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Wisconsin

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Chair Wanggaard, Vice-Chair Jacque, and Honorable Members of the Senate Committee on Judiciary and Public Safety:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide written testimony in opposition to Senate Bill 309 and Senate Bill 427.

We cannot continue to double down on harmful policies that have pushed our correctional system to a breaking point and failed to actually improve safety and material conditions in Wisconsin communities. As a reminder, we have over 21,000 people incarcerated in state prisons, about 12,000 in county jails, and nearly 63,000 people on probation, parole, and extended supervision.

Devastatingly, Wisconsin has the highest Black incarceration rate in the country. Data shows that 1 in 36 Black Wisconsinites are currently incarcerated, meaning Black people are nearly 12 times more likely to be incarcerated than white people.¹ According to a study by the Wisconsin Court System, Native American men are 28% more likely to be sentenced to prison than their white counterparts.² Wisconsin also has a higher percentage of people incarcerated for crimes committed as youth than any state in the country except Louisiana.³

We all want to live in safe and healthy communities, and legislation impacting the criminal legal system should be focused on the most effective approaches to achieving that goal. SB-309 and SB-427 would take us several steps in the wrong direction.

Senate Bill 309

This bill would require the Department of Corrections to recommend revoking a person's probation, parole, or extended supervision for just being charged with—and not convicted of—a crime. The bill also adds additional barriers to record expungement if a person has a previous conviction (including a conviction that has been expunged), if they have pending criminal charges, or if a person violated a rule or condition of probation.

¹ Clare Amari, *Wisconsin imprisons 1 in 36 Black adults. No state has a higher rate.*, Wisconsin Watch (Oct. 13, 2021), <https://wisconsinwatch.org/2021/10/wisconsin-imprisons-1-in-36-black-adults-no-state-has-a-higher-rate/>.

² DRAFT: *Race and Prison Sentencing in Wisconsin: Initial Outcomes of Felony Convictions, 2009-2018* (Jan. 2020), <https://s3.documentcloud.org/documents/20478391/race-prison-sentence-felony-report-draft-2020-02-05.pdf>.

³ Alexander Shur, *Wisconsin has 2nd highest percentage of prisoners locked up for crimes committed as youth*, Wisconsin State Journal (May 23, 2023), https://madison.com/news/state-regional/government-politics/wisconsin-has-2nd-highest-percentage-of-prisoners-locked-up-for-crimes-committed-as-youth/article_4a6c1600-f5b7-11ed-9186-ffd641c2443d.html.

Lowering the Constitutional Burden for Conviction

Taking away discretion from DOC agents and automatically initiating an administrative revocation to send a person to prison for being charged with a crime raises constitutional concerns. The practical burden of proof required for a period of incarceration on a new charge would essentially become “probable cause” (the standard for issuing the charge itself) rather than “beyond a reasonable doubt.”

Two Billion Dollar Price Tag

According to the Fiscal Estimate completed by the Department of Corrections, SB-309 would cost a fortune:

- **Over \$1.7 million annually** for increased revocation cases adjudicated by the Department of Administration’s Division of Hearings and Appeals;
- **\$1.3 to \$1.67 billion** for the construction of two new prisons to accommodate the significant increase in the incarcerated population;
- **Over \$72.7 million** in increased operations costs during the first year of enactment
- **Over \$209 million** in increased operations costs during the second year of enactment

Rather than trapping people in a revolving door of incarceration and supervision, people on parole, probation, or extended supervision should be given the support and opportunities they need to thrive in their community.

Senate Bill 427

In addition to the data collection requirements contained in SB-427, this bill would make draconian changes to state law relating to the cash bail system that ignore both the realities behind Wisconsin’s bail jumping prosecutions and the legal, economic, and human impact of cash bail. Under the bill, if a defendant has a previous conviction for bail jumping, they may only be released by executing a secured bond or paying at least \$5,000 cash bail. This minimum bail amount would apply regardless of the nature of the pendant charge, the age of the previous bail jumping conviction, or whether the previous bail jumping conviction was a misdemeanor or a felony. If a defendant is accused of a “violent crime” and has a previous conviction for a violent crime, they may only be released by executing a secured bond or paying at least \$10,000 cash bail.

The Realities of Bail Jumping Charges in Wisconsin

Over the past few decades, criminal bail jumping charges have skyrocketed in Wisconsin—often “top[ping] the list of the state’s most common charges.”⁴ It is important to note that conduct resulting in a criminal bail jumping charge does not need to be a crime itself. Missing an appointment with a caseworker, breaking a curfew, not updating an address, missing a drug test, or relapsing could all result in a bail jumping charge if they relate to a non-monetary bail condition. Sometimes Wisconsinites are charged and convicted of multiple counts of bail jumping even if they were not convicted of the original charge.

⁴ Natalie Yahr, *Walk the line: How bail jumping became Wisconsin’s ‘most-charged crime,’* Cap Times (Feb. 26, 2020), https://captimes.com/news/local/neighborhoods/walk-the-line-how-bail-jumping-became-wisconsins-most-charged-crime/article_8349851a-f8cd-5fc3-a659-7fc5c1885e25.html.

