TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

ON THE FOLLOWING MEASURE:
H.B. NO. 1289, H.D. 1, RELATING TO CRIMINAL PRETRIAL REFORM.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Wednesday, February 13, 2019 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Michelle M.L. Puu, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill, but has concerns.

The purpose of this bill is to implement the recommendations of the Criminal Pretrial Task Force convened pursuant to House Concurrent Resolution No. 134, House Draft 1, Regular Session of 2017as follows:

(1) Parts II, III, and IV of this Act implement recommendations of the task force that were accompanied by proposed legislation authored by the task force, with only technical, nonsubstantive changes to the task force's language for the purposes of clarity, consistency, and style; and

(2) Parts V, VI, VII, VIII, and IX of this Act implement recommendations of the task force for which no proposed legislation was provided; however, these parts incorporate, as much as possible, substantive language contained in the task force's recommendations.

Section 7, (pages 11-14, lines 4-7) details the right to a prompt hearing regarding release or detention. However, changes in this process already have been implemented in response to the work of the Task Force. Therefore, until the effectiveness of these process changes are evaluated, we believe this statutory fix is premature and could possibly be detrimental.

Section 15, (pages 25-26, lines 17-9) seeks to place the responsibility on the Intake Service Center to conduct periodic reviews of detainees to evaluate whether each detainee should remain in custody or whether new information warrants reconsideration of the detainee's status. This responsibility, however, should reside with the detainee's counsel who is in the best position to know whether a change in circumstances warrants reconsideration.

Section 8, (pages 14-15, lines 11-8, and pages 15-16, lines 18-3) seeks to create a rebuttable presumption for release for all offenses with the exception of Murder, Attempted Murder, Class A felonies, and B and C felonies involving violence or threats of violence. This places the burden on the prosecution to establish, via an evidentiary hearing, that individuals charged with offenses such as Habitually Operating a Vehicle Under the Influence of an Intoxicant, Burglary, Criminal Property Damage, felony Theft, car theft, Forgery, Fraud, Bribery, Computer Crimes, Credit Card offenses, Money Laundering, Arson, Cruelty to Animals, Violation of Privacy, Gambling, Promoting Pornography, and various drug offenses should not be automatically released from custody. For example, an individual accused of Burglary in the First Degree (i.e. breaking into a residence to commit a crime therein) will be entitled to automatic release unless the prosecution provides contrary evidence.

We suggest that the recommendations of the Task Force be allowed to be implemented, and the criminal justice system be afforded ample time to evaluate the impact of these changes to the law before presumptions favoring automatic release are imposed.

Based upon the above concerns, we respectfully request that this bill be amended by deleting section 7 (pages 11-14, lines 4-7), section 15 (pages 25-26, lines 17-9), and section 8 (pages 14-15, lines 11-8, and pages 15-16, lines 18-3). Thank you for the opportunity to comment.

DAVID Y. IGE
GOVERNOR

NOLAN P. ESPINDA
DIRECTOR

Maria C. Cook
Deputy Director
Administration

Jodie F. Maesaka-Hirata
Deputy Director
Corrections

Renee R. Sonobe Hong
Deputy Director
Law Enforcement

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

No. _____

TESTIMONY ON HOUSE BILL 1289, HOUSE DRAFT 1
RELATING TO CRIMINAL PRETRIAL REFORM.
by
Nolan P. Espinda, Director
Department of Public Safety

House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Wednesday, February 13, 2019; 3:00 p.m.
State Capitol, Conference Room 325

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Public Safety Department (PSD) supports House Bill (HB) 1289, House Draft (HD)1, which incorporates key recommendations of the House Concurrent Resolution No. 134 (2017) Criminal Pretrial Task Force. The Department welcomes these changes that we believe will assist with reducing the offender population within the community correctional centers

PSD offers the following suggestions to help ensure that sufficient resources are provided to successfully meet the objectives underlying the Task Force recommendations.

The new language in Section 3, referencing Section 353-10(3) & (9), requiring a risk assessment and bail report to be completed within two days of admission to a community correctional center will significantly overtax existing PSD staff and require additional resources, including, but not limited to, funds for staffing, office space, and equipment, the appropriation for which would logically be incorporated in Section 27 of this measure.

The Department notes that the language in Section 353-10(8) of HB 1289, HD1 was amended to provide limited access to PSD's pretrial services officers view relevant data on an offender's employment wages and taxes.

The Department would also recommend adding language to the measure's Section 3, referencing Section 353-10(b)(9)(F), to clarify that the research entity be approved and contracted by PSD to protect the confidentiality of the information, since this section specifies that the information is not a public record.

PSD notes that its previous concern with the measure's Section 11, Section 804-7 requirement that an individual be able to post bail 24 hours a day, 7 days a week, at a community correctional center, has been partially mitigated by the expansion of venues at which bail may be posted – i.e., the addition of a police department or other law enforcement agency. The concern now has shifted to needing to ensure that communications among these agencies be efficient and secure. The fact remains, the Department does not currently have sufficient, appropriately trained staff to implement this requirement according to the proposed duties and specified personnel classification. It follows that additional staff will be required, as well as, consultation with the relevant Collective Bargaining Unit Representative.

PSD suggests that the measure's Section 25 may be premature and may be omitted at this time. The Department has entered into a contract to conduct a new validation study of the Ohio Risk Assessment System's Pretrial Assessment Tool (ORAS-PAT) for Hawai'i pretrial offender population. Any changes to the pretrial risk assessment prior to the completion of the validation study would be premature. It should also be noted that the factors include in this section are already incorporated in the existing ORAS-PAT procedures utilized by PSD.

The Department appreciates the inclusion of budgetary appropriations in Section 22 and Section 27, as there will be additional costs and resources needed to implement bail reform, whether an offender is not detained or is released under the least restrictive non-financial conditions.

Thank you for the opportunity to present this testimony.

OFFICE OF HAWAIIAN AFFAIRS

Legislative Testimony

HB1289 HD1
RELATING TO CRIMINAL PRETRIAL REFORM
Ke Kōmike Hoʻokolokolo

Pepeluali 13, 2019 3:00 p.m. Lumi 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS** HB1289 HD1, a measure which would effectuate nearly all of the recommendations of the HCR134 Task Force on Pretrial Reform which OHA, as a member of the Task Force, has endorsed.

Unfortunately, our current bail system is overwhelmed, inefficient, ineffective, and has resulted in harmful, unnecessary socioeconomic impacts[1] on low-income individuals and their families, a disproportionate number of whom may be Native Hawaiian. The purpose of bail is not to punish the accused, but allow for their pretrial release while ensuring their return to court. However, our bail system, overwhelmed by a historically increasing volume of arrests, is fraught with delays and frequently does not provide sufficient information to judges and attorneys seeking timely and appropriate pretrial release determinations. Moreover, mounting evidence demonstrates that overreliance on cash-secured bail punishes poor individuals and their families before any trial, much less conviction. In Hawaiʻi, indigent defendants must often decide between posting hefty cash bail or bond amounts that impose considerable financial hardship, or pretrial incarceration that threatens their employment and housing. Notably, detaining individuals for weeks or months before their trial simply because they are too poor to post bail also represents a substantial cost to taxpayers,[2] and further exacerbates the overcrowding in our detention facilities.[3]

To address the inefficiency, ineffectiveness, and inequity inherent in our bail system, comprehensive reform of our pretrial system is needed. Accordingly, the HCR134

---

[1] Socioeconomic effects include daily costs of detaining each inmate, family separations, child and welfare interventions, loss of family income, reduction of labor supply, forgone output, loss of tax revenue, increased housing instability, and destabilization of community networks. *See, e.g.,* MELISSA S. KEARNEY THE ECONOMIC CHALLENGES OF CRIME & INCARCERATION IN THE UNITED STATES THE BROOKINGS INSTITUTION (2014) available at https://www.brookings.edu/opinions/the-economic-challenges-of-crime-incarceration-in-the-united-states/.

[2] On average, it costs $182 per day—$66,439 per year—to incarcerate an inmate in Hawaiʻi. STATE OF HAWAIʻI DEPARTMENT OF PUBLIC SAFETY: FISCAL YEAR 2018 ANNUAL REPORT 16 (2018) available at https://dps.hawaii.gov/wp-content/uploads/2018/12/PSD-ANNUAL-REPORT-2018.pdf.

[3] All four of the state-operated jail facilities—where pretrial defendants are detained—are assigned populations between 166-250% of the capacities for which they were designed and hold populations amounting to 127-171% of their modified operational capacities. STATE OF HAWAIʻI DEPARTMENT OF PUBLIC SAFETY, END OF MONTH POPULATION REPORT, NOVEMBER 30, 2018 *available at* https://dps.hawaii.gov/wp-content/uploads/2018/12/Pop-Reports-EOM-2018-11-30.pdf.

Task Force, composed of experts and representatives from a broad collection of agencies and organizations who interface with the pretrial system, spent one and a half years examining the breadth and depth of Hawai'i's bail system and, in its 2018 report, made specific recommendations in many areas marked for improvement. The OHA representative to the HCR134 Task Force endorsed nearly all of these recommendations and OHA generally supports efforts to reduce the State's reliance on cash bail, increase resources for and the efficiency of pretrial administrative operations and judicial proceedings, improve access to robust and relevant information related to pretrial release determinations, and reduce unnecessary pretrial detention and its impacts on families and communities.

Specifically, OHA emphasizes the following Task Force recommendations addressed in HB1289 HD1:

- **Reinforcing law enforcement authority and discretion to cite low-level defendants** instead of arresting them, to reduce pretrial procedural volume and the pretrial incarcerated population;
- **Encouraging judicial pursuit of the least restrictive conditions necessary** to ensure defendants' appearance at trial, in order to reduce barriers to pretrial release and improve pretrial release compliance;
- **Reducing, wherever possible, the use of cash bail** and, thereby, its impacts on low-income defendants and their families;
- **Ensuring that where cash bail is used, its amount is set pursuant to an individualized assessment of a defendants' ability to afford it,** to reduce inequitable pretrial detention and its consequences;
- **Requiring Intake Service Centers to prepare bail reports in a timely manner, to include a robust set of relevant facts necessary to inform pretrial release decisions,** such as defendants' financial circumstances and fully executed pretrial risk assessments (with information about any administrative overrides applied to increase risk scores or elevate administrative risk recommendations);
- **Ensuring that pretrial risk assessments are periodically re-validated**, that they and the processes used to administer them are **regularly evaluated** for effectiveness and fairness, and that any validation and evaluation findings are publicly reported;
- **Providing sufficient and timely information to all participants** to ensure a meaningful opportunity to address bail at a defendant's initial appearance; and
- **Expanding alternatives to pretrial detention** including residence and community-based alternatives, electronic monitoring, and treatment programs.

OHA supports these and other efforts to reduce the State's overreliance on cash bail and to maximize pretrial release. OHA notes that HB1289 HB1's proposed reforms to the pretrial system stop short of completely eliminating the use of cash bail and its potential impacts on poor communities, although they may be comparatively limited. Therefore, OHA also supports several other measures that would likewise progressively reduce the State's overreliance on cash bail by prioritizing consideration of all other non-financial

conditions of release. Moreover, we offer HB175, a measure in OHA's package, which would provide an "unsecured" bail option to mitigate the disparate impacts of cash bail that may remain even if the Task Force's recommendations are adopted.

