18 by 6: Restricted Defendant Participation in Dane County Court Hearings

Justified Anger Court Observers have been watching court hearings where individuals accused of crimes attend their court hearings via Zoom by looking through the 18" x 6" food slots of their segregated jail cells. This report summarizes observation and advocacy efforts to date to end this inhumane practice.

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Introduction

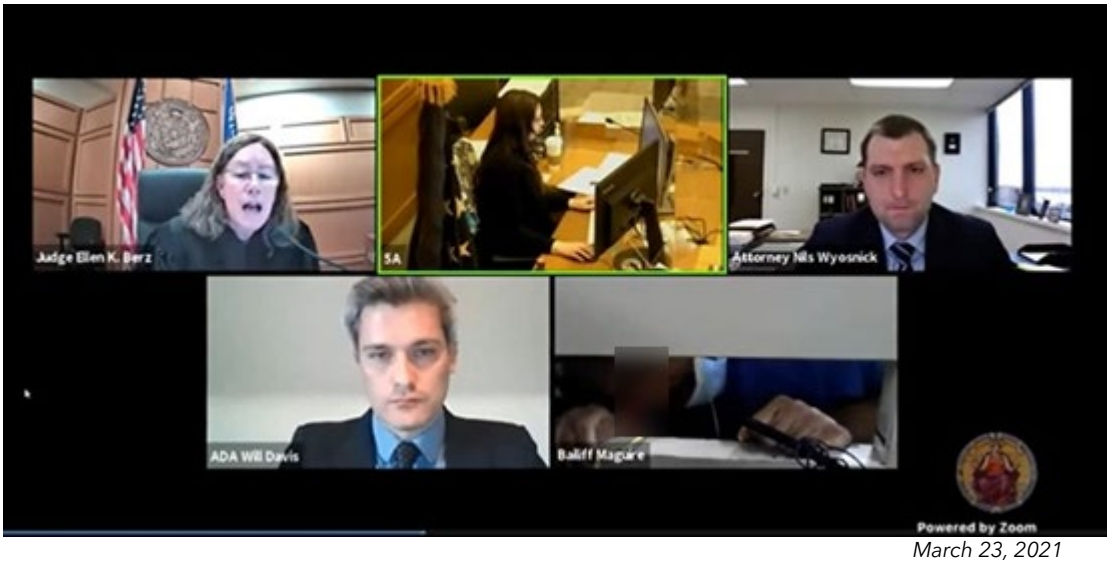
As part of Nehemiah's work to empower community members of all backgrounds to fight for racial equity and justice, the organization asked alumni of its renowned Black History for a New Day course to organize a Court Advocacy program. The program would bring community members into Dane County courtrooms to learn more about how Wisconsin has become the state with some of the worst racial disparities in incarceration.

In 2018, the Court Advocacy team held its first training on the process that criminal cases follow from arrest to conviction or acquittal. Volunteers, called Court Observers began attending court hearings and gathering data on what they saw. Initially efforts were focused on Initial Appearance and criminal court hearings and in 2021 an observation effort for eviction hearings took shape. As of September 2023, Observers have watched on over 9,400 hearings.

In 2022, Nehemiah received a technical assistance grant from a partnership between the Urban Institute and Microsoft, which allowed the team to improve its data collection systems and establish a process for ongoing data analysis. In addition, the grant provided funding to conduct focus group interviews with formerly incarcerated individuals, adding first-hand perspective to our dataset. This report represents the first of an initial series of findings that combine observational, focus group, and community participation data to share what the Court Observers have learned in the program's first five years.

Inhumane Appearances

In the fall of 2020, the Justified Anger Court Observers trained 50+ community member volunteers to observe criminal court hearings which were being held virtually due to the Covid-19 pandemic. One of the most striking observations from our volunteers was that of defendants appearing for their court hearings via Zoom through the food slots in their jail cells.



March 23, 2021

Observers reported that defendants were often barely visible, it was hard to tell if they were able to hear or participate, and that the appearance was highly dehumanizing. In response, the Court Advocacy team engaged with the members of the Dane County Criminal Justice Council in February and March of 2021 to request a change to this practice, and it was subsequently reduced, except in cases where defendants were said to have "behavioral issues," according to explanations provided by bailiff's during hearings.

