

The seal of the State of Hawaii is a circular emblem. It features a central shield with a sunburst above it, flanked by two birds. Below the shield is a banner with the Hawaiian text 'UA MAU KE EA O KA AINA I KA PONO'. The outer ring of the seal contains the text 'STATE OF HAWAII' at the top and '1959' in the center. The seal is rendered in a light gray, semi-transparent style.

# **HAWAI' I CRIMINAL PRETRIAL REFORM**

**RECOMMENDATIONS OF  
THE CRIMINAL PRETRIAL TASK FORCE TO  
THE THIRTIETH LEGISLATURE  
OF THE STATE OF HAWAI' I**

**December 2018**

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## I. INTRODUCTION

This is the final Report of the Criminal Pretrial Task Force ("Task Force"), convened by the Hawai'i State Judiciary, to carry out the requests in House Concurrent Resolution No. 134, H. D. 1 , Regular Session of 2017, ("HCR 134"). HCR 134 requested that the Judiciary convene a Criminal Pretrial Task Force to:

- (1) Examine and, as needed, recommend legislation and revisions to criminal pretrial practices and procedures to increase public safety while maximizing pretrial release of those who do not pose a danger or a flight risk; and
- (2) Identify 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 time intervals.

A copy of HCR 134 is attached hereto as *Appendix A*.

Pursuant to the resolution, Chief Justice Mark E. Recktenwald convened the Criminal Pretrial Task Force, chaired by Rom A. Trader, Judge, Circuit Court of the First Circuit. Members of the Task Force are listed in Section III below.

The Task Force's primary work product, contained in the section entitled "Recommendations of the Task Force", are the recommendations approved by a majority of its members. The Task Force provided its proposed legislation to the Legislative Reference Bureau ("LRB") to prepare the proposals in draft bill format and to offer technical and non-substantive revisions. HCR134 asks the Task Force to submit its findings and recommendations, including proposed legislation, no later than twenty (20) days prior to the convening of the 2019 regular session of the Hawai'i State Legislature. This report is submitted in response to that request.

## II. EXECUTIVE SUMMARY

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. We 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. We 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. We invited national experts and delved into the latest research and evidence-based principles and learned from other jurisdictions where pretrial reforms are well underway. We reviewed previous studies conducted in our state, engaged with community experts and heard the views of our local stakeholders. We visited our 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 this report seek to improve our 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 submits 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 Oahu.**

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.

### III. MEMBERSHIP OF THE COMMITTEE

HCR 134 resolved that the Task Force comprise persons who "represent the various perspectives of public officials with significant roles in the criminal pretrial system." Membership includes agencies and organizations, as well as a public member, with a broad spectrum of knowledge and experience, including the Judiciary, Legislature (House of Representatives and Senate), Department of the Attorney General, Department of Public Safety (Intake Service Center), prosecuting attorneys of each county, Office of the Public Defender of the State of Hawai'i, Hawai'i Association of Criminal Defense Lawyers (one representative from each county), county police departments, Department of Health, Office of Hawaiian Affairs, and the public. The members of the Task Force are:

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#### IV. THE LAW ON PRETRIAL PRACTICE

Reviewing Hawai'i's criminal pretrial practices and procedures begins with an analysis of the law and legal principles that comprise the foundation of our system. The United States Constitution and the Hawai'i State Constitution provide the legal framework for the presumption of innocence, due process, equal protection, and non-excessive bail requirements. Hawai'i statutes also set forth mandates concerning pretrial detention and release.

##### A. Overarching Legal Principles and Federal Law

##### 1. The Presumption of Innocence

The presumption of innocence is the primary principle that must guide determinations of pretrial release and detention. A person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence.

Indeed, the United States Supreme Court has stated that “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>1</sup> The presumption is implicated by the United States Constitution’s Due Process Clause, applicable to both federal and state defendants, rooted in over one thousand years of legal tradition dating back to Roman law and encapsulated by William Blackstone’s classic statement that “it is better that ten guilty persons escape than that one innocent suffer.”<sup>2</sup>

The United States Supreme Court emphasized the presumption’s role in the pretrial phase of criminal adjudications to an accused’s right to bail.<sup>3</sup> In *Stack v. Boyle*, the Court stated that “federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail” because “[t]his traditional right to freedom before

<sup>1</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895) (emphasis added).

<sup>2</sup> *Id.* at 456. See also, 4 William Blackstone, *Commentaries on the Laws of England*, 358 (1965-1969).

<sup>3</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

**conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.**"<sup>4</sup> Justice Jackson, concurring, amplified this point:

"The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death, Fed. Rules Crim. Proc. 46(a)(1) providing: 'a person arrested for an offense not punishable by death shall be admitted to bail ...' before conviction."<sup>5</sup>

## 2. Due Process

The Fourteenth Amendment of the United States Constitution provides that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>6</sup> In particular, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."<sup>7</sup>

The right to bail under federal and state law is inextricable from the American legal tradition which contemplates a presumption of release over detention during the pretrial phase of criminal adjudication. This presumption was most notably set forth by the United States Supreme Court in its decision in *United States v. Salerno*, which stated "**[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.**"<sup>8</sup> The Court determined that **pretrial detention may be imposed** for arrestees charged with certain felonies **only when the government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions "will reasonably assure...the safety of any other person and the community."**<sup>9</sup> Thus, the

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<sup>4</sup> *Id.* (emphases added; internal citations omitted).

<sup>5</sup> *Id.* at 7-8 (Conc. Op. of Jackson, J.). See also *Gerstein v. Pugh*, 420 U.S. 103, 114 & 123 (1975) (recognizing that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, impair his family relationships" and undermine his "ability to assist in preparation of his defense").

<sup>6</sup> U.S. Const. Amend. XIV, § 1.

<sup>7</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>8</sup> 481 U.S. 739, 755 (1987) (emphasis added).

<sup>9</sup> *Id.* at 739 (citing 18 U.S.C. § 3142(e)). The Supreme Court required "extensive safeguards" prior to detention, including the following: (1) detention was limited to only "the most serious crimes", (2) the arrestee was entitled to a prompt hearing with stringent speedy trial time limitations, (3) detainees were to be housed separately from those serving sentences or awaiting appeals, (4) a "full-blown adversary hearing" which required the government to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person, (5)

*Salerno* Court made clear that a defendant must be accorded due process before being subjected to preventative detention.

In the criminal pretrial context, the United States Supreme Court has long recognized “a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.”<sup>10</sup> Thus, the bail process must be limited for use under a legitimate regulatory purpose and not as pretrial punishment or to incapacitate an individual for an alleged crime.<sup>11</sup> In short, bail cannot be used to circumvent due process protections required throughout the preventive detention process.

Because of the liberty interests at stake, a heightened substantive due process standard is applied. When an individual cannot afford cash bail, and cash bail would amount to preventative detention, the same procedural protections apply as for detention without bail.

In recent years, the issue of pretrial bail and detention has sparked a flood of litigation across the country. Federal law has evolved to require several due process protections before a defendant may be held in custody on money bail. First, federal courts have held that a **defendant’s financial circumstances and possible alternative release conditions must be considered prior to detention.**<sup>12</sup> Second, since the function of bail is limited, **the bail**

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detainees had a right to counsel and could testify or present information and cross-examine witnesses at the hearing, (6) judges were guided by statutorily enumerated factors, (7) judges were to include written findings of fact and a statement of reasons for a decision to detain, and (8) detention decisions were subject to immediate appellate review. *Id.* See also Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 29 (U.S. Dept. of Justice, National Institute of Corrections 2014).

<sup>10</sup> *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

<sup>11</sup> *Id.*

<sup>12</sup> In *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017), the Ninth Circuit explained:

A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests. Since the government's purpose in conditioning release on the posting of a bond in a certain amount is to “provide enough incentive” for released detainees to appear in the future, we cannot understand why it would ever refuse to consider financial circumstances: the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance. Nor can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances. . . . Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government's current policies fail to provide “adequate procedural protections” to ensure that detention of the class members is reasonably related to a legitimate governmental interest.

*Id.* at 991 (internal quotation marks in the original; footnote omitted); *O'Donnell v. Harris County*, 892 F.3d 147, 159 (5th Cir. 2018) (“Far from demonstrating sensitivity to the indigent misdemeanor defendants’ ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the

**determination must be based on individualized, case-specific reasons**, because the “fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”<sup>13</sup> Third, federal courts have held that a **meaningful bail hearing must take place promptly after arrest**.<sup>14</sup> Fourth, if the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon **a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose**.<sup>15</sup> Finally, some, but not all, federal courts have required **bail determinations be in writing**.<sup>16</sup>

### 3. Equal Protection

Pretrial release and detention practices also implicate equal protection principles. In *Schilb v. Kuebel*, the United States Supreme Court held that “a statutory classification based upon suspect criteria or affecting ‘fundamental rights’ will encounter equal protection difficulties unless justified by a compelling government interest.”<sup>17</sup> Because liberty is a fundamental right, traditional equal protection analysis requires the government to ensure that pretrial release and detention laws do not treat similar persons dissimilarly and to show that such laws are necessary to achieve a compelling or overriding State’s interest. Recently, civil rights organizations have begun suing counties in federal court on the theory that local bail laws are treating similar persons dissimilarly based on their wealth, and correlatively their race.<sup>18</sup>

In *ODonnell v. Harris County*, plaintiffs from Harris County, Texas, successfully challenged the county’s pretrial bail system for misdemeanor defendants.<sup>19</sup> The Harris County court was asked whether a jurisdiction may impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial

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current procedure does not sufficiently protect detainees from magistrates imposing bail as an ‘instrument of oppression.’”).