For the reasons set forth above, OHA respectfully urges the Committee to **PASS** HB1289 HD1. Mahalo piha for the opportunity to testify on this important measure.

Office of the Public Defender
State of Hawai‘i

Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on Judiciary

February 12, 2019

H.B.1289, HD1: RELATING TO CRIMINAL PRETRIAL REFORM

Chair Chris Lee, Vice Chair Joy San Buenaventura and Members of the Committee:

The Office of the Public Defender supports the work of the Pretrial Task Force and therefore passage of H.B. 1289, HD1 but expresses a few concerns:

The Office offers a few suggestions to strengthen and clarify the Bill for consideration.

1. The requirement of **prompt hearings** on the issues of release and detention are imperative to any efficient and just pretrial system. While the proposal is well intentioned there is ambiguity in the definition of what constitutes a "prompt hearing." One court may deem a prompt hearing as meaning within two days of arrest, while other courts may set the hearing, as is often the current practice, several weeks after a person's detention. Therefore, The Office asserts that the better practice is to specifically state when hearings must commence. Other jurisdictions, such as New Jersey and New Mexico have specified these deadlines for hearings and decisions on detention between two (2) to five (5) days, depending on where defendants are held.

2. **Release of Non-Violent offenders.** The Office of the Public Defender supports the intention to release non-violent offenders that can be safely returned to our community. However, our Office believes that certain portions of the bill are too restrictive and may prevent consideration of certain individuals who can be safely released. For example, under the proposed legislation, **Section 804-B(b)(2)(B)** "a defendant with one prior conviction for a misdemeanor crime of violence or felony crime of violence" would not be eligible for release on own recognizance. Here, there is no clear definition of what constitutes a crime of violence. Furthermore, people may have committed these types of offenses a substantial number of years prior to an arrest on a new, non-violent offense. This provision will restrict a court from releasing a defendant even if the he or she determines that it is safe and reasonable to do so, and despite the number of intervening years since the prior offense or the current circumstances of the accused. For these persons, the better practice is to allow the court to make a decision using this type of criteria on a case-by-case basis. At the very least this provision should set a time limit for "looking back" on when these convictions should be considered for pretrial decisions.

   The current wording is also too vague and may lead to individuals being detained that should otherwise be released. For example, proposed **Section 804-B(b)(2)(F)**, would prevent release on own recognizance for defendants that present "a risk of danger to any other person or to the community." While seemingly well-intentioned, the statute is vague as to the kind of risk that would be necessary to detain an individual. Even someone of "minimal" risk, as opposed to "substantial" or "serious" risk of danger to another would not be eligible for release under the current proposal. Civil commitment hospitalization criteria under H.R.S. Section 334-60.2 requires a court finding that a person be *imminently* dangerous to others before a person can be committed. Hence, many of our mentally ill will be at risk of being jailed in a punitive setting under the proposed statutory language, even if they do not fit the criteria for hospital level civil commitment. This is clearly not the intention of anyone. We would therefore seek to clarify the degree of risk, the kind of danger that is being considered and whether that risk is imminent.

3. **Authorizing the Department of Public Safety's Pretrial Officers limited Access to offenders' financial circumstances**. While it will be necessary for pretrial officers to have limited access and to report on financial circumstances for a defendant, the Department of Public Safety must have procedures in place to protect and secure this sensitive, confidential and personal information. This information is not for public consumption and should be accessible only to the pretrial officers, the parties and the court.

The Office of the Public supports the additional amendments to the original Bill.

While we encourage the passage of this legislation, there are portions of the omnibus bill that can be improved. Thank you for the opportunity to comment on H.B. 1289, H.D.1.

The Judiciary, State of Hawai'i

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Wednesday, February 13, 2019 3:00 PM
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY

by
Judge Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge
Circuit Court of the First Circuit
Reporter, HCR 134 Criminal Pretrial Task Force

Bill No. and Title: House Bill No. 1289, H.D. 1, Relating to Criminal Pretrial Reform.

Purpose: Implements recommendations of the Criminal Pretrial Task Force convened pursuant to House Concurrent Resolution No. 134, House Draft 1, Regular Session of 2017.

Judiciary's Position:

The Judiciary respectfully supports House Bill No. 1289, H.D. 1, which reflects the Criminal Pretrial Task Force recommendations as submitted to this Legislature on December 14, 2018.

Chief Justice Mark E. Recktenwald established the instant Criminal Pretrial Practices Task Force to examine and recommend legislation to reform Hawai'i's criminal pretrial system.

The Task Force embarked on its yearlong journey in August 2017 and began with an in-depth study of the history of bail and the three major generations of American bail reform of the 1960s, 1980s, and the last decade. The Task Force researched the legal framework underlying our current practices, which are firmly rooted in our most basic constitutional principles of presumption of innocence, due process, equal protection, the right to counsel, the right to confrontation and that in America, liberty is the norm and detention is the very limited exception. National experts were invited and the Task Force members delved into the latest research and evidence-based principles and learned from other jurisdictions where pretrial reforms are well

underway. Previous studies conducted in the State of Hawaii were reviewed, community experts were engaged and the views of our local stakeholders were considered. Task Force members visited cellblocks, jails, ISC offices and arraignment courts in an effort to investigate and present an unbridled view of our criminal pretrial process.

The recommendations in the report seek to improve current practices, with the goal of achieving a more just and fair pretrial release and detention system, maximizing defendants' release, court appearance and protecting community safety. With these goals in mind, the Task Force respectfully submitted the following recommendations to be considered and implemented as a whole:

1. Reinforce that law enforcement officers have discretion to issue citations, in lieu of arrest, for low level offenses and broaden discretion to include non-violent Class C felonies.

For low-risk defendants who have not demonstrated a risk of non-appearance in court or a risk of recidivism, officers should issue citations rather than arrest.

2. Expand diversion initiatives to prevent the arrest of low-risk defendants.

Many low-risk defendants have systematic concerns (homelessness, substance abuse, mental health, etc.) which lead to their contact with law enforcement. Diversion initiatives allow law enforcement to connect such defendants with community social service agencies in lieu of arrest and detention. This allows defendants to seek help and address their concerns, reducing their future risk of recidivism. Initiatives such as the Honolulu Police Department's Health, Efficiency, Long-Term Partnerships (HELP) Program and Law Enforcement Assisted Diversion (LEAD) Program, as well as initiatives such as Community Outreach Court (COC) should be expanded.

3. Provide adequate funding, resources and access to the Department of Public Safety, Intake Service Center.

At the heart of Hawai'i's pretrial process is the Intake Service Center (ISC), a division of the Department of Public Safety (DPS). ISC is tasked with two primary responsibilities. First, ISC helps the court determine which pretrial defendants should be released and detained. More specifically, ISC conducts a risk assessment of the defendant to evaluate his/her risk of nonappearance and recidivism. The results of the risk assessment are reported to the court via a bail report, which recommends whether the defendant be held or released.

Second, once a defendant is released, ISC provides pretrial services to supervise the defendant and monitor his/her adherence to any terms and conditions of release. Pretrial services minimize the risk of nonappearance at court hearings while maximizing public safety by supervising defendants in the community.

Though Hawai‘i benefits from a dedicated and centralized pretrial services agency, staff shortages and limited funding hinders the administration of essential functions. ISC should be consulted to prepare an estimate of resources required to comply with current demand, as well as any potential future demands which may be triggered by any recommendations herein.

4. Expand attorney access to defendants to protect defendant's right to counsel.

Attorneys need access to clients to discuss matters of bail, case preparation and disposition. Inmate-attorney visiting hours and phone calls from county jails should be expanded to protect defendant's right to counsel.

5. Ensure a meaningful opportunity to address bail at the defendant's initial court appearance.

A high functioning pretrial system requires that release and detention decisions be made early in the pretrial process, at the defendant's initial court appearance. Prior to the initial appearance, parties must be provided with sufficient information (risk assessments and bail reports) to meaningfully address a defendant's risk of non-appearance, risk of recidivism and ability to pay bail. Adequate funding and resources must be provided to the ISC, courts, prosecutors and public defenders to ensure that such information is accessible to all parties and ensure that low risk defendants are released and high risk defendants are detained.

6. Where bail reports are received after the defendant's initial appearance, courts should automatically address pretrial detention or release.

In the event that a bail report is not provided for use at defendant's initial court appearance, especially when the bail report recommends release, courts should set an expedited bail hearing without requiring a filed, written motion.

7. Establish a court hearing reminder system for all pretrial defendants released from custody.

To decrease the number of defendants that fail to appear in court, a court hearing reminder system should be implemented. Each defendant who has been released from custody should receive an automated text message alert, email notification, telephone call or other similar reminder of the next court date and time.

8. Implement and expand alternatives to pretrial detention.

The Task Force recommends broadening alternatives to pretrial detention in two primary ways. First, home detention and electronic monitoring should be used as an alternative to incarceration for those who lack the finances for release on bail. Second, the use of residential and treatment programs should be expanded. Many low-risk defendants may be charged with crimes related to their inability to manage their lives because of substance abuse, mental health

conditions, or homelessness. Rather than face incarceration, defendants should be afforded the opportunity to obtain services and housing while awaiting trial. Providing a structured environment to address any potential criminogenic factors reduces the defendant's risk for non-appearance and recidivism.

9. Regularly review the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision.

Generally, court determinations as to whether a defendant is detained or released are made at or about the time of the initial arraignment hearing. Thereafter, there is no systematic review of the pretrial jail population to reassess whether a defendant may be appropriate for release. Absent a court appearance or the filing of a bail motion, there is no current mechanism in place to potentially identify low-risk defendant who may safely be released pretrial. In order to afford the pretrial detainee greater and continuing opportunities to be released, ISC should conduct periodic reviews to reassess whether a detainee should remain in custody.

10. Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center.

Currently, ISC is required to conduct risk assessments within three (3) working days. There is no correlating time requirement for bail reports. Following a felony defendant's arrest, defendants charged by way of complaint are brought to preliminary hearing within two (2) days of defendant's initial appearance. Thus, requiring both risk assessments **and** bail reports to be completed in two (2), rather than three (3), days would enable bail to be addressed at the earliest phases of the pretrial process, including at felony preliminary hearings. The current three (3) day requirement forgoes this opportunity to address bail early on.

11. Inquire and report on the defendant's financial circumstances.

Federal courts have held that a defendant's financial circumstances must be considered prior to ordering bail and detention. Hawai‘i statute also instructs all officers setting bail to "consider [not only] the punishment to be inflicted on conviction, [but also] the pecuniary circumstances of the party accused." At present, little, if any, inquiry is made concerning the defendant's financial circumstances. Courts must be provided with and consider the defendant's financial circumstances when addressing bail.

12. Evaluate the defendant's risk of violence.

Currently, the risk assessment tool used in Hawai‘i does not evaluate the defendant's risk of violence. While risk of non-appearance and recidivism remain critical components to an informed decision concerning pretrial release or detention, it is imperative that any evidence-based assessment also take into account whether the defendant is a danger to a complainant or the community.