In June 2022, Observers noticed that the practice of having defendants appear through food slots seemed to be utilized on a regular basis and undertook a focused project to gather data about the true frequency. Observers signed up for shifts and watched every in-custody intake[1] hearing for 19 out of the 20 court days in July 2022. Based on the data collected, they found that defendants appeared through food slots 9.4% of the time.

> ***Observer Note:***
>
> "The party's attorney was live in the courtroom. It was difficult (impossible) to see the defendant through the window of his cell door. The bailiff held a microphone/speaker up to a vent in the door. The defendant did not speak, was not asked a question, was not invited to speak. I saw his whole face once or twice but the glass in the cell door obscured his image." - 7/22/2022

Observers organized a meeting in September 2022 that included members of the Dane County Sheriff's Department, jail security and operations staff, a criminal court judge, a commissioner, a Dane County Supervisor, and representatives from the District Attorney's and Public Defender's offices. At this meeting, the jail personnel shared that the practice was being used when a defendant was assumed to be experiencing a mental health crisis and was placed in a segregation unit. Though these assumptions were sometimes based on observation of physical outbursts and chaotic behavior, there was no institutional criteria for the decision to have a defendant appear through the food slot or documentation of the decisions being made. It is standard procedure for anyone taken into custody to receive a mental health evaluation within a certain amount of time, but there was not a practice of having mental health professionals assess defendants before their intake hearings. At this stage in the process, bailiffs were tasked with deciding whether a defendant would appear from their segregation cell or go to the courtroom to appear in person.

Beginning in December 2022 to present day, the Court Observers have been observing intake hearings 1-2 days per week and their observation data shows that nearly 10% of hearings are still being held in this way, with an additional 4% having defendants appear in

[1] The Dane County Courts hold hearings every weekday afternoon for individuals who have been recently taken into custody. They are often referred to collectively as "Initial Appearance" hearings. However, while most of the hearings are the first time an individual goes before the court after arrest (Initial Appearance) some of the hearings are Bail/Bond hearings after someone is taken into custody for an alleged bail or probation violation. For purposes of this report, the hearings will generally be referred to as "intake" hearings.

other ways that strongly limit their ability to meaningfully participate in these hearings. This report includes data gathered from observations completed between 7/1/2022 and 7/31/2023, an assessment of appearance types, and recommendations for changes to the observed practices.

June 6, 2023

Restricted Ability to Participate in Hearings

Defendants were observed appearing for their hearings in a range of ways. The majority of defendants (~79%) appeared in person, in the courtroom, with their attorneys, but 9.9% appeared through a food slot or from behind the bars of a jail cell. Because the United States justice system includes an expectation that people have a right to participate in their own defense, the details of how someone appears for their hearing matters. Being able to see and hear are basic elements of participation; being able to easily confer with their attorney is an essential part of participation. Additionally, there has been a great deal of research indicating that the way a defendant appears – wearing prison garb, being shackled, etc – has bearing on how they are perceived by others and can have a negative impact on their presumption of innocence, even in nonjury proceedings and before the trial phase of a case.[2] Appearing through bars or a food slot can reasonably be compared to the use of shackling or wearing prison garb.

The Court Observer data show that the way defendants appeared could be viewed across two key spectrums: ability to participate and visual presentation. Defendants that appeared in person in the courtroom had the greatest ability to participate and present themselves in ways that can influence how they are perceived. Those that appeared through food slots

[2] Shourd, S. (2020). Shackling Prejudice: Expanding the Deck v. Missouri Rule to Nonjury Proceedings Notes. *Vanderbilt Law Review*, 73(2), 535–568. [Copies available upon request.]

