 4
FTA 6 (60%)				Level 3	Level 4	Level 4

The percentages listed in the table above are PSA-Court Success Rates by Risk Level for Failure to Appear (FTA) and New Criminal Activity (NCA). For more information about this research visit: [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf)

RELEASE CONDITIONS	PRETRIAL MONITORING LEVEL			
	LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4
Face-to-Face Contact	No	1x/month	Every other week	Weekly
Alternative Contact	No	1x/month	Every other week	No
Supervised Conditions	No	As Authorized	As Authorized	As Authorized
Court Date Reminder	Yes	Yes	Yes	Yes
Criminal History/CJIS	No	Yes	Yes	Yes

NOTE: SAMPLE DOCUMENT. AUTHORIZED CONDITIONS WILL VARY BY COUNTY BASED ON RESOURCES.

CONDITION	AUTHORIZED
Drug Testing	Defendant Level 3 or greater supervision on the DMF AND Scores X or greater on substance use screen AND has a history of illegal drug use/abuse
Portable Breathalyzer	Defendant Level 3 or greater supervision according to DMF AND Scores X or greater on substance use screen AND (has a history of problematic alcohol use/abuse OR current alcohol abuse) OR charged with an OWI case AND qualifies for supervision
Absolute Sobriety	Defendant has score of X or greater on substance use screen and a history of alcohol abuse or current alcohol abuse OR Police report and/or criminal complaint indicate the defendant was intoxicated at time of arrest OR charged with an OWI case and qualifies for supervision
GPS Monitoring	Defendant charged with a felony non-OWI offense, is subject to DMF Step 2 OR scored Level 5 Supervision and charged with a violent offense OR Concern for victim safety
SCRAM	Defendant charged with an OWI offense and qualifies for Level 3 Supervision according to the DMF AND if any 1 of the following is true: Scores X or higher on substance use screen OR Currently on pretrial release for an OWI at time of alleged new OWI OR Charged with 3rd or greater OWI. If defendant does not qualify for supervision, private pay SCRAM is an option depending upon program capacity.



# APPENDIX 2 – THE LACROSSE MODEL: COMPAS PLUS

## A. RAI IN LACROSSE

LaCrosse was one of the early counties to embrace EBDM and has been very active with the pilot project. LaCrosse is currently using the COMPAS Pretrial Assessment Instrument in combination with PROXY and the Domestic Violence Lethality Assessment for pretrial assessment. This “COMPAS Plus” approach gives risk assessments in LaCrosse a more fluid quality than seen in Milwaukee. LaCrosse has created its own grid for risk and conditions.<sup>192</sup> Like Milwaukee, LaCrosse has an oversight committee (Criminal Justice Management Committee) which meets regularly.

## B. PRETRIAL ADMINISTRATION IN LACROSSE

In LaCrosse, Justice Support Services (JSS) interviews all individuals in custody on new charges, checks administrative records, and prepares a report. A copy of the report is provided to the SPD and the DA’s Office about one hour before the hearing. The court is provided with a copy of a report as each case is called.

As part of its duties, the Criminal Justice Management Council keeps detailed records of how each court follows or deviates from the recommendations in the pretrial report. According to Judge Elliott Levine, judges regularly review jail reports to determine whether individuals are held in jail on low cash bond and will *sua sponte* schedule reviews.

LaCrosse makes use of a Pretrial Services Violations Guide, which will also be part of the eight county EBDM protocol. This guide insures that sanctions are equally applied and are in proportion to the seriousness of the violation.

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<sup>192</sup> This is standard practice for counties using COMPAS. For example, Outagamie County has created its own grid which differs in certain respects from that used in LaCrosse.

**LACROSSE COUNTY, WISCONSIN PRETRIAL GRID  
(PROXY, COMPAS PRETRIAL, DOMESTIC VIOLENCE LETHALITY ASSESSMENT)**

**Grid 1 Misdemeanor and Criminal Traffic (Excluding OWI & Risk of Injury)**

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance	None	None
Low-warrant issued	Personal Recognizance	Court Reminders	None
Moderate	Personal Recognizance	None	None
Moderate-warrant issued	Personal Recognizance	Court Reminders	None
Moderate/High	Personal Recognizance	Standard	As Authorized
Moderate/High warrant issued	Cash [\$1-\$500]	Enhanced	As Authorized
High	Personal Recog. - Cash [\$1-\$500]	Enhanced	As Authorized