13. Integrate victim rights by considering a victim's concerns when making pretrial release recommendations.

The perspective of victims should be integrated into the pretrial system by requiring that ISC consider victims' concerns when making pretrial release recommendations. While ISC is mindful of the victim's concerns and does make efforts to gather this information (generally from the prosecutor's office) and report it to the court, an effective and safe pretrial system must actively provide victims with a consistent and meaningful opportunity to provide input concerning release or detention decisions. Balance and fairness dictate that the defendant's history of involvement with the victim, the current status of their relationship, and any prior criminal history of the defendant should be better integrated into the decision-making process.

14. Include the fully executed pretrial risk assessment as part of the bail report.

ISC and correctional center staff who administer the risk assessment tool often employ overrides that frequently result in recommendations to detain. Furthermore, the precise reasons for these overrides are generally not provided. To increase transparency and clarity, ISC should provide to judges and counsel, as part of the bail report, the completed risk assessment, including the score and written explanations of any overrides applied.

15. Periodically review and further validate the risk-assessment tool and publicly report any findings.

In 2012, Hawai‘i began using a validated risk-assessment tool, the Ohio Risk Assessment System Pretrial Assessment Tool ("ORAS-PAT"), which had been validated in Ohio in 2009 and in Hawai‘i in 2014. Pre-trial risk assessments, including the ORAS-PAT, are designed to provide an objective assessment of a defendant's likelihood of failure to appear or reoffend upon pre-trial release. Regular validation of the ORAS-PAT is vital to ensure Hawai‘i is using a reliable tool and process. This validation study should be done at least every five years and findings should be publicly reported.

16. Provide consistent and comprehensive judicial education.

A high-functioning pretrial system requires judges educated with the latest pretrial research, evidence-based principles and best practices. Release and detention decisions must be based on objective risk assessments used by judges trained to systematically evaluate such information. Judges must be regularly informed of reforms implemented in other jurisdictions and embrace the progression toward a fairer system which maximizes the release of low-risk defendants, but also keeps the community safe.

17. Monetary bail must be set in reasonable amounts, on a case-by-case basis, considering the defendant's financial circumstances.

Federal case law mandates that monetary bail be set in reasonable amounts based upon all available information, including the defendant's financial circumstances. Hawai'i statutes already instruct officers setting bail to "consider . . . the pecuniary circumstances of the party accused." This recommendation makes clear that information regarding a defendant's financial circumstances, when available, is to be considered in the setting of bail.

18. Permit monetary bail to be posted with the police or county correctional center at any time.

Defendants should be able to post bail and be released on a 24 hours, 7 days a week basis. Defendants should not be detained simply because of an administrative barrier requiring that bail or bond be payable only during normal business days/hours. Further, reliable forms of payment, beyond cash or bond, should be considered.

19. Require prompt bail hearings.

The current system is inconsistent as to whether and when a pretrial defendant is afforded a bail hearing. This recommendation would establish a new provision requiring defendants who are formally charged with a criminal offense and detained be afforded a prompt hearing to address bail.

20. Eliminate the use of money bail for low level, non-violent misdemeanor offenses.

The use of monetary bail should be eliminated and defendants should be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor and non-violent misdemeanor offenses with certain exceptions. Many jurisdictions across the nation have shifted away from money bail systems and have instead adopted risk-based systems. Defendants are released based on the risks they present for non-appearance and recidivism, rather than their financial circumstances. At least for lower level offenses, the Task Force recommends a shift away from money bail.

21. Create rebuttable presumptions regarding both release and detention.

This recommendation would create rebuttable presumptions regarding both release and detention and specify circumstances in which they apply. Creating presumptions for release and detention will provide a framework within which many low-risk defendants will be released, while those who pose significant risks of non-appearance, re-offending and violence will be detained.

22. Require release under the least restrictive conditions to assure the defendant's appearance and protection of the public.

Courts, when setting conditions of release, must set the least restrictive conditions required to assure the purpose of bail: (1) to assure the defendant's appearance at court and (2) to protect

the public. By requiring conditions of release to be the least restrictive, we ensure that these true purposes of bail are met. Moreover, pretrial defendants, who are presumed innocent, should not face "over-conditioning" by the imposition of unnecessary and burdensome conditions.

23. Create a permanently funded Criminal Justice Institute, a research institute dedicated to examining all aspects of the criminal justice system.

Data regarding pretrial decisions and outcomes is limited. Collecting such data and developing metrics requires deep understanding of the interactions of the various agencies in the system. A Criminal Justice Research Institute should be created under the office of the Chief Justice. The Institute should collect data to monitor the overall functioning of the criminal justice system, monitor evidence-based practices, conduct cost benefit analysis on various areas of operation and monitor national trends in criminal justice. The Institute should further develop outcome measures to determine if various reforms, including those set forth herein, are making positive contributions to the efficiency of the criminal justice system and the safety of the community.

24. A centralized statewide criminal pretrial justice data reporting and collection system should be created.

As part of our obligations pursuant to HCR No. 134, this Task Force is required to "[i]dentify and define best practices metrics to measure the relative effectiveness of the criminal pretrial system, and establish ongoing procedures to take such measurements at appropriate intervals." This Task Force recommends that a centralized statewide criminal pretrial justice data reporting and collection system be created. A systematic approach to gathering and analyzing data across every phase of our pretrial system is necessary to assess whether reforms, suggested by this group or others, are effective in improving the quality of pretrial justice in Hawai‘i.

25. Deference is given to the HCR 85 Task Force regarding the future of a jail facility on O‘ahu.

House Concurrent Resolution No. 85 (2016), requested that the Chief Justice establish a task force, now chaired by Hawai‘i Supreme Court Associate Justice Michael Wilson, to study effective incarceration policies (HCR 85 Task Force). Our Task Force was directed to consult with the HCR 85 Task Force and "make recommendations regarding the future of a jail facility on O‘ahu and best practices for pretrial release". Reforms to the criminal pretrial system will have a direct impact upon the size and needs of the pretrial population, as well as the design and capacity of any future jail facility. This Task Force respectfully defers to the HCR 85 Task Force regarding the future of a jail facility on O‘ahu.

Each recommendation put forward by the Task Force came as a result of an extensive critical review and examination of each phase of our criminal pretrial system to identify

strengths, weaknesses and missed opportunities which have prevented our system, thus far, from doing a better job of not only meaningfully protecting an individual arrestee's rights, but also in a way which makes our communities much safer. Notably, despite the marked differences of opinion and concerns expressed by our diverse group of criminal justice stakeholders, our members nonetheless were able to set aside their differences and work together toward the common goal of improving the quality of pretrial justice in Hawaii. This slate of recommendations represent a set of measured, practical and achievable reforms to our present pretrial system. The fact that each recommendation garnered broad consensus speaks volumes with respect to the careful thought and effort that the Task Force brought to this endeavor.

The Judiciary fully supports the passage of House Bill 1289 in as much as it reflects the recommendations of the Task Force.

Thank you for the opportunity to testify on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY

DWIGHT K. NADAMOTO
ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

LATE

THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2019
State of Hawai`i

February 13, 2019

RE: H.B. 1289, H.D. 1; RELATING TO CRIMINAL PRETRIAL REFORM.

Chair Lee, Vice-Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to H.B. 1289, H.D. 1.

The purpose of H.B. 1289, H.D. 1 is to examine the current criminal pretrial procedures and to implement recommendations based on the findings of House Concurrent Resolution 134 Task Force report. While the Department appreciates the Committee's good intentions of improving upon current procedures, we agree with the Task Force's recommendation from the informational briefing on January 22, 2019, when it suggested that the prudent next step would be data collection following current changes implemented by various stakeholders, since the conclusion of H.C.R. 134.

With regards to the specific contents of H.B. 1289, H.D. 1, we would also like to note the following issues:

Section 5 (pg. 8, ln. 13)
By creating a broad range of eligible offenses (non-violent Class C felony, any misdemeanor or petty misdemeanor offenses) while creating a static list of excludable offenses (domestic violence, sexual assault, robbery and offenses contained in chapter 707 of the H.R.S.) this section fails to take into account that there are a plethora of charges classified as non-violent Class C felony, misdemeanor and petty misdemeanor offenses that are not excluded from being citation eligible. This includes but is not limited to Habitual OVUII (§291E-61.5, H.R.S.), Violation of an Order for Protection (§586-11, H.R.S.), Violation of a Temporary Restraining

Order (§586-4, H.R.S.), Promoting Pornography for Minors (§712-1215, H.R.S.), and Solicitation of a Minor for Prostitution (§712-1209.1, H.R.S.), Harassment by Stalking (§711-1106.1, H.R.S.), and Violation of an Injunction Against Harassment (§604-10.5, H.R.S.).

Section 7 (pg. 10, ln. 17)
The Department supports the proposed idea for the right to a prompt hearing. However, as currently written, section 804-A does not outline any procedure or mechanism to initiate such a hearing on behalf of the defendant. In addition, if this is a mandated contested hearing for all cases, there will be a huge influx of contested hearings which will delay trial cases, create a backlog, and impose a large financial burden for a number of agencies without proper funding. **In addition, the Department would raise concerns over the amendments made in H.B. 1289, H.D. 1, pertaining to the release of defendants who are unable to post bail that is set at an amount of $99 or less. The Department would note that bail is routinely set at a nominal amount for defendants who may have additional felony offenses that preclude their release. By removing bail for the defendant's lower level offense this amendment would preclude that person from receiving jail credit for time that he or she may be serving.**

Section 8 (pg. 14, ln 1)
This section raises similar concerns that the Department addressed in section 7. Currently, as written H.B. 1289, H.D. 1 creates a rebuttable presumption to release an individual charged of a criminal offense, but does not provide a procedure or mechanism for the courts. In addition, as proposed, the courts could encounter cases involving an individual charged with a Habitual OVUII (meaning an individual charged with a 4th OVUII offense in the last 10 years) offense that would be released without bail or released on bail with the least restrictions imposed. This proposal essentially shifts the burden to the state to show that an individual on probation or parole for a felony offense or a serial burglar is not a serious danger to any person or community or engage in illegal activity.

Although the Task Force report provided twenty-five various recommendations for pre-trial reform, many recommendations have already been applied without statutory requirements or mandates. Since the completion of the Task Force, it is our understanding that each agency has re-evaluated their policies and procedures and reassessed their approach to the current pretrial issues. As previously noted, we would strongly encourage the Committee to allow time for appropriate data collection and analysis as recommended by the Task Force at the informational briefing on January 22, 2019, before making any further statutory changes.

For all the reasons above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of H.B. 1289, H.D. 1. Thank you for the opportunity to testify on this matter.

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com

COMMITTEE ON JUDICIARY
Rep. Chris Lee, Chair
Rep. Joy SanBuenaventura, Vice Chair
Wednesday, February 13, 2019
3:00 pm
Room 325

SUPPORT FOR HB 1289 HD1 – PRE-TRIAL SERVICES – HCR 134 RECOMMENDATIONS

Aloha Chair Lee, Vice Chair SanBuenaventura and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the families of **ASHLEY GREY, DAISY KASITATI, JOEY O`MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE "CARE AND CUSTODY" OF THE STATE** as well as the approximately 5,400 Hawai`i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that more than 1,600 of Hawai`i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

The HD1 amended the bill by (1) authorizing the Department of Public Safety's Pretrial Service Officers limited access to offenders' financial circumstances for the purpose of viewing other state agencies' relevant data related to employment wages and taxes and including the data in the offender's bail report; (2) Authorizing the Director of Public Safety to release a defendant if a defendant is unable to post bail in the amount of $99 or less; provided that electronic defendant monitoring devices are used; (3) Requiring community correctional centers at least every three months to conduct regular reviews and surveys of the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision.