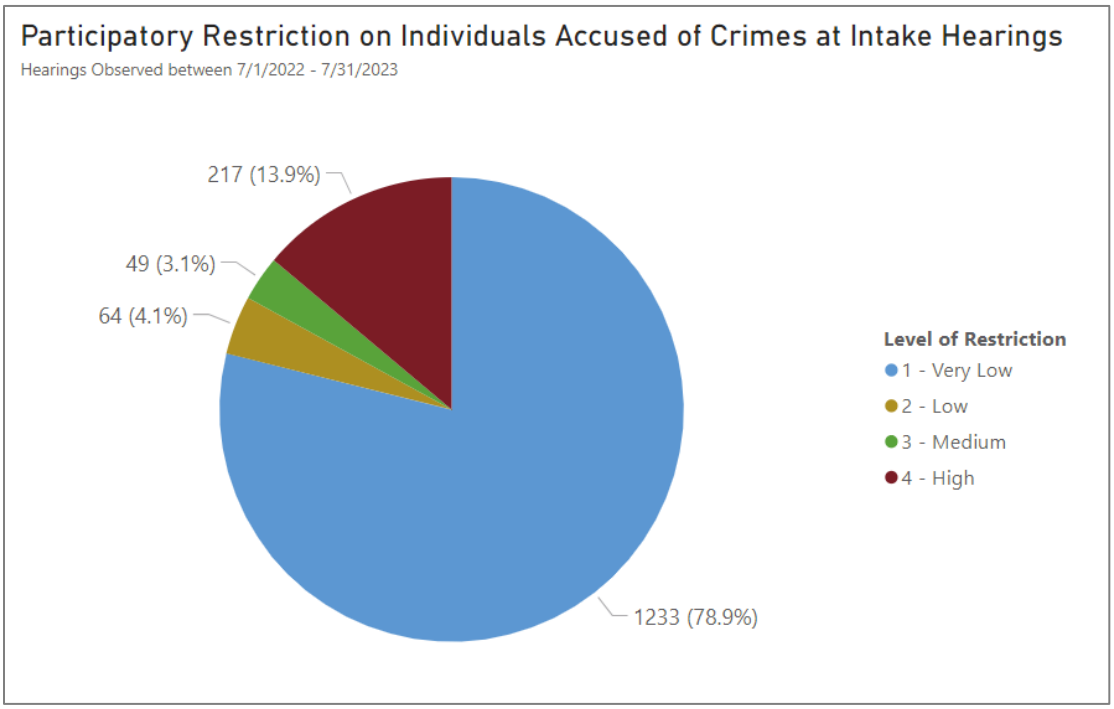
> "Defendant appeared with attorney from a different location, behind a door with two narrow windows and a food slot. Backlighting, along with a glare on the window, made it difficult for the defendant to hear, or to be seen when asked to give a thumbs up if he could hear. Defendant bent over and leaned into the food slot, where he could hear, speak, and be partially visible to the court." -1/18/2023

were most restricted from their ability to participate and had the highest chance of being perceived as guilty before the legal process even really began.

Occasionally defense attorneys will go to the jail cell where the person is being held or request a Zoom breakout room, but it is in no way clear that defendants understand that this option is available.

Our data combines these two concepts into a single description of the Level of Restriction defendants experienced, based on how they appeared in court. A **Very Low** Level of Restriction suggests that the defendants were observed as able to participate, confer with their attorneys, and choose how they wanted to present themselves through behavior and body language.

As the Levels of Restriction increased, defendants had less ability to participate and control their presentation to the court.



Defendants appeared for their court hearings in eight different ways, which were each categorized into a Level of Restriction:

Level of Restriction	Total Appearances	
Type of Appearance	#	% of Total
Very Low		
In person in the courtroom, with attorney	1233	78.9%
Subtotal	**1233**	**78.9%**
Low		
In person in the courtroom, without an attorney*	64	4.1%
Subtotal	**64**	**4.1%**
Medium		
By Zoom, no window between defendant and camera**	43	2.8%
By Phone	6	0.4%
Subtotal	**49**	**3.1%**
High		
By Zoom, through a food slot for at least part of the hearing	154	9.9%
By Zoom, behind cell bars	6	0.4%
By Zoom, through a window that is not a food slot	54	3.5%
Did not Appear/Other	3	0.2%
Subtotal	**217**	**13.9%**
Grand Total	**1563**	**100%**

* In all cases but 2, criminal charges were reduced to ordinance violations, for which the courts do not provide representation

**32 of these individuals were stated to be in facilities other than Dane County jails, including juvenile facilities, correctional institutions, other county jails, and hospitals; the locations of the other 11 were not explicitly stated.