As data from a legal and quantitative analysis published in 2018 suggests, “an underlying purpose for filing bail jumping charges may be to create leverage against defendants to induce them to plead to their original charge rather than to punish them for violating their bond conditions.”⁵ The Wisconsin Justice Initiative and the Mastantuono Coffee & Thomas law firm published data on the staggering prevalence of bail jumping charges issued by several counties in 2021.⁶ The table below summarizes some of this data:

County	Percent of Misdemeanor Cases that Include Bail-Jumping Charges	Percent of Felony Cases that Include Bail-Jumping Charges
Adams	18%	36%
Ashland	21%	42%
Barron	26%	33%
Bayfield	10%	30%
Brown	23%	44%
Buffalo	6%	11%
Burnett	9%	33%
Calumet	20%	46%
Chippewa	33%	59%
Clark	17%	37%
Columbia	28%	40%
Crawford	31%	34%
Dane	11%	35%
Dodge	20%	39%
Door	21%	46%
Douglas	8%	21%
Dunn	30%	46%

⁵ Amy Johnson, *The Use of Wisconsin’s Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619 (2018), <https://repository.law.wisc.edu/s/uwlaw/media/40009>.

⁶ Wisconsin Justice Initiative Blog (2022), <https://www.wjiinc.org/blog/category/bail-jumping-project>.

A Two-Tiered System of “Justice”

Wisconsin’s reliance on cash bail has perpetuated a two-tiered system of justice: one for the wealthy and one for everyone else. Imposing the mandatory bail requirements in SB-427 would exacerbate the inequities in the current pre-trial detention system and result in extraordinary costs to counties to support a ballooning jail population.

Spending even a few days in jail can have devastating, long-lasting consequences for presumptively innocent individuals and their families. The inability to pay cash bail hurts the very things that help someone charged with an offense succeed: employment, stable housing, and strong family and community connections. On top of the risk of job loss, eviction, and the impact on child custody and parental rights, people incarcerated pre-trial can find themselves under a mountain of system-imposed debt.

Wisconsin statutes give counties discretion to charge incarcerated people a fee for their incarceration. According to a report from the Institute for Research on Poverty (IRP), 16 of 22 counties that responded to the IRP survey charged incarcerated people a booking fee or daily rate for room and board.⁷ In 2019, Wisconsin Watch found that at least 23 Wisconsin counties assess “pay-to-stay” fees.⁸ Further, Wisconsin jails and telecommunications companies extract more money from incarcerated people and their families, with rates for phone calls as high as \$14.77 for a 15-minute call in some counties.⁹

In addition to the cascading economic and social consequences, detention poses a systemic disadvantage to people unable to afford the price of freedom pretrial. Compared to similarly situated non-detained peers, people detained pretrial are more likely to plead guilty,¹⁰ more likely to be convicted,¹¹ and more likely to have longer sentences¹² if incarcerated.

⁷ Will Maher, *Poverty Fact Sheet: Pay-to-Stay Jail Fees in Wisconsin*, Institute for Research on Poverty (2017-2018), <https://www.irdp.wisc.edu/wp/wp-content/uploads/2018/10/Factsheet15-Pay-to-Stay-Jail-Fees-in-WI.pdf>.

⁸ Izabela Zaluska, *Pay-to-stay, other fees, can put jail inmates hundreds or thousands in debt*, Wisconsin Watch (Sept. 15, 2019), <https://wisconsinwatch.org/2019/09/pay-to-stay/>.

⁹ Wanda Bertram, *New data: Wisconsin jails and telecom giants profiting from high phone rates that keep families apart*, Prison Policy Initiative (Sept. 10, 2021), <https://www.prisonpolicy.org/blog/2021/09/10/wisconsin-phones/>.

¹⁰ Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3409&context=faculty_scholarship.

¹¹ Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law, Economics, & Organization, 511 (2018), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Distortion-of-Justice_Stevenson.pdf.

¹² Meghan Sacks and Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL’Y REV. 59 (2014), <https://journals.sagepub.com/doi/abs/10.1177/0887403412461501>.

According to a 2013 study of cases in Kentucky, people held pretrial are four times more likely to receive a jail sentence and three times more likely to receive a prison sentence, even when controlling for other factors such as charge type, demographics, and criminal history.¹³ Not to mention, Wisconsin is in the midst of a constitutional crisis, where defendants in poverty—disproportionately people from Black and brown communities—are routinely forced to sit in jail while awaiting the appointment of counsel in violation of the Sixth Amendment.

Studies have also found that pretrial detention can be the strongest single factor influencing a convicted defendant’s likelihood of being sentenced to jail or prison.¹⁴ As Chief Justice Rehnquist wrote for the majority in *United States v. Salerno*, “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” 481 U.S. 739, 755 (1987). While the U.S. Supreme Court has held that, “the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary,” the reality of cash bail in our current system means that Wisconsinites charged with a crime are not innocent until proven guilty but instead innocent until proven poor.

The ACLU of Wisconsin strongly urges committee members to vote against these proposals that would exacerbate mass incarceration and the damage it inflicts on our communities, our families, and our economy.

¹³ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation (2013), <https://perma.cc/CKF5-RCMN>.

¹⁴ *Id.*