Community Alliance on Prisons supports reforming pretrial services and we thank the Task Force members and Chair, Judge Rom Trader for their work.

Although the community supports eliminating money bail, the Task Force did not do so entirely, however, they have granted judicial discretion to the courts on Class C felonies and non-violent offenses. The recommendations include broader discretion for police officers to issue citations for low-level offenses; consideration for the victim's concerns, and determination of appropriate supervision or detention of defendants. Developing an alternative set of options for the courts would definitely improve the quality of justice in Hawai`i. Many judges to whom I have spoken have said that they wish they had more options to address the wrongdoing happening in our communities.

Changing the law to enable defendants to be released on their own recognizance and any non-financial condition is needed to ensure they appear in court. Key exceptions would be for violent crimes or history thereof, prior non-appearance in court, or existing involvement in a criminal case.

Community Alliance on prisons supports this measure and urges the committee to pass it, Mahalo for this opportunity to testify.

LATE

Aloha Committee Chair Lee, Vice Chair Buenaventura, and Committee members,

On these islands that were invaded,
Taken and stay illegally occupied
We have a problem with mass incarceration
The cash bail system
And harsh sentencing regulations
Because they harm our communities and destroy lives.

We are Young Progressives Demanding Action and we will not stand idly by and watch as our government support
Endorse and enforce poorly drafted policy that is supposed to protect us but in truth only reflects the views of special interest groups.

Bail is not meant to be a form of pretrial punishment however they're using it to get convictions, now pay attention:
69% of arrestees in Hawaii during a 2017 bail study changed their plea from innocent to guilty while in custody.
Money is set as a condition of release almost 90% of the time.
and less than half of these folks actually have a dime.
So in the state of Hawaii more than 50% of all detainees haven't even been convicted of a crime.

We have outdated policies and regulations that disproportionately place native hawaiians and Pacific islanders behind bars
Target the poor and furthermore are not fucking pono at their core.

It has to stop
We are asking our governing bodies to stand up.
We want reform
A cash bail system should not be a norm.

So we have to fight.
Fight for the people,
Fight for the families,
Fight for community,
And fight for humanity.

This is our plea, please pass HB1289 out of committee.

Mahalo,
Destiny Brown
YPDA Social Justice Action Committee Chair
Email: dbrown31@my.hpu.edu

HAWAIʻI PACIFIC HEALTH | KAPIʻOLANI THE SEX ABUSE TREATMENT CENTER

LATE

Executive Director
Adriana Ramelli

ADVISORY BOARD

President
Mimi Beams

Joanne H. Arizumi

Andre Bisquera

Kristen Bonilla

Marilyn Carlsmith

Dawn Ching

Senator (ret.)
Suzanne Chun Oakland

Monica Cobb-Adams

Donne Dawson

Dennis Dunn

Steven T. Emura, M.D.

Councilmember
Carol Fukunaga

David I. Haverly

Linda Jameson

Michael P. Matsumoto

Lindsay Norcross Mist

Nadine Tenn Salle, M.D.

Joshua A. Wisch

Date: February 13, 2019

To: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

From: Justin Murakami, Manager, Prevention Education and Public Policy
The Sex Abuse Treatment Center
A Program of Kapiʻolani Medical Center for Women & Children

RE: Testimony in Opposition to H.B. 1289 H.D. 1
Relating to Criminal Pretrial Reform

Good afternoon Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary:

The Sex Abuse Treatment Center (SATC) respectfully opposes H.B. 1289 H.D. 1 and asks that the Committee please defer this measure.

As a threshold issue, it is our understanding that victims of crime and victim service agencies were not invited to participate as members of the Criminal Pretrial Task Force. Consequently, the proceedings of that task force did not include a key group of stakeholders as partners in discussions about the impacts of proposed changes in pretrial practices and in decision making about the task force's findings and recommendations.

Victims of crime and service providers that work closely with victims are in a unique position to communicate the impact that crime and Hawaiʻi's responses to crime have on real people. It is therefore important that they be included in discussions concerning criminal justice system reform, so that policy outcomes can be as well-informed and appropriate as possible.

We would like to share the following concerns for the Committee's consideration:

- On page 5 at line 15, the bill provides that the pretrial risk assessment should use an "objective, research-based, *validated*" assessment tool that measures, among other things, an offenders risk of violence or harm to "*any person or the general public*" (emphasis added).

  We note that the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) utilized as a pretrial risk assessment tool in Hawaiʻi measures risk of flight (e.g. failure to appear) and recidivism (re-arrest or conviction for another crime). However, it does not measure risk of violence or harm to any person or the general public, which is of particular concern in crimes that may be targeted

to specific persons or concerning property or interests/rights, like privacy, belonging to specific persons.

The ORAS PAT provides scores that are predictive of risk of flight and any-crime recidivism based on seven data items: (1) age at first arrest; (2) number of failure-to-appear warrants past 24 months; (3) three or more prior jail incarcerations; (4) employed at the time of arrest; (5) residential stability; (6) illegal drug use during past six months; (7) severe drug use problem.

It is not validated as a tool for predicting the risk that an offender will cause violence or harm to a specific person or the public at large—indeed, the 7 questions are not ones that would be asked if seriously considering the safety of potential future victims of crime.

It is also important to understand what it means when a tool is said to be 'validated.' The Ohio Risk Assessment System (ORAS): A Re-Validation & Inter-Rater Reliability Study: Final Report (October 2017), found that even offenders deemed 'low risk' by the ORAS PAT empirically recidivated at fairly high rates, with 19.3 percent newly arrested and 10.3 percent newly convicted *within 6 months* (emphasis added).

In addition, there was variation in how different users of the ORAS PAT scored identical cases, with two of the seven data items found to be "particularly problematic." As such, ORAS PAT does have a level of vulnerability to significantly disparate risk scoring of identical cases depending on the person who administers it.

It is unclear what, if any, pre-trial risk assessment tool currently exists that would meet the requirements of the proposed Section 353-10(b)(3), and how such a tool could be satisfactorily and timely validated for use upon H.B. 1289 H.D. 1's effective date.

- On page 6 at line 8, the bill provides that the Department of Public Safety is responsible for "making inquiry with the offender concerning [their] financial circumstances" for inclusion in the bail report, and that the Department be granted "limited access for the purpose of viewing other state agencies' relevant data related to an offender's employment wages and taxes."

  We note that an understanding of an offender's financial circumstances would tend to include verifying if the offender has assets, requiring that the Department also be given access to additional financial and county records, such as banking, investment, real property and vehicle information. Additional information, such as reports of finances created during law enforcement investigation should also be reviewed if possible.

  As drafted, the bill does not include inquiry as to these items as part of the assessment of the financial circumstances of the offender, which could distort determinations as to appropriate bail.

- On page 4 at line 21, the bill reduces the time available to conduct pretrial risk assessments from three to two working days. On page 7 at line 2, the bill further provides that pretrial bail reports to the court are due within 2 working days of admission of the offender to a community correctional center, whereas the current law does not seem to provide a due date.

As the pre-trial risk assessment tool envisioned by H.B. 1289 H.D. 1 is significantly more sophisticated than the existing ORAS PAT, it would seem that more time, and not less, would be required to conduct pre-trial risk assessment in advance of making a report for bail and release decisions.

Moreover, accurate assessment of an individual's financial circumstances for the purpose of bail determinations would seem to require review of information that goes beyond limited access to state sources, like income tax records. Banking institutions and county offices may need time to respond to requests for information. The inclusion of a bona fide review of offender financial circumstances as part of the bail report would tend to require that more time be granted to the Department, rather than less.

- On page 8 at line 20, the bill expands the discretion for police offers to issue a citation in lieu of arrest to include "non-violent class C felony," so long as, on page 8 at line 14, the police officer determines that "[t]he offense does not involve domestic violence, sexual assault, robbery, or any other offense enumerated in chapter 707 [Crimes Against the Person]."

  A sample of the crimes which would be made eligible for citation, rather than arrest, with this change includes:

  1) Violation of Privacy in the First Degree (H.R.S. Section 711-1110.9), a crime that involve "Peeping Toms" who record their victims and revenge porn that is explicitly created to harm the health, safety, finances, reputation, and relationships of the victim;
  2) Aggravated Harassment by Stalking (H.R.S. Section 711-1106.4), a crime involving a offender who has been convicted of multiple incidences of stalking;
  3) Burglary in the Second Degree (H.R.S. Section 708-811) and Unauthorized Entry in a Dwelling in the Second Degree (H.R.S. Section 708-812.6), which are crimes of home invasion either with intent to commit a crime in the home, or *when the homeowner is present in the home*.

  It seems that H.B. 1289 H.D. 1 would tend to set up a situation where a victim of one of these crimes calls police, but the offender, upon being identified and in circumstances that would normally result in arrest, is allowed to remain at large and unmonitored in the community.

- The factors, listed on page 9 at lines 5 - 16, that police are required to consider when deciding to exercise discretion and issue a citation to offenders who commit C felonies, do not include any risk assessment of the offender. This seems strangely dissonant when compared with H.B. 1289 H.D. 1's emphasis on sophisticated risk assessment for offenders who are taken into custody.

  The decision to allow an offender who commits a C felony—many which a reasonable member of the public would tend consider serious crimes—should explicitly include a consideration of the risk of recidivism and potential for harm to specific persons and the general public posed by the offender.

  From the language of H.B. 1289 H.D. 1, it is not clear what tools or training, if any, would be provided to a police officer to perform this analysis in the field.

- We respectfully encourage the Committee to consider complications in how the different parts of H.B. 1289 H.D. 1 will interact in practice.

  For example, it is not clear what effect expanding discretionary police citations to include C felonies may have upon conducting accurate pretrial risk assessment. ORAS PAT, the pretrial risk assessment tool used in Hawai‘i, specifically references prior *arrests* for the purpose of assigning a risk assessment score, and re-*arrest* over a time period subsequent to a prior arrest for validation purposes (emphasis added).

- On page 11 at line 15, the bill provides that "[t]he defendant shall be afforded an opportunity to . . . present witnesses [and] to cross-examine witnesses who appear at the hearing."

  Procedurally, it is not clear from the plain language of H.B. 1289 H.D. 1 how this would take place. For example, we would be very concerned if the creation of such a right to present and cross-examine witnesses means that an offender would be able to subpoena the victim(s) of their crime and interrogate them in court, even before the commencement of trial, on questions relevant to the detailed bail report envisioned by H.B. 1289 H.D. 1.

  Certain inquiries, such as challenging findings as to the extent to which the defendant poses a threat to the victim or the public generally, would tend to risk re-victimizing or further traumatizing the victim, distorting the criminal justice process.

- On page 14 at line 12, the bill would remove all B felonies that don't involve violence or the threat of violence to any person from the definition of "serious crime," with the effect of rendering these crimes presumptively bailable.

  It is our understanding that this would move certain crimes that we believe a reasonable member of the public would tend to find particularly heinous from the non-bailable category to the presumptively bailable category.

