



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:

H.B. NO. 1335, RELATING TO CRIMINAL PRETRIAL REFORM.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 7, 2023 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Lauren M. Nakamura, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General ("Department") opposes this bill and offers the following comments.

The bill attempts to address concerns regarding prison overcrowding and reduce the unnecessary pretrial detention by increasing the range of offenses for which police officers can release defendants after arrest with an "appearance ticket." While the Department supports the bill's intent to reduce prison overcrowding, the system proposed by the bill raises significant concerns regarding the effect it will have on the administration of justice and law enforcement's duty to ensure public safety.

The Department is concerned that the proposed changes to chapters 803 and 804 of the Hawaii Revised Statutes (HRS) may be too drastic, especially in light of the fact that a myriad of bail reforms has already been instituted since the issuance of recommendations from the Criminal Pretrial Task Force. Implementing such changes now might prove to be imprudent because of a lack of data regarding either the effects of reforms installed or recent causes of prison overcrowding. Our specific concerns are as follows.

The bill proposes that police officers be allowed to release defendants arrested for a broad range of offenses, including felonies, without sufficient limits, which are needed to prevent officers from releasing defendants charged with offenses that may significantly jeopardize public safety. While the bill attempts to prevent release in

certain circumstances, (page 3, line 16, through page 4, line 17, and page 8, line 10, through page 9, line 6), we are concerned that those limits listed in the bill are inadequate to sufficiently protect the public.

In providing that officers may issue “appearance tickets” to defendants arrested for felonies, the bill places the onus of determining whether a defendant should be held in custody on individual police officers, rather than relying on the exercise of judicial discretion. In doing so, the bill does not consider the broad range of information routinely provided to the court in determining custody status of defendants, which is often unavailable to police at the scene of arrest. The Department believes that the courts are best positioned to determine the custody status of criminal defendants.

Under the proposed wording, the bill would allow officers to issue an “appearance ticket” and release a defendant in circumstances where defendants are arrested for offenses that pose a danger to the public – such as Negligent Homicide in the Second Degree and the Third Degree (sections 707-703 and 707-704); Terroristic Threatening in the First Degree and the Second Degree (sections 707-716 and 707-717); Unauthorized Entry into a Dwelling in the Second Degree (section 707-812.6); Unauthorized Entry into Motor Vehicle in the First Degree and the Second Degree (sections 708-836.5 and 708-836.6); Extortion in the Second Degree (section 707-766); Burglary in the Second Degree (e.g. “smash and grabs” at retail establishments) (section 708-811); Violation of Privacy in the First Degree (section 711-1110.9); offenses involving minors, including Promoting Pornography for Minors (section 712-1215) and Endangering the Welfare of a Minor in the First Degree (section 709-903.5); Felon in Possession (section 134-7(a)); Place to Keep a Firearm (section 134-24); Unauthorized Control of a Propelled Vehicle offenses in the First Degree and the Second Degree (section 708-836); Aggravated Harassment by Stalking (section 711-1106.4); Harassment by Stalking (section 711-1106.5); Impersonating a Law Enforcement Officer in the First Degree and the Second Degree (sections 710-1016.6 and 710-1016.7); Sex Offender Registration Violation (section 846E-9); and an array of theft offenses (including vehicular theft offenses).

The bill may also cause confusion in several regards. First, it is unclear whether arresting officers need to provide a defendant a citation or an appearance ticket or both upon release and what information must be contained on that notice. The proposed “appearance ticket”, in effect, appears to act as a citation, which is already provided for in section 803-6, HRS, and the appearance ticket notice requirements (page 2, line 15, through page 3 line 15) conflict with the requirements of a citation (page 6 line 17, through page 7 line 21).

The bill is also unclear regarding what the arresting officer must consider in determining whether to release a defendant and issue a citation or an appearance ticket. (Compare page 3 line 16, through page 4 line 17, and page 6 lines 1-16). The proposed amendments to chapter 804, HRS, only exclude particular offenses from release and issuance of a ticket. However, the proposed amendments to section 803-6, HRS, add that the officer be “reasonably satisfied” of additional circumstances, in addition to excluding particular offenses.

Additionally, the bill creates a petty misdemeanor offense for failing to appear in court pursuant to an appearance ticket. (Page 4, line 19, through page 5, line 3). This conduct is already covered by section 710-1077 (Criminal Contempt of Court). Furthermore, the wording proposed in the bill conflicts with section 710-1077(3) (providing judicial discretion to treat such conduct as a petty misdemeanor or misdemeanor).