<sup>13</sup> *Boyle*, 342 U.S. at 5.

<sup>14</sup> *United States v. Montalvo–Murillo*, 495 U.S. 711, 716 (1990) (“A prompt hearing is necessary” because “a vital liberty interest is at stake.” Although the Supreme Court has not imposed a specific time-limit by which the government must conduct a bail hearing, lower courts have used Riverside’s forty-eight hour limitation as a useful guidepost.”); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.); *ODonnell*, 892 F.3d at 160 (“We conclude that the federal due process right entitles detainees to a hearing within 48 hours.”).

<sup>15</sup> *In re Humphrey*, 228 Cal.Rptr. 3d 513, 535 (Cal.App. 1st Dist. 2018); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (in a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person).

<sup>16</sup> *In re Humphrey*, 228 Cal.Rptr. 3d at 535 (citing *Salerno*, 481 U.S. at 751-52) (“[T]he judicial officer must include written findings of fact and a written statement of reasons for a decision to detain.”). *But see, ODonnell*, 892 F.3d at 160 (“[W]e do not require factfinders to issue a written statement of their reasons. While we acknowledge “the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials ... [and] the courts ... will act fairly,” such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process.”) (internal citations omitted).

<sup>17</sup> 404 U.S. 357, 365 (1971).

<sup>18</sup> Timothy R. Schnacke, “Model” *Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 161 (U.S. Dept. of Justice, National Institute of Corrections 2017).

<sup>19</sup> 892 F.3d 147 (2018).

detention.<sup>20</sup> The Fifth Circuit Court of Appeals squarely addressed the equal protection concern:

In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.<sup>21</sup>

The Court further described the necessary remedies for Harris County to pass constitutional muster:

The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances. Thus, the equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay). These procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker.<sup>22</sup>

Thus, courts around the nation have increasingly mandated, on due process and equal protection grounds, individualized considerations of a defendant's personal and financial circumstances prior to the setting of bail.

#### 4. Prohibiting of Excessive Bail

The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>23</sup> It is the only provision in the United States Constitution to explicitly address bail. The United States Supreme Court has interpreted this provision to apply to the states through

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 163.

<sup>22</sup> *Id.*

<sup>23</sup> U.S. Const. Amend. VIII.

the Fourteenth Amendment.<sup>24</sup> The United States Constitution does not set forth an express right to bail, thus, it does not prevent the government from denying bail altogether.<sup>25</sup> However, when bail is made available, it cannot be “excessive.”<sup>26</sup>

The United States Supreme Court, in *Stack v. Boyle*, declared that secured financial conditions of bail are “excessive” when set at a higher amount than what would assure the presence of the accused:

Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is “excessive” under the Eighth Amendment.<sup>27</sup>

This test for excessiveness was reexamined by the Supreme Court in *United States v. Salerno*, where the Court held that when the government has a compelling interest other than preventing defendant’s flight, the Eighth Amendment does not require release on bail.<sup>28</sup> However, where the government’s only interest is to prevent defendant’s flight, the Court reiterated that “bail must be set by a court at a sum designed to ensure that goal, and no more.”<sup>29</sup>

## B. Hawai‘i Law

### 1. Hawai‘i Constitution

Similar to the U.S. Constitution, Article I, Section 5 of the Hawai‘i State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”<sup>30</sup>

Article I, Section 12 of the Hawai‘i Constitution further provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.”<sup>31</sup>

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<sup>24</sup> U.S. Const. Amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). See also *Kuebel*, 404 U.S. at 365.

<sup>25</sup> *Salerno*, 481 U.S. at 754-55.

<sup>26</sup> U.S. Const. Amend. VIII.

<sup>27</sup> 342 U.S. at 3.

<sup>28</sup> 481 U.S. at 754.

<sup>29</sup> *Id.*

<sup>30</sup> Haw. Const. art. I, § 5.

<sup>31</sup> Haw. Const. art. I, § 12.

## 2. Hawai'i Revised Statutes

In Hawai'i, "bail" is defined as "the signing of the recognizance by the defendant and the defendant's surety or sureties, conditioned for the appearance of the defendant at the session of a court of competent jurisdiction to be named in the condition, and to abide by the judgment of the court."<sup>32</sup>

Hawai'i Revised Statutes ("HRS") § 804-3 sets forth when bail is available for criminal defendants:<sup>33</sup>

... (b) Any person charged with a criminal offense shall be bailable by sufficient sureties; provided that bail may be denied where the charge is for a serious crime,<sup>34</sup> and:

- (1) There is a serious risk that the person will flee;
- (2) There is a serious risk that the person will obstruct or attempt to obstruct justice, or therefore, injure, or intimidate, or attempt to thereafter, injure, or intimidate, a prospective witness or juror;
- (3) There is a serious risk that the person poses a danger to any person or the community; or
- (4) There is a serious risk that the person will engage in illegal activity.

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<sup>32</sup> Haw. Rev. Stat. § 804-1.

<sup>33</sup> "[B]ail' includes release on one's own recognizance, supervised release, and conditional release." Haw. Rev. Stat. § 804-3(a).

<sup>34</sup> "[S]erious crime' means murder or attempted murder in the first degree, murder or attempted murder in the second degree, or a class A or B felony, except forgery in the first degree and failing to render aid under section 291C-12." *Id.*

- (c) Under subsection (b)(1) a rebuttable presumption arises that there is a serious risk that the person will flee or will not appear as directed by the court where the person is charged with a criminal offense punishable by imprisonment for life without possibility of parole. For purposes of subsection (b)(3) and (4), a rebuttable presumption arises that the person poses a serious danger to any person or community or will engage in illegal activity where the court determines that:
- (1) The defendant has been previously convicted of a serious crime involving violence against a person within the ten-year period preceding the date of the charge against the defendant;
  - (2) The defendant is already on bail on a felony charge involving violence against a person; or
  - (3) The defendant is on probation or parole for a serious crime involving violence to a person.
- (d) If, after a hearing the court finds that no condition or combination of conditions will reasonably assure the appearance of the person when required or the safety of any other person or community, bail may be denied.<sup>35</sup>

If a defendant is charged with a bailable offense as set forth under HRS § 804-3, bail is a matter of right.<sup>36</sup> The exception is that “[u]pon a showing that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer...may deny the defendant’s release on bail, recognizance or supervised release.”<sup>37</sup>

Hawai’i law further directs who may set bail. Generally, bail is set by a “judge or justice of a court of record, including a district judge.”<sup>38</sup> Where the offense charged has a maximum penalty of two years or less, law enforcement such as sheriffs or police may set bail.<sup>39</sup>

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<sup>35</sup> Haw. Rev. Stat. § 804-3.

<sup>36</sup> Haw. Rev. Stat. § 804-4.

<sup>37</sup> Haw. Rev. Stat. § 804-7.1.

<sup>38</sup> Haw. Rev. Stat. § 804-5.

<sup>39</sup> When a defendant is charged with street solicitation of prostitution under Haw. Rev. Stat. § 712-1207, however, a judge must set bail.



Hawai'i law mandates that bail amounts "should be so determined **as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor.**"<sup>40</sup> It further mandates that "[i]n all cases, the officer letting to **bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused.**"<sup>41</sup>

To assist the court in determining whether to release a defendant on bail, Hawai'i law requires a pretrial risk assessment be prepared.<sup>42</sup> Within the Department of Public Safety in each county, there is an Intake Service Center that screens, evaluates, and classifies defendants upon their admission to the community correctional center.<sup>43</sup> Within three business days of the defendant's admission, a pretrial risk assessment is prepared using an "objective, researched-based, validated assessment tool that measures a defendant's risk of flight and risk of criminal conduct while on pretrial release pending adjudication."<sup>44</sup> If requested, the results of the pretrial risk assessment are included in a confidential pretrial bail report to the court, and provided to the parties, to assist the court in determining whether the defendant is a viable candidate for pretrial release.<sup>45</sup>

Upon posting of bail, a defendant must be released from custody.<sup>46</sup> Release on bail may take the form of bail, recognizance, or supervised release.<sup>47</sup> In all cases where a defendant is released, the following **mandatory** conditions apply:

- (1) The person shall not commit a federal, state or local offense during the period of release;
- (2) The person shall appear for all court hearings unless notified by the person's attorney that the person's appearance is not required; and
- (3) The person shall remain in the State of Hawai'i unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court.<sup>48</sup>

Also, with release on bail, the court has the discretion to set the following **special** conditions:

- (1) Prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order should be deemed to prohibit any lawful and ethical activity of defendant's counsel;
- (2) Prohibiting the defendant from going to certain described geographical areas or premises;

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<sup>40</sup> Haw. Rev. Stat. § 804-9 (emphasis added).