  Such crimes include Burglary in the First Degree (H.R.S. Section 708-810), meaning breaking and entering a building with an intent to commit crime while armed with a dangerous weapon or knowing that building is a home, and Burglary of a Building During an Emergency Period (H.R.S. Section 708-818), which is of particular interest given Hawai‘i's recent experience with natural disasters resulting in emergency declarations.

- On page 27 at line 15, the bill provides that the purpose of the proposed criminal justice research institute is stated as "assisting the State in understanding the system in a more comprehensive way and ensuring the protection of individual rights, increasing efficiencies, and controlling costs," with no reference to protecting the public or specific persons from crime.

  We respectfully submit that maintaining public safety should be a priority concern for a criminal justice research institute, should one be established in this state.

- On page 28 at line 13, the bill provides that the board of directors for the proposed criminal justice research institute include only the chief justice, a representative of the office of the governor, a member of the legislature, and the director of public safety.

This would seem to deny board representation—for an agency meant to study the criminal justice system—to important stakeholders in the criminal justice system, such as the police, prosecutors, defense attorneys, and, notably, victims of crime.

- On page 39 at line 12, the bill requires the Department of Public Safety to "revise the pretrial risk assessment processes currently used by its intake service centers *with respect to offenses committed against persons, including offenses involving domestic violence and violation of restraining orders and protective orders*, to ensure integration of victims' rights into the criminal pretrial system[.] (emphasis added)."

  We would suggest that just because a crime is not specifically an "offense against the person" (H.R.S. Chapter 707), does not mean it was victimless or was not personally violating. For example, the B and C felonies referenced elsewhere in this testimony are not classified as Chapter 707 offenses against the person, but involve significant violations of their homes, privacy, and other personal rights and interests.

  Therefore, pretrial risk assessment process should integrate victims' rights into the criminal pretrial system for all serious crimes and crimes of actual or threatened violence involving a victim.

  Moreover, the factors that the pretrial system should consider when making pretrial release recommendations, listed from page 39 line 20 through page 40 line 8, should include whether an offender intruded upon or into the property of the victim, including but not limited to their home or vehicle—circumstances of heightened personal violation.

- On page 39 at line 11, the bill provides an implementation date of December 31, 2019 for integrating victims' rights in pretrial risk assessment practices.

  This would create a concerning and seemingly arbitrary six month delay between the implementation of other pretrial procedural reforms that don't specifically take into account the needs of crime victims, and inclusion of victims of crime in pretrial assessment practices.

We appreciate the opportunity to testify on H.B. 1289 H.D. 1, and respectfully ask that the Committee **please defer this measure** in order to allow Hawai'i's victims of crime and agencies that serve victims, like SATC, the opportunity to meaningfully engage and collaborate with the Criminal Pretrial Task Force stakeholders on this important issue.

LATE

ACLU Hawai'i

Committees:	House Committee on Judiciary
Hearing Date/Time:	Wednesday, February 13, 2019, 3:00 p.m.
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawai'i with Comments on H.B. 1289, H.D. 1, Relating to Criminal Pretrial Reform*

Dear Chair Lee, Vice Chair San Buenaventura, and members of the Committee,

The American Civil Liberties Union of Hawai'i writes **with comments** regarding H.B. 1289, H.D. 1, which adopts the recommendations of the Criminal Pretrial Task Force (Task Force) convened pursuant to House Concurrent Resolution No. 134 (2017). While we support the intent behind this legislation and agree with many of the Task Force's findings, we respectfully request this Committee to insert the procedures and protections identified in H.B. 1436 (as introduced) into the relevant portions of this bill. We believe that doing so would more fully address our state's problems with pretrial incarceration.

We respectfully request that the language of H.B. 1436 (as introduced) be inserted into this bill.

We appreciate the extensive work and deliberation behind the Task Force's recommendations to improve our broken pretrial system, and agree with much of what the Task Force has proposed, such as requiring release and bail to be set under the *least restrictive conditions necessary,* and allowing the accused to post bail 24/7. Bail, in any form, *should never be used* as a punitive tool, and any conditions set for release should be only as restrictive as is absolutely necessary to ensure that the accused shows up to court. More about the purpose of bail and the need for pretrial reform in Hawai'i can be found on pages 2 and 3 of this testimony.

Other provisions of the bill, however, do not go far enough to reform our system and may actually contradict the Task Force's intent by conflating issues of detention and release and perpetuating barriers to release that primarily impact the poor. **We believe that these issues could be addressed by inserting the language of H.B. 1436 into the bill.**

H.B. 1436 (as introduced) would change our current pretrial system by 1) creating a presumption of release on an individual's recognizance or on the execution of an unsecured bond; 2) requiring the implementation of a court appearance reminder system; 3) prohibiting the use of bail schedules and the ordering of substance abuse treatment or testing for those who have not been charged with a drug-related crime; and 4) establishing minimum standards for any adoption and use of pretrial risk assessment tools. **Inserting this language would fulfill the intent of the legislation and constitute significant progress towards ensuring that people are not sitting in jail simply because they are poor.**

As an example, one specific provision of H.B. 1289, H.D.1 that could be amended to include language from H.B. 1436 is Part II, Section 3, which addresses pretrial risk assessment tools.

While we support the idea of periodic review of these tools, we believe that this provision is a missed opportunity to establish standards for their use. We have serious concerns about the use of the Ohio Risk Assessment System's Pretrial Assessment Tool (ORAS-PAT), which is programmed in a way that contributes to racial disparities in our justice system. By incorporating the protections of H.B. 1436 (as introduced), this Committee could potentially minimize some of these harms by establishing basic standards for risk assessment tools.

Other sections addressing conditions of release would also be drastically improved if the language of H.B. 1436 were to be incorporated. **We are happy to continue this conversation and to work with this Committee on developing alternative language.**

The need for pretrial reform in Hawai‘i

Pretrial incarceration is one of the major drivers of overcrowding in Hawai‘i's jails. Currently, around 1,100 men and women in Hawai‘i – around half of the individuals jailed in Hawai‘i's correctional facilities – have not been convicted of any crime and are merely awaiting trial, most often because they cannot afford the amount of bail set in their case.[1]
To better understand why so many people, who are innocent in the eyes of the law, are being jailed pretrial in Hawai‘i's jails, the ACLU of Hawai‘i recently conducted an in-depth study of the state's bail setting practices. Our study reviewed all cases filed in Hawai‘i's circuit courts in 2017. While we have published a preliminary report examining cases between January and June of 2017, this testimony reflects our most recent findings.

Courts' reliance on money bail results in people who otherwise pose no risk of flight or threat to public safety staying in jail because they are simply too poor to get out. Our research revealed that circuit courts heavily rely on the use of money bail to secure court appearances, setting cash bail, as a condition of release in 90 percent of cases. The Task Force similarly found that Hawai‘i's system "relies upon money bail largely to the exclusion of other financially-neutral alternatives" and that this is problematic because "the setting of money bail alone . . .does not correlate with a defendant's risks of non-appearance, danger, or recidivism."[2] Put simply, money bail is not necessary to ensure public safety or an individual's appearance in court.

Moreover, the courts assigned bail at amounts without regard to an individual's financial circumstances but rather solely based on the crime charged. **Indeed, the median bail amount on Oahu for a single class C felony was $11,000.** This is despite the lack of any serious inquiry into someone's ability to pay or specific risks of flight or danger to the community. Given these

[1] State of Hawai‘i Dep't of Pub. Safety, End of Month Population Report (Dec. 31, 2018).
[2] Hawai‘i Criminal Pretrial Reform, Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawai‘i, pp 66-67 (December 2018).

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluHawai‘i.org
www.acluHawai‘i.org

large amounts, it was not a surprise when we learned that only 46 percent of arrestees were able to post bail. By enacting a statutory presumption of release on recognizance or unsecured bond, while also placing the burden on the State to show the court with clear and convincing evidence why more conditions, non-financial or financial, are necessary, H.B. 1436 ensures that courts will be required to further honor an individual's due process rights by treating liberty as the norm, and detention the exception as required by the U.S. and Hawai'i constitutions.[3] Additionally, by requiring courts to document in writing the reasons for additional conditions of release, we will be ensuring that courts are not treating bail hearings as perfunctory routines, but rather as a carefully considered and individualized process.

Courts fail to individualize the bail setting process as required by the U.S. Constitution and Hawai'i Revised Statutes. Courts routinely fix bail based on the charge-based amounts as set by the guidelines adopted by the circuit courts, or by setting blanket and inappropriate conditions of release. The Supreme Court of Hawai'i has found the use of bail schedules to be an abuse of judicial discretion and beyond the scope of legislative authority.[4] Nevertheless, courts rely heavily on them.

Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai'i

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for 50 years.

---

[3] *US v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). *See also Huihui v. Shimoda*, 62 Haw. 527, 532 (holding that not allowing individualized inquiries violates the due process clause of the Fourteenth Amendment of the U.S. Constitution and Art. 1 § 12 of the Hawai'i Constitution).

[4] *Pelekai v. White*, 75 Haw. 357, 367 (1993) ("In striking down the sentencing guidelines [in *State v. Nunes*, 72 Haw. 521, 824 (1992)], we held that where the legislature vested the trial courts with discretion to impose a sentence, rigidly adhering to sentencing guidelines promulgated without legislative authority was an abuse of discretion. . .. Like the trial judge in *Nunes*, the trial judge in the instant case had the discretion to reset bail. . . . By rigidly following the Bail Schedule, the trial judge substituted the Bail Schedule for the discretion vested in her [in HRS § 804-5], and in doing so, abused her discretion.")

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluHawai'i.org
www.acluHawai'i.org

HB-1289-HD-1
Submitted on: 2/11/2019 6:05:34 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments	No

Comments:

We believe that the various bail measures pending this session are significant proposals that could go a long way towards reforming our penal system in Hawaii. While the issue extends beyond those individuals with mental illness our focus is on that and unfortunately they do comprise a fairly high percentage of the pretrial inmates.Many of these individuals are arrested for relatively minor offenses and are held as pretrial detainees simply because they cannot post bond.While they are incarcerated their mental health can deteriorate. In reality they pose little risk of flight which is what the purpose of bail was intended to be. It makes no sense and serves no purpose to house these individuals for months on end while they are awaiting trial. If they are ultimately convicted and sentenced then so be it.However, in the meantime it is a waste of resources to the state to keep them there and it is an infringement on their liberty to be held simply because they are to poor to have the resources needed for the bail. Our facility at OCCC is particularly overcrowded and it would be a smart move for the state to seriously consider if it makes any financial sense to clog up the prison with individuals who do not a pose a risk of not appearing for Court or any danger to the community.

A. Y. S. Bail Bonds LLC
91-1121 KEAUNUI DR. Suite 108
EWA BEACH, HAWAII 96706
(808) 427-3430

February 12, 2019

HOUSE OF REPRESENTATIVES – State of Hawaii (The Thirtieth Legislature)
Committee on Judiciary
Chairperson: Chris Lee
Vice-Chairperson: Joy A. San Buenaventura
Wednesday February 13, 2019 @ 3:00pm
Conference Room: 325

RE: Opposition to HB-1289 (H.D. 1) – Relating to CRIMINAL PRETRIAL REFORM

Greetings Chairperson Lee and Committee Members;

Aloha, my name is Lance Ling and I am the Vice-President of A. Y. S. Bail Bonds LLC, which is a small, woman owned, and minority owned business in the State of Hawaii. Our company offers Surety Bail Bonds to defendants across the island of Oahu.