High Level of Restriction

Appearing through food slots is the most egregious type of appearance due to the vulnerability of the individual. In appearing through a food slot, a person must sit on the floor of their cell or hold a squatting position for the length of their hearing. However, other types of appearances were also highly restrictive for defendants. Appearing by Zoom from behind the bars of a cell or through a window in a cell door were also characterized as a High Level of Restriction not only due to the visual suggestion of guilt, but because noise from the cell blocks made it difficult for all parties to hear.

In all the environments with a High Level of Restriction, defendants were frequently asked to signal that they could hear proceedings by giving a thumbs-up at the beginning of the hearing, though it was unclear whether they would have been able to garner attention or request a breakout room if they had questions for their attorney or struggled to understand what was happening. Defendants who appeared in the courtroom standing physically next to the attorney are regularly observed to ask questions and have brief discussions with the attorneys, suggesting that it is not unusual for defendants to have the need for information about the hearing, the case, or their next steps.

> "Noise from the defendant's background made it difficult for him to hear. He was repeatedly distracted by things happening behind him, grimacing, turning around to call out to people to be quiet. Repeatedly said 'I can't hear what's going on.' Commissioner: 'I believe that the problem isn't from here, it is with the noise behind you.' Muted [Defendant]. Instructed attorneys to speak louder. I didn't discern an indication that [Defendant] understood the conditions of his bail." -1/18/2023

In three hearings, defendants either did not appear for their hearings or they could not be seen on camera. Two of those were the result of difficulties coordinating the Zoom connection with other correctional facilities, one in Texas and one in Dodge County, WI. Both hearings were rescheduled. In the third case, the defendant was offered a Zoom appearance option but refused to participate in the hearing and the hearing was rescheduled.

Medium Level of Restriction

Appearances by phone were categorized as a Medium Level of Restriction because the phone participants usually had clear audible participation in the hearings and because there was no ability to see them, there was no visual image that might impact the presumption of innocence or guilt.

In twenty-three cases, individuals appeared via Zoom and were seated in a direct, unobstructed view of the camera – that is there was no window, bars or food slots between the individual and the camera. The appearances in this category were closer to that commonly recognized in business and social videoconference meetings. It is notable that in all but two of those cases, the individuals were being held somewhere other than the Dane County jail facilities.