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> Haw. Rev. Stat. § 353-10.

<sup>43</sup> *Id.*

<sup>44</sup> Haw. Rev. Stat. § 353-10(b)(3).

<sup>45</sup> Haw. Rev. Stat. § 353-10(b)(8).

<sup>46</sup> Haw. Rev. Stat. § 804-7.

<sup>47</sup> Haw. Rev. Stat. § 804-7.1.

<sup>48</sup> Haw. Rev. Stat. § 804-7.4.

- (3) Prohibiting the defendant from possessing any dangerous weapon, engaging in certain described activities, or indulging in intoxicating liquors or certain drugs;
- (4) Requiring the defendant to report regularly to and remain under the supervision of an officer of the court;
- (5) Requiring the defendant to maintain employment, or, if unemployed, to actively seek employment, or attend an educational or vocational institution;
- (6) Requiring the defendant to comply with a specified curfew;
- (7) Requiring the defendant to seek and maintain mental health treatment or testing, including treatment for drug or alcohol dependency, or to remain in a specified institution for that purpose;
- (8) Requiring the defendant to remain in the jurisdiction of the judicial circuit in which the charges are pending unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court;
- (9) Requiring the defendant to satisfy any other condition reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person or community; or
- (10) Imposing any combination of conditions listed above.<sup>49</sup>

When defendants are placed on supervised release as set forth above, Hawai'i law requires continued supervision by the Intake Service Center.<sup>50</sup>

If a prosecuting attorney, pretrial officer, or law enforcement officer alleges that a defendant has violated a condition of release on bail, a warrant may issue for the defendant's arrest.<sup>51</sup> After a hearing on the issue, if the court finds that the defendant has violated a reasonable condition on bail, the court may impose different or additional conditions of release, or revoke defendant's release in its entirety.<sup>52</sup>

## V. NATIONAL TRENDS

Task Force members conducted a comprehensive evaluation and review of the history of the American criminal pretrial bail system, previous movements for nation-wide reform, and more recent research underlying the trend toward risk-based, rather than finance-based, systems.

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<sup>49</sup> Haw. Rev. Stat. § 804-7.1.

<sup>50</sup> Haw. Rev. Stat. § 353-10(b)(7).

<sup>51</sup> Haw. Rev. Stat. § 804-7.2.

<sup>52</sup> Haw. Rev. Stat. § 804-7.3.

## A. History of Bail and Bail Reform

Bail originated in medieval England “as a device to free untried prisoners.”<sup>53</sup> In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused’s criminal history.<sup>54</sup> In 1679, the English Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing.<sup>55</sup> In 1689, Parliament enacted an English Bill of Rights prohibiting excessive bail.<sup>56</sup> Across the Atlantic, early American constitutions also codified a right to bail as a presumption that defendants should be released pending trial.<sup>57</sup> Indeed, 48 American states (including Hawai’i) have adopted, via constitution or statute, a right to bail by “sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”<sup>58</sup>

From its inception, from medieval England to the early American republic, a bail bond was typically based on an individualized assessment of what the arrestee or the arrestee’s surety could pay to assure appearance and secure release.<sup>59</sup> This English practice was adopted in America through the Judiciary Act of 1789, providing an absolute right to bail in noncapital cases and bail at the judge’s discretion in capital cases. At the ratification of the United States Constitution, the English principle of bail was again accentuated, “[t]he rule is - where the offen[s]e is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail is to be required as the party is able to procure; for otherwise the allowance of bail would be mere colour for imprisoning the party on the charge.”<sup>60</sup> Thus, the First Congress proposed the Eighth Amendment to the United States Constitution, which, like the Hawai’i Constitution and the English Bill of Rights, prohibits excessive bail. American history, however, would prove to obfuscate this original purpose of bail, spurring movements for nation-wide reform.

The Bail Reform Act of 1966 became “the first major reform of the federal bail system since the Judiciary Act of 1789.”<sup>61</sup> The stated purpose of the Bail Reform Act of 1966 was “to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges ... when detention serves neither the ends of justice nor the public interest.”<sup>62</sup> The Act required: (1) a presumption of release on personal recognizance unless the court determined that release would not reasonably assure the defendant’s appearance in court; (2) the option of conditional pretrial release under supervision or other terms designed to decrease the flight risk; and (3) a prohibition on using money bail

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<sup>53</sup> Daniel J. Freed and Patricia M. Wald, *Bail in the United States: 1964* 1 (National Conference on Bail and Criminal Justice 1964).

<sup>54</sup> June Carbone, Article, *Seeing Through the Emperor’s New Clothes: Rediscovery of the Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 523-26 (1983).

<sup>55</sup> *Id.* at 528.

<sup>56</sup> *Id.*

<sup>57</sup> Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966 (1961).

<sup>58</sup> Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013).

<sup>59</sup> See Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Pretrial Justice Institute 2010).

<sup>60</sup> 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 88-89 (Forgotten Books 1819).

<sup>61</sup> See *State v. Brown*, 338 P.3d 1276, 1286 (N.M. 2014); Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984).

<sup>62</sup> *Id.* at § 2.

when nonfinancial release options such as supervisory custody or restrictions on "travel . . . or place of abode" could reasonably assure the defendant's appearance.<sup>63</sup>

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984.<sup>64</sup> The legislative history of the 1984 Act states that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."<sup>65</sup> The 1984 Act, as amended, retains most of the 1966 Act but "allows a federal court to detain an arrestee pending trial [only] if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure ... the safety of any other person and the community.'"<sup>66</sup> Thus, even under the 1984 amendments, a defendant could be detained only after being accorded due process considerations. The history of bail and bail reform confirms that bail is a mechanism of pretrial release, not of preventive detention.

America is now in the midst of its third generation of bail and pretrial reform. As the preeminent expert in this field, Timothy Schnacke from the National Institute of Corrections, explains:

...[O]ver the last century, America has undergone two generations of bail reform, but those generations have not sufficed to fully achieve what we know today constitutes pretrial justice. Nevertheless, we are entering a new generation of pretrial reform with the same three hallmarks seen in previous generations. First, like previous generations, we now have an extensive body of research literature – indeed, we have more than previous generations – pointing uniformly in a single direction toward best practices at bail and toward improvements over the status quo. Second, we have the necessary meeting of the minds of an impressive number of national organizations – from police chiefs and sheriffs, to county administrators and judges – embracing the research and calling for data-driven pretrial improvements. Third, and finally, we are now seeing jurisdictions actually changing their laws, policies, and practices to reflect best practice recommendations for improvements. Fortunately, through this third generation of pretrial reform, we already know the answers to most of the pressing issues at bail. We know what changes must be made to state laws, and we know how to follow the law and the research to create bail schemes in which pretrial practices are rational, fair and transparent.<sup>67</sup>

In 2007, the American Bar Association published guidelines for pretrial reform.

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<sup>63</sup> 18 U.S.C. § 3146.

<sup>64</sup> See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 STAT. 1837 (1984).

<sup>65</sup> S. Rep. 98-225, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, at 3185.

<sup>66</sup> *Salerno*, 481 U.S. at 741 (quoting the Bail Reform Act of 1984 and upholding the preventive detention provisions in the 1984 Act).

<sup>67</sup> Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 17 (National Institute of Corrections 2014) (some formatting altered).

## B. American Bar Association Standards for Criminal Justice: Pretrial Release

HCR 134 references the American Bar Association Criminal Justice Section's ("ABA") most recent 2007 edition of "Standards Relating to Pretrial Release."<sup>68</sup> The ABA Standards note that "[t]he purpose of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference."<sup>69</sup> The ABA Standards further explain that "the law favors the release of defendants pending adjudication of charges" and that "[d]eprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."<sup>70</sup>

Overall, the ABA Standards indicate that the decision to release or detain a defendant should be just that – a "bail" or "no bail" decision.<sup>71</sup> This emphasis is clearly indicated in the ABA Standards' ultimate disfavor of money bail.<sup>72</sup> First, the ABA Standards specify that "[i]t should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense."<sup>73</sup> Next, [i]f a defendant is not released on personal recognizance... the court should impose conditional release, including, in all cases, a condition that the defendant attend all court proceedings as ordered and not commit any criminal offense."<sup>74</sup> The ABA Standards note that if a defendant is released on conditions, the court should impose "the least restrictive of release conditions necessary to reasonably ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process."<sup>75</sup> Examples of such conditions include the supervision of the defendant by a pretrial service agency; release of the defendant to a sponsor or program; restrictions on the activities of the defendant (house arrest, electronic monitoring, curfew, stay away orders, geographical restrictions); weapons, drug and alcohol prohibitions; and requiring defendants to undergo substance abuse and/or mental health treatment.<sup>76</sup> The ABA Standards describe money bail as a last resort, given that "[f]inancial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's presence in court."<sup>77</sup>

In the case of money bail, the ABA Standards note that the judge "should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay."<sup>78</sup> Financial conditions should not be used to prevent future criminal conduct, to protect the safety of the community or any person, nor to punish the defendant or placate public opinion.<sup>79</sup> The ABA Standards further specify that "[f]inancial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the

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<sup>68</sup> American Bar Association, *Standards for Criminal Justice: Pretrial Release* (3d ed. 2007).