We can see and understand the research and views given by the Task Force, though we strongly oppose proposed Bill for an Act HB1289(H.D. 1). We do not believe everyone is truly informed of the financial burden this will put on the State of Hawaii, the Judiciary, and the Department of Public Safety.

Here are some of the issues other States across the nation are having with their so-called BAIL REFORM/PRETRIAL RELEASE:

1. It has led to the quick release of some who weren't deemed a threat but were soon re-arrested on new charges.
2. The Judiciary Branch is spending more on the program than it was collecting in fees, that this is "simply not sustainable.". The program "requires a stable and dedicated funding stream at an appropriate level" through the state's general fund.

A. Y. S. Bail Bonds LLC
91-1121 KEAUNUI DR. Suite 108
EWA BEACH, HAWAII 96706
(808) 427-3430

3. Another challenge involves the inability of staff to offer necessary services to certain defendants released on pretrial monitoring. Defendants sometimes need support for mental health, housing or substance abuse issues. The state needs to develop access to community-based treatment and housing assistance programs. Without enough/proper funding to handle what this Bill does, we are set-up for failure.

4. A major issue is finding the most effective and efficient ways to pay for electronic monitoring of defendants. Court staffers also dedicate significant resources to address issues related to noncompliance with electronic monitoring, such as when defendants go missing or enter prohibited zones.

The State of Hawaii already has issues dealing with the backlog of cases in the Judiciary, along with prison over-crowding, and not enough staffing to handle the day to day court operations. Why not ensure these issues are handled first, before allowing something that will further burden the Judicial and Executive Branches, without the proper staffing and funding?

I believe we first must look to filling the many positions that our Judicial Branch has open, and smooth out the process of handling the many cases that have clogged up our court system for many years. Maybe it's time to revamp the Judicial Court process and systems first before enacting something to this magnitude.

Respectfully,

Lance T. M. Ling
Vice-President
A.Y.S. Bail Bonds LLC

Mental Health America of Hawai`i

1136 Union Mall, Suite 510
Honolulu, Hawaii 96813
P 808.521.1846 |
mentalhealthhawaii.org

Helping Hawai'i Live Well

To: Representative Chris Lee, Chair, Representative Joy San Buenaventura, Vice Chair, Members, House Committee on Judiciary

From: Trisha Kajimura, Executive Director

Re: TESTIMONY IN SUPPORT OF HB 1289 HD1 Relating to Criminal Pretrial Reform

Hearing: February 13, 2019, 3:00 pm, CR 325

Thank you for allowing us to provide testimony in support of HB 1289 HD1 which implements the recommendations of the criminal pretrial task force that met in 2017 and 2018, resulting in a report to the Legislature submitted on Dec 14, 2018.

Mental Health America of Hawaii is a 501(c)3 organization founded in Hawai'i 77 years ago, that serves the community by promoting mental health through advocacy, education and service. Unfortunately, many people who are arrested and/or incarcerated suffer from untreated mental illness. We support criminal pre-trial reform, particularly alternatives to money bail.

Our current bail system unfairly imprisons people who are awaiting trial and do not have the financial means to pay their bail. This can result in a cascade of additional problems such as job loss and the inability to fulfill family responsibilities that puts the pretrial individual in an even worse position than their arrest did. We support this bill and reform of the pretrial system to be more efficient and fairer for the pretrial individuals as well as taxpayers. Implementation will significantly cut our incarcerated population, reduce overcrowding and the cost of our prison system while continuing to equip the Judiciary with the tools needed to protect public safety.

Thank you for the opportunity to testify in support of HB 1289 HD1. Please contact me at trisha.kajimura@mentalhealthhawaii.org or (808)521-1846 if you have any questions.

HB 1289, HD 1, RELATING TO CRIMINAL PRETRIAL REFORM

FEBRUARY 13, 2019 · HOUSE JUDICIARY
COMMITTEE · CHAIR REP. CHRIS LEE

POSITION: Support.

RATIONALE: IMUAlliance supports HB 1289, HD 1, relating to criminal pretrial reform, which implements recommendations of the Criminal Pretrial Task Force convened pursuant to House Concurrent Resolution No. 134, House Draft 1, Regular Session of 2017.

IMUAlliance is one of the state's largest victim service providers for survivors of sex trafficking. Over the past 10 years, we have provided comprehensive direct intervention services to 135 victims, successfully emancipating them from slavery and assisting in their restoration, while providing a range of targeted services to over 1,000 victims in total. Each of the victims we have assisted has suffered from complex and overlapping trauma, including post-traumatic stress disorder, depression and anxiety, dissociation, parasuicidal behavior, and substance abuse. Trafficking-related trauma can lead to a complete loss of identity. A victim we cared for in 2016, for example, had become so heavily trauma bonded to her pimp that while under his grasp, she couldn't remember her own name. Yet, sadly, **many of the victims with whom we work are misidentified as so-called "voluntary prostitutes" and are subsequently arrested and incarcerated, with no financial resources from which to pay for their release**.

Hawai'i has approximately 5,500 inmates, over, 1,500 of whom are incarcerated overseas, away from their families and homeland. According to a report by the American Civil Liberties Union released last year, pre-trial detainees in Honolulu wait an average of 71 days for trial because

Kris Coffield, Executive Director · Anna Davide, Policy Specialist · Shana Merrifield, Board of Directors · Jeanné Kapela, Board of Directors · Tara Denney, Board of Directors · Jenifer Allen, Board of Directors

they cannot afford bail. Additionally, researchers found that circuit courts in Hawai'i set money bail as a condition of release in 88 percent of cases, though only 44 percent of those people managed to post the amount of bail set by the court. Moreover, the study found the average bail amount for a Class C felony on O'ahu is set at $20,000. Even with help from a bail bonding agency, posting bond, in such cases, would require an out-of-pocket expense of roughly $2,000. Finally, while officials claim that bail amounts are supposed to be based on a consideration of multiple factors–including flight risk, ability to pay, and danger to the community–researchers learned that in 91 percent of cases in Hawai'i, money bail mirrored the amount set by police in arrest warrants, an amount based solely on the crime charged. These injustices led the ACLU to declare that our state's pretrial detention system was and remains unconstitutional.

Furthermore, as the visitor industry reaps record profits and supports expansion of the local prison-industrial complex, people of Native Hawaiian ancestry, who comprise approximately 25 percent of the state's population, continue to suffer the pangs of a biased criminal (in)justice system. Approximately 39 percent of incarcerated detainees are Hawaiian, according to a comprehensive study by the Office of Hawaiian Affairs, with the proportionality gap being even greater for Hawaiian women, who comprise 19.8 percent of the state's female population, but 44 percent of the state's female inmate population. Researchers also found that, on average, Hawaiians receive longer sentences, more parole revocations, and, importantly for this measure, **harsher drug-related punishments than other ethnic groups**. Therefore, passage this measure is a step toward reforming and preventing more people from becoming victims of our unjust and racially coded prison system.

LATE

HB-1289-HD-1
Submitted on: 2/12/2019 10:07:14 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

LATE

HB-1289-HD-1
Submitted on: 2/12/2019 11:14:41 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Joseph Kohn MD	We Are One, Inc. - www.WeAreOne.cc - WAO	Support	No

Comments:

Aloha Chair Lee, Chair San Buenaventura members of the committee,

I support a reduction or elimination of our state's reliance on cash bail in determining pretrial incarceration. Cash bail does not serve the function for which it was intended. The purpose of bail is not pretrial punishment. Bail is supposed to minimize the risk of flight and danger to society while preserving the defendant’s constitutional rights. However, requiring cash bail does not achieve any of these outcomes.

Jurisdictions like Washington D.C. that have all-but replaced cash bail with smart justice reforms have seen better rates of court attendance and lower rates of re-arrest, all while satisfying the intent of bail without violating civil liberties.

Cash bail has serious societal costs. Incarceration disrupts lives, often leading to loss of employment, custody issues and loss of housing. These worsened outcomes derail people from the trajectory of their lives, increasing the likelihood of negative outcomes like homelessness, health problems and crime: costs for which we all pay the price. Please pass HB175 & HB1289. Mahalo!

Mahalo,

www.WeAreOne.cc

LATE

HOUSE OF REPRESENTATIVES
THE THIRTIETH LEGISLATURE
REGULAR SESSION OF 2019

Testimony in Support of HB 1289, HD1, With Amendments

By, James Waldron Lindblad
James.Lindblad@mail.com
808-780-8887

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy A. San Buenaventura, Vice Chair

Rep. Tom Brower	Rep. Calvin K.Y. Say
Rep. Richard P. Creagan	Rep. Gregg Takayama
Rep. Nicole E. Lowen	Rep. Ryan I. Yamane
Rep. Angus L.K. McKelvey	Rep. Cynthia Thielen
Rep. Dee Morikawa	

AMENDED NOTICE OF HEARING

DATE: Wednesday, February 13, 2019

TIME: 3:00pm

PLACE: Conference Room 325
State Capitol
415 South Beretania Street

HB 1289, HD1 (HSCR208) Status	RELATING TO CRIMINAL PRETRIAL REFORM. Implements recommendations of the Criminal Pretrial Task Force convened pursuant to House Concurrent Resolution No. 134, House Draft 1, Regular Session of 2017. (HB1289 HD1)

Testimony in Support HB 1289, HD1. (With Amendments) By, James Waldron Lindblad.

My name is James Waldron Lindblad, and I have worked in and around police, courts, jails and prisons since 1973, and I have worked in both pretrial release, and in surety bail bonding.

*I support the intent of HB 1289, HD1, which I think will improve the pretrial process. Subject to the following proposed amendments.

Page 4, (1) Time to make pretrial assessment at 48 hours v 72 hours. I think quick assessments are great but our Hawaii Intake Service Center knows what it is doing and I think 48 hours is too quick. There are many clients that are not even interviewable at 48 hours due to drugs and alcohol. This 48 hours is listed again on Page 6, (9)

Page 7, regarding Pretrial Bail Reports. This pretrial bail report should be made readily available to all competent sureties or licensed and approved bail agents or at least by direction of defendant and the defendant should not be required to deliver the pretrial bail report to the bail agent or competent surety themselves but should be able to direct delivery of the report via intake. This will help ensure quicker release when suretyship is required by the court. Bail agents can use the information to speed release when bail is required. The public defenders could also be instructed to provide the pretrial bail report to any surety considering involvement in the pretrial release. There is nothing confidential in the pretrial bail report requiring the report to be sealed and openness would assist those persons in providing quicker release when the court decides bail should be a condition of release. I have prepared over 2000 pretrial bail reports and

validated the information when I was a pretrial worker and believe this information should be shared.