**Grid 2 Misdemeanor-Risk of Injury or OWI-2nd Offense**

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance	None	None
Low-warrant issued	Personal Recognizance	Court Reminders	None
Moderate	Personal Recognizance	Standard	As Authorized
Moderate-warrant issued	Personal Recognizance	Enhanced	As Authorized
Moderate/High	Personal Recognizance	Enhanced	As Authorized
Moderate/High-warrant issued	Cash [\$1-\$2,500]	Enhanced	As Authorized
High	Cash [\$2,500-\$10,000 or statutory limit]	Enhanced	As Authorized

**Grid 3 Felony (Excluding OWI & Risk of Injury)**

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance	None	None
Moderate	Personal Recognizance	Standard	As Authorized
Moderate/High	Cash [\$1-\$2,500]	Enhanced	As Authorized
High	Cash [\$2,500-\$10,000 ]	Enhanced	As Authorized

#### Grid 4 Felony-Risk of Injury (Excluding Non-OWI Homicides)

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance	Standard	As Authorized
Moderate	Personal Recognizance - Moderate Cash	Enhanced	As Authorized
Moderate/High	Cash [\$2,500 - \$10,000]	Intensive	As Authorized
High	Cash [Minimum of \$10,000]	Intensive	As Authorized

#### Grid 5 Operating While Intoxicated 3rd Offense and Misdemeanor 4th Offense OWI

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance	None	None
Moderate	Personal Recognizance	Standard	Testing
Moderate/High	Cash [\$1 - \$500]	Enhanced	Testing
High	Cash [\$500 - \$2,500]	Enhanced	Testing

#### Grid 6 Felony Operating While Intoxicated

RISK LEVELS	BOND TYPE [RANGE]	SUPERVISION	SUPERVISED CONDITIONS
Low	Personal Recognizance - Cash [\$0-\$500]	Standard	None
Moderate	Cash [\$500-\$2,500]	Enhanced	Testing
Moderate/High	Cash [\$2,500 - \$10,000]	Enhanced	Testing
High	Cash [Minimum of \$10,000]	Enhanced	Testing

#### Key

- Bond Type [Ranges]
- Personal Recognizance
- Cash [Low] = \$1 to \$500
- Cash [Low/Moderate] = \$1 to \$2,500
- Cash [Moderate] = \$1 to \$10,000
- Cash [High] = \$1 - statutory limit

## SUPERVISION LEVELS

	COURT REMINDERS	STANDARD	ENHANCED	INTENSIVE
Face-to-Face Contact	NA	Monthly	Every other week	Weekly
Alternative Contact (phone, text, e-mail)	NA	1 x/month	Every other week	NA
Supervised Conditions Compliance Verification	NA	As authorized	As authorized	As authorized
Court Date Reminder	X	X	X	X
Criminal History/CJIS Check	NA	X	X	X

## SUPERVISED CONDITIONS

CONDITION	Authorized when:	CONDITION	Authorized when:
NO DRUGS and DRUG TESTING	<p>Defendant is eligible for supervision according to the Pretrial screening.</p> <p><b>AND</b></p> <ul style="list-style-type: none"> <li>• Scores 3 or greater on UNCOPE.</li> </ul> <p><b>AND</b></p> <ul style="list-style-type: none"> <li>• Has a history of illegal drug use/abuse.</li> </ul>	ABSOLUTE SOBRIETY and ALCOHOL TESTING	<ul style="list-style-type: none"> <li>• Defendant has an UNCOPE Score of 3 or greater and alcohol is the primary substance used.</li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li>• The police report and/or criminal complaint indicate the defendant was intoxicated at the time of arrest.</li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li>• The defendant is charged with an OWI case and qualifies for supervision.</li> </ul>
NO ALCOHOL and ALCOHOL TESTING	<ul style="list-style-type: none"> <li>• Defendant is eligible for supervision according to of the Pretrial screening.</li> </ul> <p><b>AND</b> -Scores 3 or greater on UNCOPE.</p> <p><b>AND</b></p> <ul style="list-style-type: none"> <li>• The defendant has a history of problematic alcohol use/abuse.</li> </ul>	GPS MONITORING	<ul style="list-style-type: none"> <li>• Defendant qualifies for Intensive Supervision</li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li>• Concern exists for victim safety/no contact monitoring.</li> </ul>