<sup>69</sup> *Id.*, Standard 10-1.1 at 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, See also, Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* 34 (National Institute of Corrections 2014).

<sup>72</sup> *Id.*, Standard 10-5.3 at 17-18.

<sup>73</sup> *Id.*, Standard 10-5.1(a) at 14.

<sup>74</sup> *Id.*, Standard 10-5.2(a) at 15.

<sup>75</sup> *Id.*, Standard 10-5.2(a) at 15-16.

<sup>76</sup> *Id.*, Standard 10-5.2(a) at 16.

<sup>77</sup> *Id.*, Standard 10-5.3 at 17.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, Standard 10-5.3(b) and (c) at 17.

defendant's ability to meet the financial conditions and the defendant's flight risk."<sup>80</sup> The ABA Standards note that bail should not be set "by reference to a predetermined schedule of amounts fixed according to the nature of the charge."<sup>81</sup>

The ABA Standards make clear that not all pretrial defendants should be released, but that detention should be ordered only after "the presentment of an indictment or a showing of probable cause" and only after the government proves at a hearing by "clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person."<sup>82</sup> The ABA Standards suggest that judges be guided by the following substantive factors:

- (1) The nature and circumstances of the offense charged;
- (2) The nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;
- (3) The weight of the evidence;
- (4) The person's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;
- (5) Whether at the time of the current offense or arrest, the person was on probation, parole, or on other release pending trial, sentencing, appeal or completion of sentence for an offense;
- (6) The availability of appropriate third party custodians who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;
- (7) Any facts justifying a concern that the defendant will present a risk of flight or of obstruction, or of danger to the community or the safety of any person.<sup>83</sup>

The ABA Standards specifically limit defendants eligible for pretrial detention, recommending that defendants not be detained before trial except:

- (i) Upon motion of the prosecutor in a case that involves:
  - (A) A crime of violence or dangerous crime; or

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<sup>80</sup> *Id.*, Standard 10-5.3(e) at 18.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, Standard 10-5.8(a) at 21.

<sup>83</sup> *Id.*, Standard 10-5.8(b) at 21-22.

- (B) A defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or imposition or execution of sentence; or on probation or parole for a serious offense involving a crime of violence, a dangerous crime; or
- (ii) Upon motion of the prosecutor or the [court's] own initiative, in a case that involves:
  - (A) A substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or
  - (B) A substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidates a prospective witness or juror.<sup>84</sup>

Finally, the ABA Standards recommend specific procedural guidelines regarding how and when pretrial detention hearings should be conducted. If the court finds that probable cause exists, the ABA Standards recommend that a detention hearing be held “immediately upon the defendant’s first appearance before the [court] unless the defendant or the prosecutor seeks a continuance.”<sup>85</sup> Moreover, except for “good cause shown”, a continuance of the detention hearing should not exceed five working days.<sup>86</sup> In any detention hearing, the defendant should have the right to be present, be represented by counsel, testify and present witnesses on his or her behalf, confront and cross-examine prosecution witnesses, and present information by “proffer or otherwise.”<sup>87</sup> Regarding detention proceedings, the ABA Standards note that “the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant’s appearance in court and protect the safety of the community or any person.”<sup>88</sup> If the defendant is to be detained, the court should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within three days.<sup>89</sup> The Standards suggest a time limitation of no more than 90 days, after which another pretrial detention should be conducted to consider extending the defendant’s detention an additional 90 days.<sup>90</sup> The ABA Standards further suggest that the pretrial detention order should be immediately appealable by either party and receive expedited appellate review.<sup>91</sup>

### C. Costs of Detention

The costs of detention – to an individual defendant and the community as a whole – also support the need for pretrial reform. HCR 134 references several studies that reflect how pretrial detention significantly affects many aspects of a defendant’s life.

In 2013, research supported by the Laura and John Arnold Foundation found that pretrial defendants who were detained, even for relatively short periods of time, were more likely to be

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<sup>84</sup> *Id.*, Standard 10-5.9(a) at 22.

<sup>85</sup> *Id.*, Standard 10-5.9(b) at 23.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, Standard 10-5.10(a) at 23.

<sup>88</sup> *Id.*, Standard 10-5.10(f) at 23-24.

<sup>89</sup> *Id.*, Standard 10-5.10(g) at 24.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, Standard 10-5.10(h) at 24.

rearrested before trial.<sup>92</sup> More specifically, compared to low risk defendants detained for no more than 24 hours, those detained for 8 to 14 days were 56 percent more likely to be rearrested before trial and 51 percent more likely to commit another crime within two years after completion of their cases.<sup>93</sup> Other studies have confirmed these findings and further found that the likelihood of recidivism and failure to appear correlates with the imposition of secured bail, in and of itself, and not with a particular bail amount.<sup>94</sup> A separate but related report found that compared to low-risk defendants released prior to trial, those detained prior to trial were four times more likely to receive a sentence of imprisonment and three times more likely to receive a longer prison sentence.<sup>95</sup> The implication is that reducing detention, especially for low- and medium-risk defendants, can help reduce incarceration by lowering recidivism and prison terms.

In 2015, the Vera Institute of Justice published a report, referenced in HCR 134, highlighting the personal and human costs of pretrial detention:

The growth of jails has been costly in many ways, contributing little, if at all, to the enhancement of public safety. From 1982 to 2011, local expenditures on corrections – largely building and running jails – increased nearly 235 percent. The increasing direct costs of operating jails, however, are matched by the indirect costs and consequences of jailing people who do not need to be there or holding them for longer than necessary. These consequences – in lost wages, worsening physical and mental health, possible loss of custody of children, a job, or a 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.<sup>96</sup>

Further, research suggests that pretrial detention disadvantages a defendant's ability to prepare for trial and increases the likelihood that a defendant will plead at earlier stages of criminal proceedings, regardless of the merits of the defendant's case, to gain release from custody.<sup>97</sup>

Pretrial detention has been found to disproportionately impact racial minorities. The majority of research examining the effects of race on pretrial release decisions has found that African American/Black and Hispanic defendants are more likely to be detained than White defendants.<sup>98</sup> For example, research shows that at the outset, Black defendants are twice as

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<sup>92</sup> Christopher T. Lowenkamp, Marie VanNostrand and Alexander Holsinger, *The Hidden Costs of Pretrial Detention 3* (The Laura and John Arnold Foundation 2013).

<sup>93</sup> *Id.*

<sup>94</sup> Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Univ. of Pennsylvania Nov. 2016).

<sup>95</sup> *Id.* See also Christopher T. Lowenkamp, Marie VanNostrand and Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (The Laura and John Arnold Foundation 2013).

<sup>96</sup> Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishmen, Peggy McGarry, *Incarceration's Front Door: The Misuse of Jails in America* 12-13 (Vera Institute of Justice 2015).

<sup>97</sup> Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 Yale L.J. 1344 (2014).

<sup>98</sup> See e.g., Meghan Sacks, Vincenzo Sainato and Alissa Ackerman, *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 Am. J. Crim. Justice 661 (2014); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Justice Quarterly 170, 187-188 (2005).



likely to be arrested as White defendants.<sup>99</sup> Other studies have found that Black and Hispanic defendants are systematically assessed higher bail amounts than White defendants.<sup>100</sup> Partly as a result, Black and Hispanic defendants are twice as likely to be held on bail as their White counterparts, even adjusting for case characteristics.<sup>101</sup> The available research and data on the costs of pretrial detention, magnified upon minorities, has prompted national organizations and policymakers in many states to undertake significant reform.

#### D. Support for Risk-Based Systems

National organizations and pretrial justice stakeholders are calling for urgent reform, including the implementation and use of risk-based systems. HCR 134 references the American Council of Chief Defenders' ("ACCD") Policy Statement on Fair and Effective Pretrial Justices Practices, June 2011. The ACCD notes that "[b]ail decisions are often made arbitrarily and quickly and on little information other than previous criminal history and current charges" and that "[m]any jurisdictions utilize bond schedules that assign a dollar amount to an offense type," irrespective of the specific characteristics and risks associated with the particular individual charged."<sup>102</sup> The ACCD urges pretrial services agencies to (1) use objective research-based tools "that impartially assess a person's likelihood to flee or pose a threat to the community", (2) "monitor, supervise and assist defendants released prior to trial, and to review the status and release eligibility of detained defendants ...on an ongoing basis" and (3) "vigorously identify and use noncash-based alternatives to incarceration ...in order to eliminate financial discrimination against the poor and minorities."<sup>103</sup> The ACCD further urges public defenders to be present at bail hearings, efficiently collect data from defendants, and "present judicial officers with the facts and legal criteria that support release, and where release is not obtained, to pursue modification of the conditions of release."<sup>104</sup> The ACCD references the ABA Standards in advising courts "to use release on financial conditions only when no other conditions will ensure appearance, and when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a

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<sup>99</sup> See Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishmen, Peggy McGarry, *Incarceration's Front Door: The Misuse of Jails in America* 15 (Vera Institute of Justice 2015).