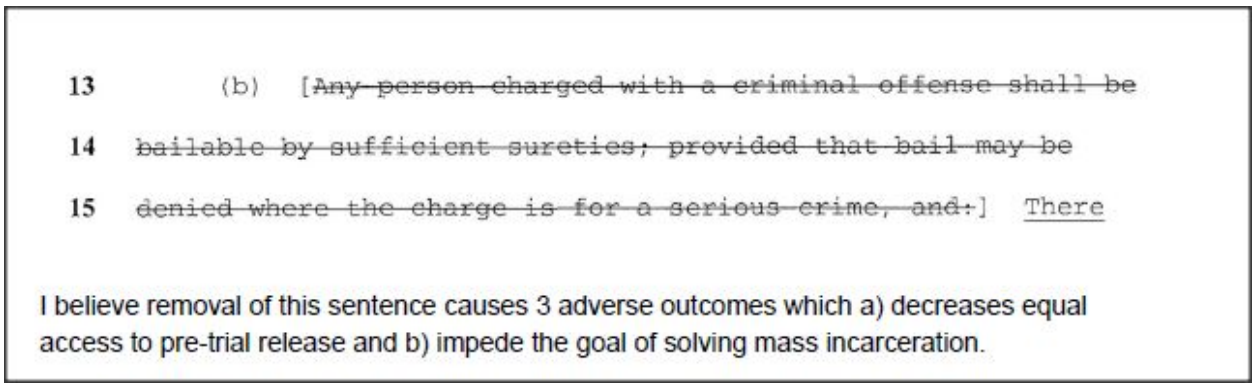
Page 9 (1) Money or monetary bail and language relevant to any and all bail including bail bonds should be uniform and refer to a statute defining bail in order that money bail is not confused with cash only bail or cashier's checks and bail bonds are included in the pretrial release process. The police holding stations and DPS jails should allow and to be instructed further in order to ensure bail bonds as defined and bail agents as defined are adequate and sufficient for pretrial release and that the statutory intent is that bail bonds and bail agent be treated the same as money bail which is presently the true intention of our statutory scheme. In fact, money is a substitute for sufficient surety which is the foundation of bail release. To say monetary bail as suggested in Part IV., Section 6., (2) on Pages 9 and 10, confuses matters and law enforcement persons along with everyone else including me who all require clear language and intent. <u>This section must be corrected to clearly state what is allowable and if bail bonds and bail bond agents are allowable 24/7 we must state so, very clearly and read this into the committee report so that going forward everyone knows the legislative intent and any ambiguity or lack of clarity in the statutes can be made clear by reading the committee report as to legislative intent. This is very important.</u>

Page 11, on section *804 A. We need to say, set bail. Or refer to bail setting and not limit the section to release or detain. What is meant here is to <u>set bail,</u> or to release or to detain. We must say this clearly to avoid confusion.

Page 11, 804-B Money Bail; non-violent offenders. We must be very careful here as already those persons being arraigned are complaining on camera regarding the expectation of release on OR or SR as their crime is non-violent. We cannot write laws where the expectation of fairness becomes an entitlement. Certainly judges will have guidelines but people with 50 arrests expecting release after release as their crime is

deemed not violent when every person in Hawaii whose had their house burglarized feels violated must be made clear as to legislative intent. We cannot go overboard as I believe judges know best and we cannot force every decision or instruct our judges who may know better on mandatory pretrial release and we must trust our judges to judge. Otherwise, why even book a defendant. It would be better to require the police to issue a citation release instead if the intent is not to ever require bail.

Page 14, Section 8 (b) Lines 13, 14, 15 are taken out that speak to "bailable by sufficient sureties." Bailable by Sufficient Sureties is the cornerstone of equal justice and explained very well the the Washington state Barton Case, https://caselaw.findlaw.com/wa-supreme-court/1674501.html


13 (b) [~~Any person charged with a criminal offense shall be~~
14 ~~bailable by sufficient sureties; provided that bail may be~~
15 ~~denied where the charge is for a serious crime, and.~~] There

I believe removal of this sentence causes 3 adverse outcomes which a) decreases equal access to pre-trial release and b) impede the goal of solving mass incarceration.

****Suggest leaving in the lines 13,14,15, absent good cause. Taking these words out confuses matters and could be interpretted to mean no more bail by sufficient sureties which is not the intent. Further, since the intent of HB1289, HD1 is to keep bail by sufficient surety and money bail as an option for judges when setting pretrial release conditions, this section is very important and should not be deleted or replaced.**

As I interpret the future of pre-trial release, I think its critical to keep the term "sufficient sureties"in the statutes because the more options that may be associated with the term, the more cause a judge may find to release a detainee.

Page 21, Line 1 Release after Bail. When bail is offered and taken the prisoner shall be discharged from custody or imprisonment. This language has been a cornerstone to pretrial justice in Hawaii for many years and should never be deleted. Courts, police and public safety persons and especially bail agents rely on this statute to ensure fairness and prompt release when bail is posted or filed with the court or holding facility. Please add this back and do not delete or substitute this important language. Importantly, an added mention of bail bond agent, bail bond or sufficient surety language should be added here, on or around lines 2 and 3 or anywhere on page 21. Officials must know bail bonds mean bail or money and bail bonds are sufficient for release. Adding the words bail bond agent or licensed and approved sufficient surety or something to mean bail agents that can in-fact, bail people out is needed here. How a person proves they are a legitimate bonafide bail agent would help too. Is there an approved list? Is there an approval procedure for bail agent certification or is going online to the state site showing insurance bonds are sufficient or the producer license is current the only needed proof? Whatever the proof must be to show bail agent adequacy, we should say so in this section. I think everyone requires more certainty in this section and improved language here stating bail agents are in the mix and a mention of bail agents in the committee notes as to legislative intent is required.

Page 24, line 12. Taking out considering punishment is a mistake and should be left alone. Anyone in the position of determining risk factors must know and consider potential consequences in order to make the right decisions. Consequences play a key role in determining risk factors. To not include risk factors is going overboard and takes away or hamstrings the decision maker as consequences are key elements in criminal justice and consequences guide us all. We must consider consequences on the release, detain or setting of pretrial release bail conditions or in setting money bail amounts that can also be provided by surety bonds a.k.a., bail bonds.

People commit crimes and society must deal with criminals. I have great faith in our DPS having worked in and around the Hawaii DPS since 1980. There is no finer group of more dedicated people anywhere. I think we, the people, must provide the needed tools for our DPS to succeed and it is in the public interest to take the advice of those DPS professionals working inside the correctional system who work on the front lines every day in Hawaii and we must provide the needed basic information to enable our judges to judge and to administer justice. We don't need to write everything down as we need to trust those persons we place in authority. We have a process to ensure pretrial justice that works pretty well in Hawaii and has been proven. As I have stated, Hawaii rates very high among states in fewest defendants per capita and there are only about 577 actual pretrial defendants 500 felon and 77 misdomenants at OCCC out of 20,000 HPD arrests and probation violators should be counted separately of which there are about 250 HOPE and about 450 other probationers.

Pretrial justice and reforms needed to help maintain our already very high functioning pretrial process in Hawaii is something we have worked very hard to maintain and improve and that we know is among the best in the nation and is rated very high and has produced among the lowest numbers of pretrial persons waiting in jail and not able to be released pending court dates per capita in the nation but we can be #1 in Hawaii and HB 1289, HD1, will help accomplish this.

I think the HCR 134 Task Force report is one of the most informative documents on pretrial justice ever written in anywhere, and moves us forward toward achieving improved equal access to justice for all. The HCR 134 report is crystal clear, offers a road map for pretrial justice improvement and helps to provide improved equal justice for all by requiring individual decision making by the courts. Thus, the discrimination caused by machine-generated

algorithms is avoided and any algorithm issues deemed discriminatory can be addressed by the court asking more questions on a one-on-one, case-by-case basis.

There are several levels of support in matters of pretrial justice contained in the HCR 134 Task Force Report, that are also contained in the HCR 85 Task Force Report. Bail agents like me, and especially pretrial workers like me, when I began my career, all know full well the significance of the substantial effort that produced such clarity and great purpose in HCR 134, regarding pretrial justice and equal treatment by judges. There is really nothing else comparable anywhere in terms of thoroughness and completeness. Judges will remain in the pretrial process, be allowed to judge, and will have a palette of pretrial release choices at their disposal in order to ensure and protect every individual's right to equal justice. The HCR 134 report also maintains our constitutional right to bail by sufficient surety when a court determines that it is needed as an alternative to detention, to protect us all from potential government oppression that is caused by improper or unnecessary pretrial detention. The HCR 134 report achieves a balance between preferring release while avoiding the need to detain, except in extreme circumstances. We still allow our courts the pretrial detention tools required to detain, which are preserved for use by the court on a case-by-case basis.

I think parents or other relatives should be able to bail out their family members, and when a judge sets bail a paid surety bail bond should be allowable to speed up the process of release for those persons, who, in my view, comprise the vast majority of those persons arrested. Scarce state resources should be reserved for the truly needy. No person should remain in jail simply for lack of funds.

Many states and countries will soon have the opportunity to look at our Hawaii pretrial model, as Hawaii already rates very high among American states, just below Maine with the least percentage of pretrial detainees, on a per capita basis. Again, Hawaii can be #1.

We all want Hawaii to be a leader in pretrial justice and in prison and jail reforms. I have extensive personal experience on issues relating to pretrial release and I am uniquely qualified, based on my background in bail and in pretrial release and with forty-two years of experience to help to achieve positive results. I believe that Magistrate Judge Rom Trader's HCR 134 bail report is of very high quality.

- There is a certain new and improved clarity and perfection regarding pretrial release that is clearly documented in the HCR 134 Task Force Report. The report clarifies duties and responsibilities of all concerned and fully argues the issues.

Finally, I think we should insist that the police use the citation-release option more frequently. This citation-release procedure is often used in Oregon and in Vancouver, B.C. The police should book only class B and class A felons into jail and then let the court decide what to do with the class B and class A felons in the pretrial phase. That decision would include the options of release or detain or perhaps setting bail.

Individualizing bail decisions is very important but also is understanding and employing basic suretyship concepts that are in the public interest. We can't just trust every recognizance defendant to show up for court like OR and SR calls for. Magistrate Judge Trader and the HCR 134 Task Force understand this and say so in the HCR 134 report. California decriminalized

many classes of crime and released many people from custody in prison reform efforts, and the result was a spike in property crimes.

This is what Justice Marshall wrote in his dissent in United States v. Salerno, 481 U.S. 739 (1987), which I think is on point.

https://www.law.cornell.edu/supremecourt/text/481/739 (Marshall, J., dissenting)

I think we need a new jail to replace the decrepit OCCC and we should not wait to build one. We all want fewer people in jail and we all want equal access to justice. Perhaps purchasing the Federal Detention Center will speed up improvements. In the meantime, tweaking what we have, one small step at at time and watching places like New Jersey, New Mexico, Washington, D.C., and especially now California and SB-10 and the referendum that will be heard regarding the abolition of bail to see what evolves that is better or worse.

We are very close to perfection with the HCR 134 Task Force report. Comparing and contrasting the work of other states and nations to see what has actually worked will benefit Hawaii.

I believe the two HCR reports, are correct in their thinking and correct in asking the Hawaii Legislature for the reforms they are seeking.