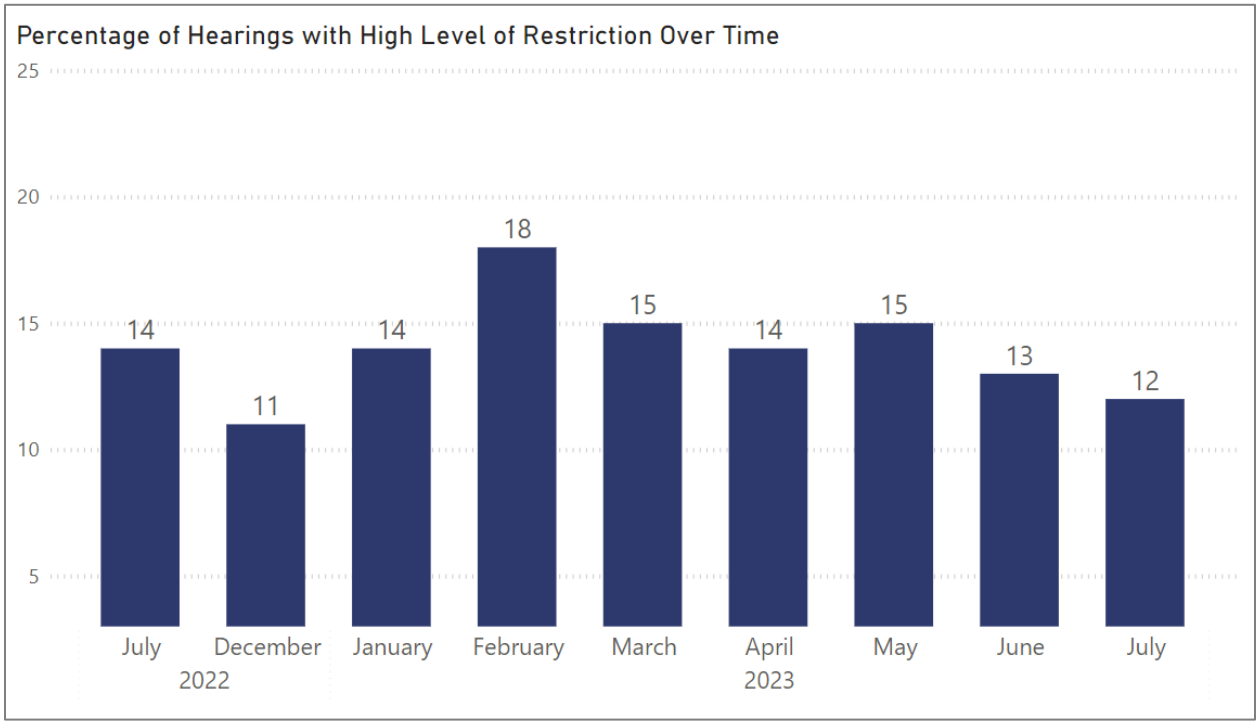
Low Level of Restriction

In 64 hearings, the individual appeared in person, without an attorney. In all but two cases, this was because in the time between their arrest and the Initial Appearance hearing, the District Attorney's office decided not to file criminal charges. Instead, prosecutors elected to

move forward with a traffic violation or a non-traffic ordinance violation, which is punishable only by fine. These individuals were informed of these decisions by the Commissioners at the hearings and provided information for paying their fines. While in this situation they do not need an attorney for criminal defense, observers have noted that these hearings proceed very quickly and defendants often appear confused about being released with no charges after having been in jail for one or more nights.

Change Over Time

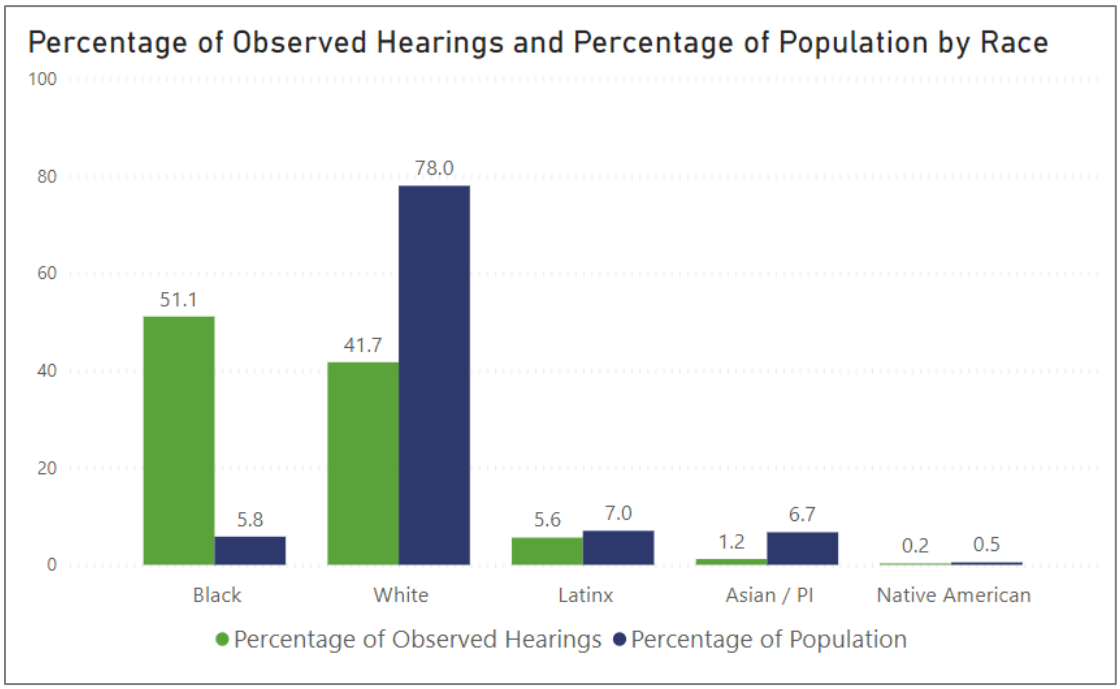
Though the number of people who have attended their hearings under a High Level of Restriction has gone down significantly since Observers first called attention to the practice February of 2021, the ongoing use of the practice in Dane County two and a half years later is of major concern.