<sup>100</sup> *Id.* See also Shawn D. Bushway and Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* 1 (2010) ("Black defendants are assigned systematically greater bail levels than whites accused of similar offenses and, partly as a result, have systematically lower probabilities of pre-trial release."); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 *Criminology* 873, 895-897 (2003) (using administrative data from the State Courts Processing Statistics, Black and Hispanic defendants are about 20 percent more likely to be denied bail than Whites; Black and Hispanic defendants are also more than twice as likely to be held on bail than are Whites, even after adjusting for case characteristics); K.B. Turner & James B. Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 *Am. J. of Crim. Just.* 35, 43 (2005) (documenting racial disparities in Lancaster County, Nebraska); David Levin, *Pretrial Release of Latino Defendants Final Report* (Pretrial Justice Institute 2008) (finding that Latino defendants are more likely to have financial conditions to release set than non-Latino defendants).

<sup>101</sup> Stephen Demuth and Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 *Social Problems* 222 (2004) (Black defendants were more likely to be detained than White defendants and had an increased likelihood of detention based solely on the inability to pay bail).

<sup>102</sup> American Council of Chief Defenders, *Policy Statement on Fair and Effective Pretrial Justices Practices* 9 (June 2011).

<sup>103</sup> *Id.* at 11-13.

<sup>104</sup> *Id.* at 9-10.

person's ability to post bond."<sup>105</sup> Finally, the ACCD, like the ABA, cautions courts against using financial preconditions to address concerns for public safety."<sup>106</sup>

HCR 134 also references the National District Attorneys Association's ("NDAA") National Prosecution Standards, Third Edition, with Revised Commentary, 2012. The NDAA Standards serve as a guide to professional conduct for the performance of the prosecutorial function. In the pretrial phase, NDAA Standards dictate that a "prosecutor request that bail be set at an appropriate amount to ensure that the defendant appears at all required court proceedings, and, where allowed by law, does not pose a danger to others or to the community."<sup>107</sup> Further, an affirmative obligation is placed on the prosecutor "to take steps to gather adequate information about the defendant's circumstances and history to request an appropriate bail amount."<sup>108</sup> The standards specify that a "prosecutor should not seek a bail amount or other release conditions that are greater than necessary to ensure the safety of others and the community and to ensure the appearance of the defendant at trial."<sup>109</sup> Moreover, "[p]rosecutors should recommend bail decisions that facilitate pretrial release rather than detention to the extent such release is consistent with the prosecutor's responsibilities[.]"<sup>110</sup> Finally, the NDAA Standards place a continuing obligation on prosecutors to modify the bail status or conditions of a defendant if they learn of new information rendering the initial bail request inappropriate, and require prosecutors to request periodic reports on detained defendants to determine if continued detention is appropriate.<sup>111</sup>

In 2013, the Conference of State Court Administrators ("COSCA") issued a policy paper entitled "Evidence-Based Pretrial Release," that urges court leaders to "promote, collaborate and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions," and ultimately calls for "the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes."<sup>112</sup> The same year, the Conference of Chief Justices ("CCJ") issued a resolution endorsing and supporting COSCA's policy.<sup>113</sup> In addition, numerous other stakeholder organizations, including the National Institute of Corrections, Pretrial Justice Institute, National Association of Counties, American Jail Association, International Association of Chiefs of Police, and the American Probation and Parole Association have endorsed transitioning from traditional money bail systems to risk-based systems for detention and release determinations and for the setting of pretrial release conditions. Following the latest

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<sup>105</sup> *Id.* at 13-14.

<sup>106</sup> *Id.*

<sup>107</sup> National District Attorneys Association's *National Prosecution Standards*, Standard 4-4.1 at 56 (3d ed.).

<sup>108</sup> *Id.*, Standard 4-4.2 at 56-57. Factors to consider in requesting a proper bail amount include: the defendant's employment status and history, the defendant's financial condition, the defendant's length and character of residence in the community, the defendant's family ties to the community, the nature and severity of the crime, the strength of the evidence, the severity of the sentence that could be imposed upon conviction, the defendant's criminal record, the defendant's record of appearance or non-appearance on other criminal charges, the likelihood of the defendant attempting to intimidate witnesses or victims or tamper with evidence, identification of responsible members of the community who would vouch for the defendant's reliability, and any other factors indicating the defendant's ties to the community. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, Standard 4-4.4 at 57.

<sup>111</sup> *Id.*, Standard 4-4.5 at 57.

<sup>112</sup> Conference of State Court Administrators, *Evidence-Based Pretrial Release 2* (2012-2013 Policy Paper).

<sup>113</sup> Conference of Chief Justices, *Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* (adopted Jan. 30, 2013).

research and answering the national call for reform, states have begun to change their laws, policies, and practices to better effectuate pretrial justice.

#### E. Recent State Reforms

In the last six years, every state legislature in the Union has addressed pretrial policy, resulting in close to 700 new enactments.<sup>114</sup> Just last year, in 2017, state lawmakers in 46 states and the District of Columbia enacted 182 new pretrial laws, representing almost a 50 percent increase compared to 2015 and 2016.<sup>115</sup> This upsurge vividly shows how states across the board have increasingly focused on improving the front end of the criminal justice system. These legislative enactments can be grouped by category to reveal specific trends in state reform.

In nearly every state, there is an agency which provides pretrial services to defendants before the courts. Between 2012 and 2014, 20 laws in 14 states, including Hawai'i, enacted laws governing a statewide pretrial services program.<sup>116</sup> These programs conducted risk assessments to assist the court in making pretrial release decisions and supervising defendants released pending trial.<sup>117</sup>

Since 2012, most states have enacted laws relating to the use of risk assessments, shifting focus to the individual defendant instead of determining release suitability and conditions based primarily on the alleged charges.<sup>118</sup> More recently, in 2017, nine more states enacted laws allowing or requiring the use of risk assessments to assist in establishing bail and release conditions, with another five states passing bills to study such assessment tools.<sup>119</sup>

States also modified eligibility requirements for release after arrest. Ten states in 2017 and 13 states in 2016 enacted laws restricting eligibility for pretrial release, primarily relating to defendants accused of violent crimes, many requiring hearings and protective orders prior to release.<sup>120</sup> In November 2016, New Mexico voters approved a constitutional amendment authorizing courts to deny release for the state's most dangerous defendants, while ensuring that low-risk defendants are not detained because of an inability to post a financial bond.<sup>121</sup>

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<sup>114</sup> National Conference of State Legislatures, *Trends in Pretrial Release: State Legislation Update* (April 2018), [http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments\\_2017\\_v03.pdf](http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf).

<sup>115</sup> *Id.*

<sup>116</sup> National Conference of State Legislatures, *Trends in Pretrial Release: State Legislation* (March 2015), [http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends\\_v05.pdf](http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends_v05.pdf).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> National Conference of State Legislatures, *Trends in Pretrial Release: State Legislation Update* (April 2018), *supra* note 116*pdf*.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

In 2015, many states enacted pretrial policies directed at individualizing the pretrial process.<sup>122</sup> States enacted legislation for defendants identified as having mental health or substance abuse issues and defendants accused of domestic violence or sex offenses, implementing specific release procedures or required conditions prior to release.<sup>123</sup>

More recently, legislatures amended pretrial release provisions by limiting the use of financial conditions in release decisions. In 2017, Connecticut barred cash-only bail for certain crimes and restricted the use of money bail in misdemeanor cases.<sup>124</sup> Illinois created a presumption for non-monetary conditions of release, while Connecticut, Illinois, Texas, and Maryland required prompt bail hearings if a defendant remained in custody due to the inability to post bail.<sup>125</sup>

In 2017, over two-thirds of the states enacted legislation broadening the functioning of diversion and treatment courts.<sup>126</sup> Eight states enacted laws to support veterans' treatment courts. Most of these laws aimed at reducing barriers to participation and expanding criteria for eligibility.<sup>127</sup> Sixteen states appropriated funds, expanded eligibility or supplemented available programming for drug courts.<sup>128</sup> Seven states similarly broadened provisions for mental health courts.<sup>129</sup> In addition, 18 states enacted laws to divert and support those with mental health disorders – establishing crisis intervention protocols, training for responders, funding for treatment beds, and deflection policies for law enforcement to place a person in treatment rather than jail.<sup>130</sup>

## VI. REFORMS IN HAWAI'I

As part of a national wave of pretrial reform, Hawai'i's legislative, executive, and judicial branches have called for studies on this issue. The Office of Hawaiian Affairs, Hawai'i State Bar Association, and the Hawai'i Chapter of the American Civil Liberties Union have performed important research concerning apparent inequities and inefficiencies of the current system, setting the stage for true reform.

