DANE COUNTY
DISTRICT ATTORNEY
ISMAEL R. OZANNE

April 24, 2024

Sent via Email: crickert@madison.com

Mr. Chris Rickert
Wisconsin State Journal
1901 Fish Hatchery Road
Madison, WI 53713

RE: Free the 350 Bail Fund

Dear Mr. Rickert:

Thank you for contacting me for comment on Free the 350 and its practice of posting cash bail for defendants in Dane County. This is a complicated issue and I want to start by acknowledging that current Wisconsin law allows groups like Free the 350, or private citizens, to post cash bail on behalf of defendants.

Wisconsin allows judges or court commissioners to set cash bail in criminal cases. Wisconsin also has a uniform misdemeanor bail schedule. This means that if the police book a defendant into jail on only misdemeanor charges—and nothing else is holding the defendant—a defendant can be released from custody by posting a set amount of money without waiting to see a judge or court commissioner for a bail hearing. Chapter 969 of the Wisconsin Statutes contains most of the laws related to the use of bail. Prior to conviction, Wisconsin law allows cash bail if a judge or court commissioner finds that there is a reasonable basis to believe cash bail is necessary to assure a defendant's future appearance in court. Under 2023 Wisconsin Act 3—passed in response to the Waukesha parade tragedy—judges or court commissioners may also impose cash bail:

> If the defendant is accused of a violent crime, there is a reasonable basis to believe that bail is necessary based on the totality of the circumstances. The court, when considering the totality of the circumstances, may take into account whether the defendant has a previous conviction for a violent crime, the probability that the defendant will fail to appear in court, the need to protect members of the community from serious harm, the need to prevent the intimidation of witnesses, and the potential affirmative defenses of the defendant - Wis. Stat. § 969.01(1)(b)2.

As a practical matter in Dane County, the vast majority of defendants are not required to post cash bail. Some defendants with signature bonds—the equivalent of what some places call "personal recognizance"—are still held in custody because of warrants from other places or holds from the Wisconsin Department of Corrections, but cash bail is used exceedingly sparingly in Dane County. Generally, Dane County judges or court

commissioners impose cash bail in two situations. The first is because a defendant has prior failures to appear in court or to abide by bail conditions, or so lacks ties to the community that he or she is a flight risk. The second situation is when a charge is so serious that it creates a concern a defendant will flee and not appear in court, or the other Act 3 factors suggest cash bail is necessary.

Wisconsin does have a cumbersome pre-trial detention statute—Wis. Stat. § 969.035—that is almost never used. In the past 26 years in Dane County, I am only aware of it being invoked once. This statute creates severe timelines that can be difficult to follow in complex cases. The legislature has also not updated this statute to reflect the change in preliminary examination procedures which occurred in 2012 and allowed the use of hearsay at preliminary examinations.

When a judge or court commissioner sets cash bail, he or she is making a significant decision. Wisconsin law provides a list of factors for a judge or court commissioner to consider—Wis. Stat. § 969.01(4)—but the judges or court commissioners setting bail are well aware that their decision may be the difference between someone being able to work and see their family, versus being confined in the Dane County Jail until their case is resolved. Defendants do have statutory and constitutional rights to speedy trials, but pre-trial incarceration can last longer than that if a defendant and his or her attorney are not ready to proceed to trial.

I know that there are people in our community who are concerned about the use of cash bail because they see it as unfair or unjust. Dane County practice for years has taken these concerns into account by severely limiting the use of cash bail. Dane County has done this despite legitimate competing concerns from victims and the public about how this impacts victim safety specifically and public safety in general. Ultimately, there is no simple solution to balancing these interests.

From my perspective, it is unclear if groups like Free the 350 apply any nuanced or balanced decision-making about who they should bail out. I know that victims of crimes, including people of color, have contacted such groups in an effort to get answers about why they bailed out defendants. There is no articulated reason other than ideology. We live in a free country and, as I indicated, there is no law that makes it illegal for Free the 350 to post bail for people, but I do think such groups that claim to be committed to social justice should take into account the impact on victims in marginalized communities and look at social justice from a 360-degree perspective.

I cannot discuss in detail cases that are pending, but I can say that some of the people bailed out are charged with crimes related to domestic violence, human trafficking, and acts of gun violence. Some of the people bailed out are charged with serious crimes committed after they bailed out. When judges or court commissioners initially set bail in these cases, they would have looked at the defendant's conduct, history, and background. The judges and court commissioners would have set bail based on what they felt was fair and reasonable for that defendant. What the judges or court commissioners would not have done is to set bail in an amount that would have

encompassed the existence of organizations that post bail for people without regard to any of those factors.

No bail system is perfect and even a change to a system without cash bail, where judges or court commissioners decide on detention or no detention, would result in concerns for equity and fairness. As District Attorney, I have always tried to balance how to protect public safety while acknowledging the disparate impact the criminal justice system has had or can have on certain people. I know that there are people who think my office is too lenient and people who think my office is too harsh. That is because the decisions we have to make are hard. Outside groups posting bail without regard to any factor other than group ideology have the luxury of not concerning themselves with the outcomes and impacts of their decisions on this community. My hope is that at some point the people in those groups will set ideology aside and consider how their decisions may be victimizing other people.

Sincerely,



Ismael R. Ozanne
Dane County District Attorney