Racial Disparity

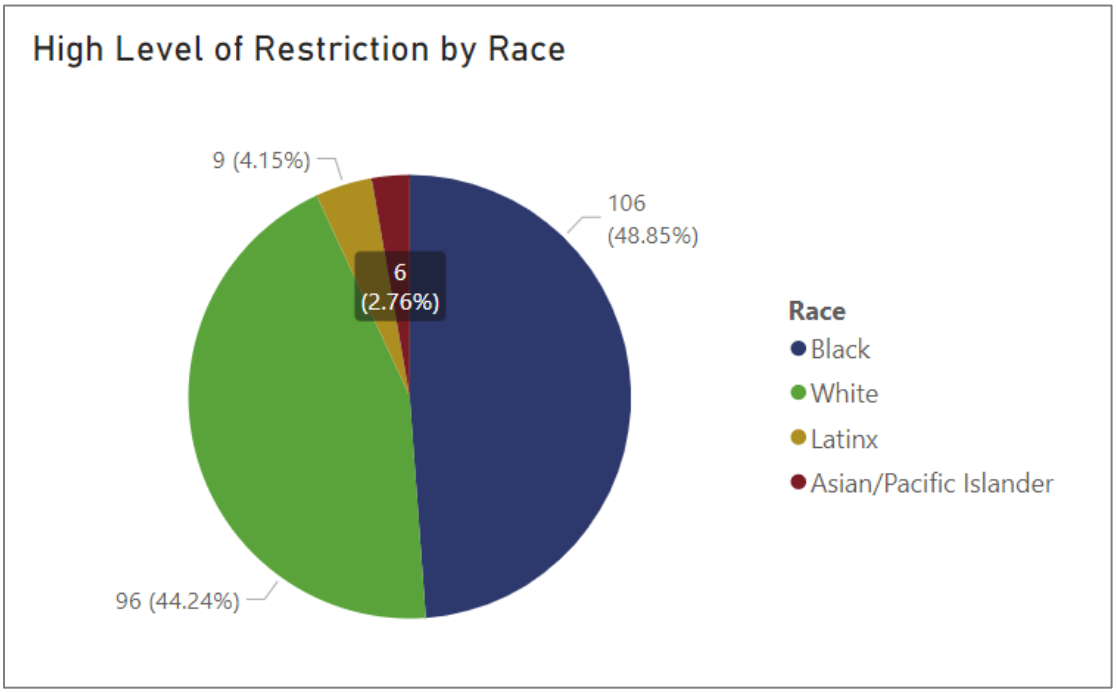
According to US Census Bureau data from July of 2022, Black people represent 5.8% of the population of Dane County, though it is regularly noted that they make up close to half of the county jail population.

The observation data collected for this project showed an even higher over-representation of Black individuals as compared to the population:



Population data source: U.S. Census Bureau Population Estimate as of July 1, 2022.
U.S. Census Bureau QuickFacts: Dane County, Wisconsin

Though the percentages of Black individuals who attended their hearing with a High Level of Restriction was slightly smaller, Black individuals appeared this was more than any other racial group:



While Court Observers object to the use of highly restrictive attendance procedures for all individuals, they note that this is yet another way that the egregious racial disparities in Wisconsin's criminal legal system impact non-white individuals disproportionately.

Mental Health Considerations

When the group of stakeholders met in September of 2022, several challenges to alternative approaches were identified. A representative from the Public Defenders' office shared that she has, at times, been concerned that if someone is experiencing a mental health crisis and they become violent when a bailiff enters their cell to escort them to their hearing, they could hurt themselves, others, and/or receive additional charges for assaulting an officer. However, public defenders are sometimes reluctant to delay the hearings because Initial Appearances so often result in signature bonds – the person is released without any bail required. So, the decision the attorneys are faced with is the following: proceed with the hearing with a High Level of Restriction so that there is a good chance the person can be released in a matter of hours, or intervene in the process and risk delay or a volatile situation which could result in a longer jail stay.