### A. 2010 Office of Hawaiian Affairs Study

In 2010, the Office of Hawaiian Affairs ("OHA") published a report entitled "The Disparate Treatment of Native Hawaiians in the Criminal Justice System." This report examined the impact of the criminal justice system on Native Hawaiians. The report noted:

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

For the last two centuries, the criminal justice system has negatively impacted Native Hawaiians in ways no other ethnic group has experienced. The findings in this report are concerning as it tells the story of how an institution, fueled by tax payers' dollars, disparately affects a unique indigenous group of people, making them even more vulnerable than ever to the loss of land, culture, and community. These racial disparities begin with the initial contact of a punitive system that creates over-powering barriers in changing the course of their lives and are exponentially increased as a person moves through the system.<sup>131</sup>

Although not focused on pretrial incarceration, OHA found that since 1977, the number of people incarcerated in Hawai'i increased more than 900 percent.<sup>132</sup> Native Hawaiians sustained a disproportionate impact of the criminal justice system, as they made up 24 percent of the general population of Hawai'i, but 27 percent of all arrests, 33 three percent of people in pretrial detention, and 39 percent of the incarcerated population.<sup>133</sup> The OHA report also found that Native Hawaiians are more likely to receive a prison sentence than all other groups, and receive longer prison sentences than most other racial/ethnic groups.<sup>134</sup> Though both men and women of Native Hawaiian descent are disproportionately represented in Hawai'i's criminal justice system, the disparity was greater for women, as they represented 44 percent of women incarcerated, while only comprising 19 percent of the general population of women in Hawai'i.<sup>135</sup> With respect to punitive responses to drug use, the OHA study found that Native Hawaiians made up the largest portion (32 percent) of people incarcerated for drug offenses, are imprisoned for drug offenses more often than those of other races or ethnicities, and account for the largest proportion of defendants charged with offenses related to methamphetamine.<sup>136</sup>

To reduce the harmful effects of the criminal justice system on Native Hawaiians and all people, the study implored:

Hawai'i must take action, and seek alternative solutions to prison. Assistance and training is needed in law enforcement, holistic interventions need to be implemented and evaluated, and a cultural shift in the way we imprison a person must change. If not, we will exacerbate prison over-crowding and continue to foster the incarceration of generations to come.<sup>137</sup>

The Task Force is mindful of OHA's appeal for rehabilitation and also recognizes the disparate treatment of Native Hawaiians in pretrial detention.

#### B. 2012 Justice Reinvestment Initiative

In June 2011, Hawai'i Governor Neil Abercrombie, Supreme Court Chief Justice Mark E. Recktenwald, and legislative leaders requested technical assistance from the Council of State

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<sup>131</sup> Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), at 8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 8-9.

<sup>135</sup> *Id.* at 9.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 8.

Governments Justice Center (“CSGJC”) to employ a data-driven “justice reinvestment” approach to improve public safety, reduce corrections spending, and reinvest savings in strategies that can decrease crime and reduce recidivism.<sup>138</sup> This call for reform was initiated by an 18 percent increase in Hawai‘i’s jail and prison populations between 2000 and 2010.<sup>139</sup> Significantly, despite a stable number of jail admissions for sentenced individuals, the pretrial population increased 117 percent from 2006 to 2011, which contributed to a 47 percent increase in the overall jail population.<sup>140</sup> Data showed that pretrial release took three months on average.<sup>141</sup> In a 2008 study comparing 2004 data on 39 large U.S. counties, of which Honolulu was one of the largest, Honolulu had the longest average length of stay in jail for those ultimately released during the pretrial stage.<sup>142</sup>

With respect to Hawai‘i’s pretrial practice, the CSGJC concluded that Hawai‘i’s pretrial population increased partly due to delays in Hawai‘i’s pretrial decision-making process. The CSGJC recommended that: (1) an objective risk assessment tool<sup>143</sup> be used to inform pretrial detention and release decisions, (2) risk assessments be conducted within three days of admission to jail, and (3) goals be set to reduce the average length of time individuals spend in detention awaiting a release decision.<sup>144</sup>

The CSGJC further recommended reducing obstacles for paying bail, specifically, expanding methods to pay bail and expanding the hours during which payments can be made to 24 hours a day, seven days a week. The CSGJ concluded that “[r]emoving obstacles to posting bail by expanding methods of payment and the period of time during which payment can be made will expedite the bail process and reduce inefficiencies.”<sup>145</sup> Accordingly, Hawai‘i’s justice reinvestment legislation (SB 2776 and HB 2515) was signed into law in 2012, requiring timely risk assessments of pretrial defendants to lessen costly delays in the pretrial process.

### C. 2016 Judicial Administration Committee’s Criminal Law Forum

In September 2016, the Hawai‘i State Judiciary, along with the Hawai‘i State Bar Association’s (“HSBA”) Judicial Administration Committee (“JAC”) held a Bench-Bar Criminal

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<sup>138</sup> The Council of State Governments Justice Center, *Justice Reinvestment in Hawai‘i: Analyses & Policy Options to Reduce Spending on Corrections & Reinvest in Strategies to Increase Public Safety* (Aug. 2014) at 1.

<sup>139</sup> *Id.* at 2.

<sup>140</sup> *Id.* at 4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4 (“Of the 39 counties, 32 were able to release defendants under non-financial conditions in 15 days or fewer, but Honolulu’s average length of stay for the same type of defendants was 71 days.”).

<sup>143</sup> *Id.* at 9 (“Risk Assessment tools help users sort individuals into low-, medium-, and high-risk groups. They are designed to gauge the likelihood that an individual will come in contact with the criminal justice system, either through a new arrest and conviction or reincarceration for violating the terms of supervision. They usually consist of 10 to 30 questions designed to ascertain an individual’s history of criminal behavior, attitudes and personality, and life circumstances. Risk assessments can be administered at any time during a person’s contact with the criminal justice system—from first appearance through pre-sentencing, placement on probation, admission to a correctional facility, the period prior to release, and post-release supervision. They are similar to tools used by an insurance company to rate risk: they predict the likelihood of future outcomes according to their analysis of past activities (e.g., criminal history) and present conditions (such as behavioral health or addiction). Objective risk assessments have been shown to be generally more reliable than any individual professional’s judgment. Too often, these judgments are no more than ‘gut feelings’ that vary from expert to expert about the same individual.”).

<sup>144</sup> *Id.* at 7.

<sup>145</sup> *Id.*

Law Forum, specifically devoted to pretrial practice reform. The agenda of the Criminal Forum is specifically referenced in HCR 134. The JAC noted the growing national trend to reevaluate and reform bail and pretrial release practices to balance concerns for public safety and court obligations while maintaining the constitutional presumption of innocence and right to reasonable bail.<sup>146</sup>

The Criminal Forum began with a discussion by a panel of pretrial stakeholders, including representatives from the Judiciary, Prosecuting Attorney, Honolulu Police Department, and Department of Public Safety Intake Service Center (“ISC”). The panel explained the procedure for setting bail in both misdemeanor and felony cases. The use of bail schedules or bail guidelines was discussed, as well as disparities in bail amounts between the circuits.

ISC provided statistics about lengths of incarceration for felons pending trial. Forum participants determined that Hawai‘i’s pretrial release and detention procedures are not consistent with best practices and national trends.<sup>147</sup>

At the Criminal Forum, experts in pretrial practice were invited to address national standards that promote the essential pretrial goals of maximizing public safety, court appearances, and release. Leland Moore of the National Institute of Corrections (“NIC”) reviewed the historical course that pretrial release has taken to arrive at present-day conceptions of bail and release.<sup>148</sup> He explained that the purpose of setting bail is to release the defendant, while a determination of no bail is to detain the defendant, and that courts should not use bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot pay for their release.<sup>149</sup>

Kathy Waters of the Arizona Administrative Office of the Courts noted that Arizona’s Supreme Court Chief Justice commissioned a task force, similar to our Task Force, to formulate best practices and recommendations for pretrial practice reform.<sup>150</sup> Its 2016 report calls for eliminating the use of cash bond as a means to secure a defendant’s appearance for a future court date and recommends the expanded use of the Arnold Foundation’s risk assessment tool to determine pretrial release decisions.<sup>151</sup>

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<sup>146</sup> Hawai‘i State Bar Association Committee on Judicial Administration, *Report of the 2016 Criminal Law Forum* (Sept. 2016) at 4.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 8-9.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 13.

<sup>151</sup> *Id.*

As a result of the 2016 Criminal Forum, the JAC reported that Hawai'i's current pretrial release procedures would benefit from timely bail studies and reports, alternate release conditions for those who cannot afford monetary bail, and reducing lengthy pretrial incarceration for those who have not been provided release hearings.<sup>152</sup> Ultimately, the JAC recommended the formulation of the instant task force to review pretrial practices and make recommendations for reform where appropriate.