Accordingly, the Department recommends deferring the bill and allowing the courts to retain the discretion and flexibility to set bail and conditions of bail or release to ensure both the continued appearance of defendants and the protection of the public.

Thank you for the opportunity to testify.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

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

February 7, 2023

H.B. No. 1335: RELATING TO ARRESTS

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender (“OPD”) supports H.B. No. 1335 which permits police officers, when effecting an arrest without a warrant for certain felonies, misdemeanors, petty misdemeanors, and violations, the discretion to serve an appearance ticket rather than arresting the individual.

Appearance ticket in lieu of arrest

H.B. No. 1335 allows law enforcement the discretion to issue an appearance ticket in situations where a warrantless arrest could otherwise be effected for certain felonies, misdemeanors, petty misdemeanors, and violations. Enumerated offenses are excluded in addition to excluding all “serious crimes”, “offenses involving physical assault or sexual assault” and offenses with a “mandatory term of imprisonment.” Rather than arresting the individual, law enforcement would have the option to release individuals with the issuance of a citation. Being arrested, physically handcuffed and transported to a holding cell or jail or prison, deprived of their freedom, even for a few days, can potentially have harsh and irreversible effects on an individual.

Research suggests that pretrial detention leads to worse outcomes for people who are held in jail – both personally and legally – compared with similarly situated individuals who are able to secure pretrial release. Individuals who are unable to make bail stand to lose their job, and with that, the money that pays the rent and utilities and puts food on the table for their family. They may lose their home, their car, their health insurance, and after maxing out on their credit cards, the family may end up deep in debt or even homeless. Holding individuals in jail who do not pose a significant safety risk of danger also exacerbates overcrowding, creates unsafe

conditions, places a huge financial burden on taxpayers, and compromises public safety.¹

Recent studies show that time in jail, even if brief, has minimal impact on reducing crime, yet entails significant costs. The legislature has recently received many recommendations, testimonies, and studies relating to the devastating impact of incarceration and jail time on individuals, their families, and our communities. *See* Costs of Detention, Hawai'i Criminal Pretrial Reform, Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawai'i (Dec. 2018), citing various studies, pages 24-26. In reaching this conclusion, the Task Force quoted the Vera Institute of Justice (2017):

These consequences – in lost wages, worsening physical and mental health, possible loss of custody of children, a job, or place to live – harm those incarcerated, and, by extension, their families and communities. Ultimately, these consequences are corrosive and costly for everyone because no matter how disadvantaged people are when they enter jail, they are likely to emerge with their lives further destabilized and, therefore, less able to be healthy, contributing members of society.

Id. at page 25.

This measure will streamline the process by which an individual is summoned to court in order to answer to criminal charges. Rather than spending the night in jail (or multiple days and nights if the arrest is on the weekend) before making an initial appearance before a judge to argue for release and/or bail reduction, the individual can receive a citation which simply instructs them to appear in court on a particular day at a particular time. It should be noted that once a defendant appears in court pursuant to a citation, the Court possesses wide latitude in ordering terms and conditions of release.

Commentary on the “discretionary” issuance of an appearance ticket

The only criteria which H.B. No. 1335 offers to guide the police officer on the scene is the enumerated list of which offenses *qualify* and which offenses *do not qualify*

¹ National Institute of Corrections, “The Hidden Costs of Pretrial Detention” (2018) at 4, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (Finding the longer low-risk defendants are detained, the more likely they are to commit another low-level offense).

under the amendment to HRS § 803-6 (f). This presents the following issue: once the police officer determines that the alleged offense falls squarely within the parameters of this bill, what “discretionary” criteria is the police officer to consider? The bill is silent. If no criteria are provided or defined, this “discretionary” call potentially becomes nothing more than a police officer’s exercise of personal preference, prejudice, and bias.

In contrast, H.B. No. 1336,² in addition to the identical list of excluded offenses as in H.B. No. 1335, includes “discretionary” criteria which the police officer can reference in making the determination on whether to issue a citation or arrest: (1) does the person have a history of failing to appear in court and (2) does the person pose a significant danger to a specific or reasonably identifiable person or persons, based upon an articulable risk to a specific person or the community, as evidenced by the circumstances of the offense or by the person’s record of prior convictions?