I think both reports can help move matters forward. All this is especially true for the HCR 134 Task Force report, and mostly true but to a lesser degree for the HCR 85 Task Force. This is

because as I said before, I think we need a new jail now, and the HCR 85 report does not call for moving forward now with a new facility. Much of my thinking involves the need for contact visits for new parents as at least one of my clients, was denied contact visits with his newly born child while awaiting trial, and before his attorney could arrange for bail release with my bail bond company. Further, I see the anguish of parents and their children on a daily basis when seemingly harsh treatment for genuinely remorseful and repentant defendants is meted out in the name of our statutes. I think we need to put fewer people in prison in the first place, those who are in jail should be subject to reviews for early release, and minimum sentences should be amendable at the discretion of the sentencing judge or parole board. I have a client (with children and a wife) who was sentenced to a very long time in prison due to an offense committed long ago. That situation focuses me on the idea of a new correctional facility, as I know that treatment of local prisoners is sometimes substandard, vicious, and lacking in compassion. As to jail and prison, I did my own poll of my clients and every single one of them prefers mainland incarceration for one reason alone: cleanliness. We must do better and that is why I participate in the process and try to ensure that valid data is provided to those administrators in authority and to our legislative decision makers.

We know from California proposition 47 that bail reform will bring about a spike in property crimes and we know in order to improve the success rates for pretrial release we must have jail as a last resort. In my experience, family members of some defendants rely on jail as a last resort. While Hawaii is a leader in pretrial justice in America today ranking very high among the states in having the fewest numbers in pretrial status per capita the fact is, we need jail space now and have needed jail space since at least 1980. Buying the Federal Detention Center is a great opportunity and must be explored. We should not force our judges to release persons

due to crowding. Of the 500 felons and 77 misdemeanants at OCCC, left over after 20,000 arrests by HPD, dated on or around June 2018, all these remaining defendants have been thoroughly reviewed by the Hawaii Intake Service Center and the court and it was ruled by a judge that bail is required in part, to ensure public safety and to ensure appearance at court but if crowding persists and there is no adequate pretrial holding facility these persons must be released. At a minimum, pressure to release due to crowding is on our courts and on the Director of Public Safety and we know the results and failure rates when minimum release standards cannot be met and the resulting spikes in crime rates affecting public safety. A line in the sand being jail, as a last stop and required is very important for a high-functioning criminal justice system.

I attended almost every HCR 85 Task Force meeting and submitted testimony along with over 100 emails containing additional support and data. I submitted three sets of testimony to HCR 134 Task Force Members and offered oral testimony at the public meeting, October 13, 2017. http://808bail.com/honolulu/ My blog contains links to relevant data and reports. I have invited person interested in pretrial justice to my office and to view bail hearing and to visit the jails, booking facilities and prisons so that they may know how hard all this is. I believe the hard decisions our judges face are very difficult because I see the before and after effects to both defendant and their families as well as victims and this is why I think our community and tax payers will support our providing improvements.

I think buying the Federal Detention Center will improve pretrial justice and improve fairness in Hawaii and will jumpstart the needed infrastructure and foundation required to maintain our high-functioning pretrial process in Hawaii as HCR 134 Task Force members report.

Please support HB 1289, HD1, with amendments.

Thank you for the opportunity to present this testimony.

James Waldron Lindblad

808-780-8887.
James.Lindblad@gmail.com REV 02.13.2019

HB-1289-HD-1
Submitted on: 2/11/2019 9:07:54 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Alan Urasaki	Individual	Support	No

Comments:

HB-1289-HD-1
Submitted on: 2/11/2019 9:39:40 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Gerard Silva	Individual	Oppose	No

Comments:

SUPPORT FOR HB1289 HD1 Criminal Pre-Trial Reform

TO: Chair Chris Lee, Vice Chair Joy San Buenaventura and
Members of the Committee on the Judiciary

FROM: Barbara Polk

I strongly support HB1289HD1 to implement the key recommendations of the Pre-Trial Task Force. This group has done a comprehensive job of considering all aspects of pre-trial practice and making recommendations.

One concern throughout the bill is the situation of homeless individuals, who not infrequently come in contact with the criminal justice system, if only for sleeping where or when they are not allowed to. Many long-term homeless people now have little option but to break the law due to changes in state and local laws that have increased the places they are not permitted to sleep. If they have timed out of shelters they may not have anywhere to go. This puts them at a disadvantage in dealing with the courts.

I suggest amending Part II to include assessment of the impact of the pre-trial provisions on homeless individuals, including making recommendations to DPS, the police departments, and the legislature for ways to mitigate any adverse impacts identified.

Also, please consider amending Part VII, Section 22, to include establishing a system of cell phone notification of court appointments. This was done on New York City a few years ago, where it was found that people notified by cell phone and people released on cash bail did not differ in the percentages that showed up in court.

Thank you for the opportunity to testify on this bill. With or without the amendments I have suggested, I urge you to pass HB1289 HD1.

R O B E R T K. M E R C E

February 12, 2019

TO: House Committee on Judiciary
RE: HB 1289, HD 1
HEARING DATE: February 13, 2019
TIME: 3:00 PM
ROOM: 325
POSITION: **SUPPORT**

Chair Lee, Vice Chair Buenaventura, and members of the committee:

I am a retired attorney and recently served as vice chair of the HCR 85 Task Force on prison reform. I am writing in support of HB 1289, HD 1.

On April 30, 2018, there were 546 pretrial detainees at the Oahu Community Correctional Center (OCCC). It costs $152 per day to house an inmate at OCCC, therefore on April 30 the 546 pretrial detainees cost the State $82,992. Although the Department of Public Safety does not have data on the reasons why every pretrial detainee is in custody, it is safe to assume that most of them are in jail because they cannot afford cash bail or a surety bond. If HB 1289, HD 1 reduced the number of pretrial detainees at OCCC by just 45%, that is from 546 to 245 inmates, the State would save approximately $46,000 per day, or about $17 million per year. On a statewide basis the savings would be even greater.

In addition to saving money, HB 1289, HD 1 would significantly improve our justice system by reducing the number of people who are who are held in jail simply because they are too poor to make bail.

If HB 1289, HD 1 is enacted, I recommend also enacting HB 175 which would give judges the option of allowing unsecured or partially secured bail when a defendant cannot make bail and continued incarceration would create a hardship on the defendant or his family.

HB 1289, HD 1 does not eliminate cash bail which, in my view, should be the goal of bail reform, but it is an important step in the right direction and will certainly improve our criminal justice system by making it more just and less expensive.

Thank you for the opportunity to comment on this bill.

2467 Aha Aina Place
Honolulu, Hawaii 96821
Email: mercer001@hawaii.rr.com

Phone: (808) 732-7430
Cell: (808) 398-9594

ROBERT K. MERCE

2467 Aha Aina Place
Honolulu, Hawaii 96821
Email: mercer001@hawaii.rr.com

Phone: (808) 732-7430
Cell: (808) 398-9594

HB-1289-HD-1
Submitted on: 2/12/2019 3:46:47 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

HB-1289-HD-1
Submitted on: 2/12/2019 3:50:38 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
William Caron	Individual	Support	No

Comments:

Aloha Chair Lee, Vice Chair Buenaventura, members of the committee,

Cash bail does not serve the function for which it was intended. The purpose of bail is not pretrial punishment. Bail is supposed to minimize the risk of flight and danger to society while preserving the defendant's constitutional rights. However, requiring cash bail does not achieve any of these outcomes. Jurisdictions like Washington D.C. that have all-but replaced cash bail with smart justice reforms have seen better rates of court attendance and lower rates of re-arrest, all while satisfying the intent of bail without violating civil liberties.

Cash bail violates the right to presumption of innocence. In the United States, the accused is presumed innocent until proven guilty, and the the Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty without due process of law (including while awaiting trial and regardless of indigence). Yet, in Hawai‘i, some 1,145 individuals are currently being held behind bars without having been convicted of a crime. Nationwide, 443,000 people are being detained without ever having been tried in a court of law. This is a gross violation of their civil liberties and amounts to an unconstitutional, extrajudicial punishment.

Cash bail has serious societal costs. Incarceration always disrupts lives, often leading to loss of employment, custody issues and loss of housing. These worsened outcomes derail people from the trajectory of their lives, leading to increased criminality, homelessness, health problems and other societal costs for which we all pay the price.

Please pass HB175 & HB1289.

Mahalo!

HB-1289-HD-1
Submitted on: 2/12/2019 4:15:49 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Steven Costa	Individual	Support	No

Comments:

HB-1289-HD-1
Submitted on: 2/13/2019 2:24:34 PM
Testimony for JUD on 2/13/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Nicholas Lindblad	Individual	Support	Yes

Comments:

LATE

COMMITTEE ON JUDICIARY
Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair

Rep. Tom Brower
Rep. Richard P. Creagan
Rep. Nicole E. Lowen
Rep. Angus L.K. McKelvey
Rep. Dee Morikawa
Rep. Calvin K.Y. Say
Rep. Gregg Takayama
Rep. Ryan I. Yamane
Rep. Cynthia Thielen

AMENDED NOTICE OF HEARING

DATE: Wednesday, February 13, 2019
TIME: 3:00pm
Conference Room 325

PLACE: State Capitol

415 South Beretania Street

Support HB 1289 HD1

Aloha, my name is Nicholas Lindblad and I've been a licensed bail agent since 2006. It is my view that HB 1289 would have a high probability of success and financial stability if HCR 134 recommendation 7 was inserted into the bill. I predict 3 primary outcomes from inserting:

"HCR Recommendation 7 - Establish a court hearing reminder system for all pretrial defendants released from custody"

Primary Outcome #1 - Implementing the system will dramatically reduce the cost of managing the pre-trial population.

According Dr. Robert Morris, author of the peer reviewed study "Differences in Failure to Appear, Recidivism/Pretrial Misconduct, and Costs of FTA" a failure to appear (FTA) in court results in county costs of approximately $1,775 per missed appearance. This was calculated off the administrative cost accrued in judges time, attorney fees and law enforcement costs for for a 2008 sample group of roughly 22,000 pretrial releases. Hawaii has roughly 20,000 arrests per year so I think it's critical for a reminder system to be implemented via statute, so that the reforms of HB 1289 are both successful and financially sustainable perpetually.

Primary Outcome #2 - Implementing a reminder system, is the most compassionate, least invasive form of supervision/monitoring currently available.

Having a releasee text message in response "C" to confirm receipt of their next court date is a valid check-in; its just not normalized as a check-in currently, but can just as easily be creatively called a "virtual check-in." Texts can 1) increase the probability of making the next court appearance, 2)confirms contact with the court, and 3) be used in future follow up texts for purposes yet to be imagined. For example, maybe on day texts of encouragement may be sent from the public defender's office or a programming professional; creativity and utility have no limit!

In my view, the reminder system is just a stepping stone to implementing “add-on” contact between the Judiciary and the releasee. Even friendly notes of encouragement or tips on what bus to catch can be presented to help encourage future appearances. Lastly, it’s a means of supervision which does not require a bracelet. It’s important that we supervise defendants in the least invasive way possible, so that no stigmas follows a recently released defendant.

Primary Outcome #3 - The best way to be eligible for a cash free release, is to remain bench warrant free.

If a defendant qualifies for release without posting cash bail or bond, all parties involved must try their absolute best to keep this record clean. If a mix-up occurs, and a bench warrant is created, there is now cause to deny a cash-free release or release through the intake service center. Monitoring requirements could be stacked upon each other, simply because a defendant’s record has the blemish of a past bench warrant within the last 24 months. There is no rating to differential a bench warrant created due to a hospital visit, miscommunication with an attorney, or a malicious bail jumping effort constituting a true contempt of court. Thusly, its important to keep releasees bench warrant free, so that they may qualify for the best options the court may provide in future hearings.

Warmest regards,

Nicholas Lindblad