#### D. 2017 Criminal Bench-Bar Conference

In October 2017, the Hawai'i State Judiciary, along with the JAC, held its annual bench-bar conference where a significant portion of the criminal section's discussion again focused on the improvement of Hawai'i's pretrial practices.<sup>153</sup>

First, participants noted the disparity of bail amounts set among the various counties. Bail amounts set on O'ahu tended to be higher than those set in the other counties, especially for first time alleged defendants. Attorneys maintained that the setting of cash bail is disproportionate and unfairly discriminates against the economically disadvantaged - the poor are held in custody when they cannot afford bail, while those who can afford bail may be released regardless of the danger they pose to the community or their risk of non-appearance. It was decided that a new bail procedure, or elimination of cash bail altogether, should be considered.<sup>154</sup>

Second, participants noted a need for a more transparent bail system where objective factors are considered in the determining of bail amounts. Defense counsel indicated that as it stands today, the court's bail consideration is limited to evidence and arguments presented by law enforcement, and that rules should be amended to allow defendants an opportunity to present evidence for the judge's consideration.<sup>155</sup>

Third, procedurally, participants noted that defendants are not always provided with a timely pretrial bail report. For example, on O'ahu, the pretrial bail form is often not provided prior to arraignment and defendants may not be able to effectively advocate for their release at their initial court appearance. Participants also shared that bail hearings are set on an inconsistent timeline and advocated set criterion on when it is appropriate to consider pretrial release and detention issues.<sup>156</sup>

Fourth, some participants suggested considering the federal system, including the use of signature bonds, electronic monitoring and the setting of a detention hearings, at the request of the defendant, within three business days of the initial appearance.<sup>157</sup>

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<sup>152</sup> *Id.* at 14.

<sup>153</sup> *See generally*, Hawai'i State Bar Association Committee on Judicial Administration, *Report of the 2017 Bench-Bar Conference* 11-14 & 25-27 (Sept. 2016).

<sup>154</sup> *Id.* at 11-12, 27.

<sup>155</sup> *Id.* at 12, 26-27.

<sup>156</sup> *Id.* at 12-13, 25-26.

<sup>157</sup> *Id.* at 27-28.



Ultimately, participants observed that key components to reform may be educating the court, parties, counsel, and other stakeholders about the constitutional requirements and the underlying purpose of bail. The Bench Bar concluded that reform is needed to shift from a determination based on cash to one based on risk.<sup>158</sup>

#### E. 2018 American Civil Liberties Union of Hawai'i Report

In January 2018, the American Civil Liberties Union of Hawai'i ("ACLU") addressed the need for pretrial reform in Hawai'i.<sup>159</sup> Its preliminary report, entitled "As Much Justice As You Can Afford: Hawai'i's Accused Face an Unequal Bail System", identified "the many contributing factors to Hawai'i's unjust and flawed pretrial detention system." The ACLU reviewed, online, all cases filed in circuit court during the first semester of 2017, studying offenses charged, bail amounts set on arrest warrants, bail amounts set at initial bail hearings, bench warrants issued for failure to appear or comply, motions of supervised released and/or bail reduction, and changes in plea.<sup>160</sup> The ACLU reported that "[w]hile all community correctional centers are operating around double their design capacity, about 1,145 men and women, around half of those jailed in those correctional facilities have not been convicted of any crime and are merely awaiting trial...[t]he primary reason for this indiscriminate jailing of people who should be presumed innocent until proven guilty is that they cannot afford the amount of bail set in their case."<sup>161</sup> On March 9, 2018, representatives from the ACLU presented their findings to the Task Force, describing four areas of particular concern in Hawai'i's pretrial release and detention process.

First, the ACLU reported that Hawai'i's pretrial system fails to individualize release and detention decisions on a case-by-case basis. The study reports that "[d]espite the legal obligations to consider [a defendant's] ability to pay [bail] and to individualize the bail setting process, our research demonstrates that courts have been largely overlooking these inquiries, and instead setting bail amounts solely based on the classification of the charged crime, often well beyond the amounts and conditions needed to ensure the appearance in court and community safety."<sup>162</sup> Further, the study described the use of bail schedules ("an established financial amount for specific charges or classes of charges") that "unconstitutionally discriminate based on indigence and deny pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk[.]"<sup>163</sup> The report notes courts deferring to bail amounts previously set by law enforcement on arrest warrants, without specifically evaluating the defendant's financial and other circumstances.<sup>164</sup> Finally, the ACLU concludes that courts are setting inappropriate conditions of release (such as drug testing or substance abuse treatment) without regard to the defendant's need for such conditions to ensure the defendant's appearance and reduce the chances of re-offending.<sup>165</sup>

Second, the ACLU concludes that Hawai'i's pretrial system relies too heavily on money bail. The study reports that "circuit courts in Hawai'i set money bail as a condition of release in

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<sup>158</sup> *Id.* at 26-27.

<sup>159</sup> See ACLU of Hawai'i, *As Much Justice as You Can Afford: Hawaii's Accused Face an Unequal Bail System* (Jan. 2018).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 4.

<sup>162</sup> *Id.* at 12.

<sup>163</sup> *Id.* at 19.

<sup>164</sup> *Id.* at 4 ("[I]n 91 percent of cases in Hawai'i, initial money bail simply mirrors the amount set by the police in the arrest warrant. And that amount is based solely on the crime charged.").

<sup>165</sup> *Id.* at 21-22.

88 percent of cases with only 44 percent of people managing to eventually post the amount of bail set by the court.”<sup>166</sup> The ACLU also found that the First Circuit, as opposed to the neighbor island circuits, set bail amounts that were not affordable.<sup>167</sup> The ACLU reports that “[t]hese large amounts indicate that money bail is inappropriately used not to ensure court appearances but to keep people in pretrial detention based on the crime charged or the perceived danger posed by the individual.”<sup>168</sup>

Third, the ACLU study addresses the use of Hawai‘i’s risk assessment tool -- the Ohio Risk Assessment System Pretrial Assessment Tool (“ORAS-PAT”). As part of Hawai‘i’s Justice Reinvestment Initiative, the ORAS-PAT was selected in 2012 as the Department of Public Safety Intake Service Center’s (“ISC”) risk assessment tool to evaluate a pretrial defendant’s risk of non-appearance in court and risk of recidivism. Based on the ORAS-PAT rating, ISC would recommend the court either release the defendant on his/her own recognizance, on supervised release, or no release.<sup>169</sup> The ORAS-PAT was validated for the Hawai‘i pretrial population in 2014.<sup>170</sup>

The ACLU cautions that “[p]retrial assessment tools often ascribe higher degrees of risk to individuals with criminal histories as well as those with mental health concerns, residential instability, and challenges regarding substance abuse,” and when used, “should be limited ... to administratively *release* individuals after their arrest, before appearing in front of a judge.”<sup>171</sup> To the extent that risk assessment tools are used, the ACLU “strongly recommend[ed] that they be 1) locally validated, 2) have no impact on racial and other improper disparities, 3) be transparent to all parties, both as to data collection and scoring, and 4) not act as a substitute for an individualized determination of bail.”<sup>172</sup> Additionally, the ACLU urged that the tool have separate scores for failure to appear and new arrests.<sup>173</sup> Finally, the ACLU recommends that courts “receive better training on risk assessment tools and should be careful to not solely rely on the tools’ rating and Intake Service’s recommendation”, but rather hold “evidentiary [bail] hearings where the government has the burden of establishing an individual’s flight risk and risk of harm to others, by clear and convincing evidence, and if money bail is specifically found to be necessary, ability to pay also considered.”<sup>174</sup>

Finally, the ACLU contends that bail in Hawai‘i is being used as a means to induce guilty pleas.<sup>175</sup> The ACLU asserts that the data collected showed that “most arrestees who changed their plea to guilty or no contest did so while detained pretrial” and that the “data also revealed a pattern of judges granting motions for supervised release or bail reduction on the same day or immediately following plea change.”<sup>176</sup> According to the ACLU, “[t]his all suggests that arrestees in Hawai‘i are using the opportunity to plead guilty to obtain release, and that judges

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<sup>166</sup> *Id.* at 4.

<sup>167</sup> *Id.* at 23. (“Most bail for all felony charges in the First Circuit is set in the \$11,000 to \$25,000 range, but is often set above that.”).

<sup>168</sup> *Id.* at 24.

<sup>169</sup> *Id.* at 13, 16.

<sup>170</sup> Janet T. Davidson, *Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) on a Hawaii Pretrial Population* (Aug. 2014).

<sup>171</sup> ACLU of Hawai‘i, *supra* note 161, at 24 (emphasis in the original).

<sup>172</sup> *Id.* at 25.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 27.

<sup>175</sup> *Id.* at 27-28.

<sup>176</sup> *Id.* at 28.

are denying and prosecutors are not supporting release until arrestees no longer fight a charge.”<sup>177</sup>

While the Task Force does not specifically endorse nor refute the ACLU’s findings, it was aided by the comprehensive presentation and open dialogue the findings generated.