> "Defendant was speaking throughout the hearing but was muted; there were mats (protective?) visible in his cell behind him; did not answer a question about eligibility for Public Defender; he pointed and raised his hand at times but no one in court appeared to be looking at the screen to see him."
> -5/16/2023

All professionals at the meeting agreed that prior to the pandemic, when an individual was suspected to be experiencing a mental health crisis severe enough that it interfered with their ability to attend a hearing without excessive disruption, the person would have either been brought to court in restraints or the parties would all go to the person's jail cell and hold the hearing there. In the latter situation, the person would still be participating through their food slot or in another highly restricted way. However, in this situation, the defendant would have at least had better access to the defense attorney and the hearings. The option of using restraints and bringing the person to court, while not ideal, does provide a better opportunity for the attorneys and the commissioner to get a sense of the person's mental status and, if necessary, raise the question of competency to stand trial.

In mid-May of 2023, Observers began explicitly recording details of how accused individuals appearing through a High Level of Restriction appeared to behave during their hearings, noting that only partial view is available. Out of 48 appearances (from mid-May through the end of July 2023) through Zoom where the individual appeared through a food slot, from behind cell bars, or through a window, fewer than 10 individuals appeared to be visibly agitated, pacing, or disruptive.

In addition:

- 35 spoke during their hearings with clear and coherent language
- 27 were described as "calm"
- 10 were observed to use "polite" language using the words "please" and/or "thank you"

Twenty-five individuals who appeared this way were released on signature bond. Competency evaluations were ordered in only two cases.

Court Observers recognize that there are real safety considerations at play for all involved and that court personnel need ways to mitigate situations where an individual's condition might render them violent for a number of reasons. However, the stated reasoning that hearings are conducted from segregated cells because the person is too agitated or unruly to come out has not been observable during hearings.

Currently, because decisions of whether or not a person appears by Zoom are made by security personnel and not mental health professionals, and because there is little insight into the person's status available through the limited Zoom interactions, there is little accountability for the decisions that are made and or how they are justified.

Recommendations

The Justified Anger Court Observers urge the Dane County Court system and Sheriff's Department to take immediate and effective action to reduce the number of people attending hearings with a High Level of Restriction. The following specific steps that should be considered:

- **Deploy mental health professionals to assess and work with people who are suspected to be experiencing a mental health crisis on the day of their intake hearings.** It is the understanding of Observers that mental health practitioners that work in the jail routinely meet with individuals who might be experiencing mental health crises on days when they have other court hearings, but they do not do so for those awaiting an intake hearing. Because mental health status is highly fluid and because interactions with uniformed security and jail personnel can be triggering for some individuals, the decision of whether or not someone is capable of safely attending a hearing outside a segregation cell should be made by a mental health professional.

- **Learn how other courts are handling scenarios that lead to the use of High restriction in Dane County.** JA Court Observers have interacted with court observers in Outagamie, Racine, and Milwaukee counties in Wisconsin, as well as groups in Louisiana, Maryland, Pennsylvania, and Washington D.C., and none of them have seen individuals appear for hearings through food slots or from behind bars, though there is no doubt they also have individuals in custody who are experiencing serious mental health conditions. At minimum, Dane County professionals should reach out to find out how other jurisdictions are handling this scenario.

- **Develop a process and written standards for determining whether an individual's mental status allows them to participate in their hearing and how.** Currently, it is the Observers' understanding that there is no documentation of what criteria is used or how decisions are made to have individuals appear for hearings from the other side of a cell door and the decision is being made at the discretion of the security staff, not based on assessment from mental health professionals. The lack of formalized process creates a gap in accountability and leaves room for individuals to abuse decision-making authority. Initial Appearance hearings are heard prior to an individual being assigned to a specific public defender (when eligible), and the fact that they appeared from their cell may not be captured in standard court records. If someone's hearing is delayed or the decision is made for them to appear in a highly restrictive way, that information should be captured in a way that any attorney retained after that point is made aware.

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