Draft 1: 8/13/14

Revised: 5/12/2016 (RV)

Revised: 11/9/16 (JK) Removed "Intensive" supervision from grids 2, 5 and 6

**LA CROSSE COUNTY PRETRIAL SERVICES VIOLATIONS GUIDE (draft 8/13/14)**

LOW SEVERITY VIOLATIONS	MODERATE SEVERITY VIOLATIONS	HIGH SEVERITY VIOLATIONS
Definition: Involves violations that show a lapse in judgment and do not cause harm to themselves or others.	Definition: Violations that appear to show a disregard for court orders and pretrial supervision but did not cause harm or potential harm to others.	Definition: Violations that appear to show a willful and/or repeated disregard for court orders and pretrial supervision, and/or violations which cause or present a risk of harm to themselves and/or others.
Late to scheduled office contact without acceptable excuse	Failure to respond to call or communication from PTS w/in 24 hours	Any new criminal charge(s) resulting in the filing of a criminal complaint
Insufficient UA/Diluted UA/refusal to follow UA collection protocol	Failure to report a new arrest	Missed scheduled face contact
Disruptive behavior in PTS Office	Missed scheduled alternate contact	Missed court date (FTA)
GPS Low Severity Violations (see list)	GPS Moderate Severity Violations (see list)	GPS High Severity Violations (see list)
SCRAM Minor Severity Violations (see list)	SCRAM Moderate Severity Violations (see list)	SCRAM High Severity Violations (see list)
Failure to report police contact	Failure to comply with verification	Tamper/attempt tamper-UA
Failure to report after court	Missed UA/PBT, refusal to submit UA/PBT, positive drug test/PBT	Violation of no contact/stay away order
Failure to report address/phone # change	Repeated* Low Severity Violations	Failure to complete a violations response
		Repeated* Moderate Severity Violations

\*Repeated=More than two events within the period of supervision

**LA CROSSE COUNTY PRETRIAL VIOLATIONS RESPONSE MATRIX**

SUPERVISION LEVEL	LOW SEVERITY VIOLATION	MOD. SEVERITY VIOLATION	HIGH SEVERITY VIOLATION
STANDARD	Low Response	Low-Mod. Response	Mod.-High Response
ENHANCED	Low-Mod. Response	Mod.-High Response	High Response
INTENSIVE	Low-Mod. Response	Mod.-High Response	High Response
RESPONSE DEFINITIONS			
LOW RESPONSE	Verbal warning, review release conditions with defendant, consult with attorney, consult with family/support, role clarification, use of disapproval		
MODERATE RESPONSE	Meet with attorney and defendant (staffing), reflective writing assignment, increase frequency of substance testing, increase PBT/UA testing frequency, refer for AODA assessment, refer for mental health services, increase supervision level, consult with AODA/MH treatment provider, Event worksheet, Risk Mitigation Plan		
HIGH RESPONSE	Must notify court, ADA, defense attorney: may request additional bail conditions (SCRAM, GPS, curfew, drug testing, treatment), request bail hearing, return to custody, Court Appearance Plan, Thinking Model		
SCRAM/GPS SPECIFIC VIOLATIONS			
VIOLATION SEVERITY	GPS	SCRAM	
LOW	1 <sup>st</sup> low battery event	Low battery event	
MODERATE	Inclusion zone violation, failure to respond to order-in by case manager, subsequent low battery event	Failure to download, loss, damage or destruction of equipment, failure to respond to order-in by case manager	
HIGH	Failure to cooperate/show for install, exclusion zone violation, confirmed tamper	Failure to cooperate/show for install, loss of contact, confirmed tamper, confirmed drinking event	

# APPENDIX 3 – BAIL FORFEITURE PROCEEDINGS

STATE OF WISCONSIN

CIRCUIT COURT BRANCH \_\_\_\_\_

WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff, vs. Case No. \_\_\_\_\_, Defendant.

## NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT FORFEITING BAIL

TO:

DISTRICT ATTORNEY  
WAUKESHA COUNTY

CORPORATION COUNSEL  
WAUKESHA COUNTY

PLEASE TAKE NOTICE, that the defendant by attorney \_\_\_\_\_, will appear in that branch of the circuit court presided over by the Honorable \_\_\_\_\_ in his/her courtroom on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_M. or as soon thereafter as counsel may be heard and will move the Court pursuant to Sec. 806.07(1)(h), Wis. Stats., for an order vacating the judgments forfeiting bail previously entered by this court on \_\_\_\_\_.

AS GROUNDS, counsel states that the judgment is unfair, excessive, unduly harsh and contrary to the interests of justice.

WHEREFORE, the defendant moves to vacate the Judgment or in the alternative to modify the judgment consistent with the interests of justice.

Dated at Waukesha, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Respectfully submitted,

\_\_\_\_\_  
Attorney for Defendant

P.O. ADDRESS:

Office of Public Defender  
407 Pilot Court, Suite 500  
Waukesha, WI 53188

STATE OF WISCONSIN

CIRCUIT COURT BRANCH  
CRIMINAL TRAFFIC DIVISION

WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff, vs. Case No. \_\_\_\_\_, Defendant.

**NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT FORFEITING BAIL**

TO:

DISTRICT ATTORNEY  
WAUKESHA COUNTY

CORPORATION COUNSEL  
WAUKESHA COUNTY

PLEASE TAKE NOTICE, that the defendant will appear in that branch of the circuit court presided over by the Honorable \_\_\_\_\_ in his/her courtroom on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_M. or as soon thereafter as counsel may be heard and will move the Court pursuant to Sec. 806.07(1)(h), Wis. Stats., for an order vacating the judgment(s) forfeiting bail previously entered by this court on \_\_\_\_\_.

AS GROUNDS, the defendant states the following reasons that would justify relief from the operation of the judgment(s) in this case:

WHEREFORE, the defendant moves to vacate the judgment(s).

Dated at Waukesha, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Respectfully submitted,

\_\_\_\_\_  
Defendant

## KEY FACTORS REGARDING RELIEF FROM BAIL FORFEITURE

### Outline by Samuel W. Benedict

- Forfeiture §969.13
  - » If conditions are not complied with, the court shall enter an order declaring bail to be forfeited. (1)
  - » The order may be set aside if it appears justice does not require enforcement of the forfeiture. (2)
  - » Notice of forfeiture shall be mailed to the defendant and sureties within 30 days.
  - » If the defendant does not appear and surrender or the sureties do not satisfy the court that appearance was impossible and without fault within 30 days, the court shall enter judgment for the amount of the bail and costs.
  
- Case law
  - » *State v. Ascencio*, 92 Wis. 2d 822 (1979 Ct. Apps.) – Prior to judgment, the trial court may set aside or modify the order as justice requires. The decision requires an exercise of discretion by the court. The court discussed factors that justified a partial remission.
  - » *State v. Achterbery*, 201 Wis. 2d 291 (1996) - The court has the authority to enter a judgment without a motion from the State within 30 days. The court approved the discretionary order of forfeiture and judgment even though the defendant was in jail when the court appearance was missed. The court relied on the finding that it was the second time the defendant missed court.
  - » *Melone v. State*, 240 Wis. 2d 451 (2000) – Blanket orders for forfeiture are not permitted; case was remanded for the court to weigh relevant factors.
  - » *State v. Badzmirowski*, 171 Wis. 2d 260 (1992) – Bail forfeiture is allowed for any non-compliance, even when the defendant appears for all court dates.
  
- Obtaining relief for our clients
  - » Assist clients to appear in court within 30 days.
  - » Make a motion to rescind, reduce, or vacate forfeiture and reinstate bail and conditions that were previously set.
  - » Don't forget to ask the court to vacate judgment of bail forfeiture pursuant to §806.07.
  - » This is a civil judgment and requires following civil rules.
  - » Trial court still has jurisdiction.
  - » Service of corporate counsel is required.
  - » Judges are sympathetic to mitigating factors and harshness of judgment that interferes with the rehabilitation of defendants.
  - » Consider other costs that client must pay such as restitution and fines.
  - » Lawyers from the county are frequently unsympathetic and may resist stipulations to vacate.
  - » Consider agreements to vacate part of the judgment.



*“In our society, liberty is the norm,  
and detention prior to trial or  
without trial is the carefully  
limited exception.”*

– *SALERNO V. UNITED STATES*, 481 U.S. 739, 755 (1987)



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