Therefore, if the police officer ascertains that under the circumstances of the offense or by the person’s criminal record that the person poses a significant danger to a specific person, the police officer *has the discretion* to arrest the individual and not issue a citation. If the police officer ascertains that the person has a history of failing to appear in court, similarly, the police officer *has the discretion* to arrest the individual and not issue a citation.

Thank you for the opportunity to comment on H.B. No. 1335.

² H.B. No. 1336, which is a comprehensive, multi-faceted approach to addressing issues of overcrowding in Hawaii’s jails and prisons, the impact of unnecessary and disruptive arrests in our communities, and the disparate treatment of indigent defendants in the criminal justice bail system, amends HRS § 803-6 to require the issuance of a citation in lieu of arrest for certain felonies, misdemeanors, petty misdemeanors, and violation with exceptions.

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THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Second State Legislature
Regular Session of 2023
State of Hawai`i

February 7, 2023

RE: H.B. 1335; RELATING TO CRIMINAL JUSTICE REFORM.

Chair Tarnas, Vice-Chair Takayama and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney, City and County of Honolulu (“Department”), submits the following testimony in **strong opposition** to H.B. 1335.

The Department appreciates the intent to improve upon current procedures, but is deeply concerned that H.B. 1335 would allow law enforcement officers to issue citations for nearly all class C felonies, with only a very limited list of C felony offenses for which arrest would continue to be required. It would also tie law enforcement’s hands by requiring them to arrest for certain types of low-level offenses. In addition, it is unclear how the “appearance tickets” proposed in Section 1 of the bill would work with existing bail procedures under Hawaii Revised Statutes (“HRS”) Chapter 804, or current procedures for citations under HRS Chapter 805.

By allowing nearly all class C felonies to be addressed by citation-in-lieu-of-arrest, Section 2 of this bill fails to account for a large number of concerning felony offenses for which suspects could simply be handed a citation and permitted to walk away, with no further processing, assessment of dangerousness, or accountability system in place. This includes but is not limited to:

- Burglary in the Second Degree (§708-811)
- Aggravated Harassment by Stalking (§711-1106.4)
- Negligent [aka vehicular] Homicide (§707-703)
- Unauthorized Entry in a Dwelling in the Second Degree (§708-812.6)
- Violation of Privacy in the First Degree (§711-1110.9)
- Promoting Pornography for Minors (§712-1215)
- Habitual commercial sexual exploitation (§712-1209.5)
- Promoting Gambling in the Second Degree (§712-1222)
- Promoting a Dangerous Drug in the Third Degree (§712-1243)

- Unauthorized Possession of Confidential Personal Information (§708-839.55)
- Identity Theft in the Third Degree (§708-839.8)

Notably, officers in the field do not have the same resources or opportunity to reliably assess every individual's prior record, when compared to the arrest and booking process. If an officer in the field were to issue a citation for a class C felony, without having all of the relevant information, that could potentially pose a significant risk to public safety. That said, under our existing statutes and procedures, many felony suspects are simply "released pending investigation"—following their arrest and booking—once it is confirmed that those individuals have little or no prior record (or other significant issues related to accountability or safety). So already, those individuals are not being detained in Oahu Community Correctional Center.

In addition, we would note that this bill contains no court procedures or mechanisms for initiating a felony case against individuals who are only issued a citation. Also, the system proposed in Section 1 of the bill appears to be redundant or parallel to, or potentially circumvents, our existing bail and risk assessment process, any of which we would also oppose.

While the Department understands the Legislature's desire to lower the number of pretrial detainees, the changes proposed in H.B. 1335 would not be expected to have such an effect, but would create a mechanism that could potentially let dangerous individuals walk away with only a citation, while mandating the arrest of others whom law enforcement officers probably would have issued a citation (e.g. for petty misdemeanor offenses where the individual has little to no prior record). In felony cases, the Department believes that the current booking and bail process consistently allows law enforcement officers—and later our courts, if applicable—to better identify each individual (including their circumstances and history) on a case-by-case basis, before determining if and how to release them back into the community. At the same time, officers should have discretion not to arrest for lower level offenses, if they are reasonably satisfied that certain criteria (relating to accountability and safety) are met. As such, we urge the committee to defer H.B. 1335, and maintain the current procedures and safeguards that are currently in place.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **strongly opposes** the passage of H.B. 1335. Thank you for the opportunity to testify on this matter.

HB-1335

Submitted on: 2/5/2023 1:53:47 PM

Testimony for JHA on 2/7/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Will Caron	Individual	Support	Written Testimony Only

Comments:

I support HB1335.