## VII. WORK OF THE TASK FORCE

### A. Education and Research on Pretrial Practice

The Task Force met in plenary session for three hours every month, beginning August 11, 2017. Initial sessions were devoted to educating members about the legal principles and statutory framework of pretrial practice, history of bail, national research in pretrial detention, implementation of risk assessment tools, best practices in provision of pretrial services, local initiatives for diversion programs, statistics of the Hawai‘i pretrial population, effective judicial decision-making tools, and growing trends in state pretrial justice reform. Local and mainland experts in the area of pretrial practice were invited to present the latest research, findings, and trends to members of the Task Force.

#### 1. Federal Pretrial Services in Hawai‘i

In August 2017, Carol Miyashiro, Chief U.S. Pretrial Services Officer, U.S. District Court for the District of Hawai‘i, discussed with the Task Force the current landscape of Hawai‘i’s federal pretrial system. Federal law requires the release of a defendant on the “least restrictive conditions, or combination of conditions,” that will “reasonably assure the appearance of the person” and the “safety of any other and the community.”<sup>178</sup> Only if, *after a detention hearing*, the judicial officer finds that no condition or combination of conditions will reasonably assure appearance and safety, such judicial officer shall order detention before trial.<sup>179</sup>

Within this legal framework, in 2009, an Alternatives to Detention Study was conducted, which sampled one million federal defendants, resulting in the creation of the federal Pretrial Risk Assessment Tool (“PTRA”). The PTRA is a standardized empirically-based risk assessment instrument used by federal pretrial agencies to provide guidance regarding release and detention recommendations. The PTRA scores factors such as a defendant’s prior felony convictions, prior failures to appear, pending cases, offense type, offense severity, age, residence status, employment, education, substance abuse, and citizenship status to predict defendants’ probability of failure (failure to appear, to recidivate, and/or be revoked). The PTRA has been validated through consistent review by federal pretrial service agencies.

Following a PTRA assessment, a defendant’s pretrial release or detention status is determined. In the federal system, cash bail or bond is limited in use and defendants are required to post only what he or she can afford. The federal system uses many bond alternatives, including unsecured bonds, personal recognizance, signature bonds, and agreements to forfeit, as well as secured bonds, such as property bonds, collateral bonds, cash bonds, and corporate surety bonds. As a condition of release, federal defendants must often comply with specialized terms, including: reporting to a pretrial services officer, supervision by a third-party custodian, halfway house placement, treatment programs, sex offender treatment, drug and alcohol urinalysis testing, and travel restrictions. Federal pretrial services also

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<sup>177</sup> *Id.*

<sup>178</sup> *See*, 18 U.S.C.A. § 3142.

<sup>179</sup> *Id.*

frequently employs location monitoring tools for higher risk defendants and Electronic Report Forms (requiring defendants to send a report once a month) for low risk defendants.

Using the many release alternatives offered, yearly data collected as of March 31, 2017 indicated that 67 percent<sup>180</sup> of federal defendants in Hawai'i were released pending trial. Out of those released, 98 percent of federal defendants in Hawai'i were released on unsecured bond, while only 2 percent were released on secured bond. Despite this high release rate, only 11 percent of defendants were reported non-compliant prior to trial.

Ms. Miyashiro recommends that judges and stakeholders embrace a “culture of release,” where release or detention decisions are based on risk rather than financial resource. Ms. Miyashiro noted that defendants should be provided timely hearings represented by legal counsel. She also notes that risk should be assessed by an objective tool like the PTR, utilizing individualized information following a pretrial interview focusing not on the charged offense, but the characteristics of the defendant. She further suggests that once release is ordered, the defendant’s level of supervision should remain commensurate with the defendant’s risk level and risk should be managed with treatment resources and the use of monitoring technology.

## 2. Diversion Alternatives Initiated in Partnership with Law Enforcement

The September 2017 plenary session included speakers from diversion projects recently initiated by Honolulu law enforcement through a partnership with community stakeholders and service agencies.

### a) HELP Initiative

Lt. Michael Lambert introduced HPD’s newly-formed HELP initiative, which is committed to responsibly facilitating resources through partnerships and unified strategies that are focused on providing improved services to Honolulu’s at-risk homeless community. The acronym HELP encapsulates the initiative’s goals as follows:

H-Health:	Providing services that improve the response to the physical, mental, and emotional needs of Honolulu’s at-risk homeless population.
E-Efficiency:	Utilizing practices and procedures that reduce redundancy in order to provide quicker access to resources and assistance.
L-Long-Term:	Creating meaningful interactions that foster trust between the at-risk homeless community and HPD in concert with service providers in order to offer long-term solutions to recurring circumstances.
P-Partnerships:	Building professional partnerships with associated services and participants that will benefit all members of the community.

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<sup>180</sup> Figures do not include defendants with “illegal alien” status.

HELP's goals include reducing instances of arrest by intervening with at-risk homeless individuals before extreme circumstances arise by identifying at-risk homeless individuals in a timely manner through information sharing. Next, HELP hopes to reduce the residentially-challenged population by offering and providing services in a timely manner and placing them into appropriate housing options. Further, HELP intends to train HPD personnel on social service options and referral strategies that are delivered in a manner that builds trust between the at-risk community and HPD. Finally, HELP strives to improve information sharing between service providers by creating an online database to track at-risk individuals among participating organizations. Ultimately, HELP seeks to reduce recidivism of chronic arrestees and the mentally ill within the homeless population.

b) LEAD Initiative

Heather Lusk, MSW, Executive Director of the CHOW Project, introduced the recently proposed Law Enforcement Assisted Diversion Project ("LEAD"), which is tasked to "improve public safety and public order, and to reduce the criminal behavior of people who participate in the program." LEAD is a community-based diversion program for people whose criminal activity is due to behavioral health issues. LEAD has been established and found successful in Seattle, Santa Fe, and Albany, and is now a pilot program centered in the Chinatown, Honolulu area. In practice, a criminal suspect for low-level drug or status offenses (e.g., criminal trespass, park closure, liquor in public, etc.) who comes into contact with HPD would be offered a referral to LEAD instead of being arrested. The LEAD social worker would then refer the client to social services, health care, housing, and mental health and substance abuse services.

3. Information from the Department of Public Safety

a) Pretrial Bail Reports

Also at the September 2017 plenary session, Dane Uemura of the State of Hawai'i Department of Public Safety ("DPS") Intake Service Center ("ISC"), provided an overview of the Pretrial Bail Report process. At the outset, the purpose of a bail report is to provide the court with: (1) objective, verified, and relevant factual information on the defendant in a timely manner; (2) an assessment of whether the defendant, if released, will appear in court as required or pose a danger to the safety of any other person or the community; and (3) a recommendation as to whether the defendant should be released or detained. Bail reports should be completed and submitted to the court before the defendant's first arraignment appearance.

Bail reports provide the court with accurate information about the defendant's current situation and background. Information contained in a bail report include: the nature of the offense, current custody status, last residence, employment, health concerns, and criminal record. If supervised release is requested, ISC will verify information regarding the proposed sponsor or program as available.

Bail reports will include an assessment of the defendant's risk of non-appearance and recidivism and a recommendation as to release. The ORAS-PAT is used by ISC staff to assess defendant's risk of non-appearance or recidivism. Bail report standards are applied in a progressive manner, from least restrictive to most restrictive, and recommendations are made respective to the scored risk level. "Overrides" of risk levels are made on a case-by-case basis. An "override" is a risk level assignment of a defendant other than that determined by the ORAS PAT based on additional documented information presented by the assessor.

Bail Report recommendations are limited to the following:

- (1) OWN RECOGNIZANCE: Least restrictive type of release. Defendant is released pending trial on the promise to appear in court when required. There are no conditions attached to this type of release.
- (2) SUPERVISED RELEASE: Defendant must comply with conditions set by the court. Conditions are supervised by a monitoring agency, typically ISC.
- (3) SUPERVISED RELEASE TO SPONSOR: Defendant is released to a third party “sponsor” who usually provides residence and monitors court-ordered conditions.
- (4) SUPERVISED RELEASE TO PROGRAM: Defendant is released to a program that provides services to address specific risk factors, such as substance abuse or mental health concerns.
- (5) NO RELEASE
- (6) NO RECOMMENDATION

Should release be recommended, ISC will provide a recommended list of release conditions appropriate for the defendant.

b) Statistics from the Hawai'i Department of Public Safety

DPS regularly compiles statistics regarding pretrial detainees at any given time. Pretrial detainees are inmates in the custody of DPS who await adjudication or sentencing for criminal offenses.

In September 2017, DPS Research Statistician George R. King, Ph.D. presented the Task Force with a statistical overview of the incarcerated pretrial population. DPS has continued to provide updated data to the Task Force. This information assists the Task Force in determining who is incarcerated, where they are incarcerated, how long they are incarcerated, and the general characteristics of the detained population. DPS statistics further reveal an overall landscape of ORAS-PAT results, as well as how pretrial detainees are eventually released.

In March 2018, DPS recorded the following numbers of pretrial detainees statewide:

Pretrial Felons	925
Pretrial Misdemeanants	112
Pretrial Petty Misdemeanants	4
Total	1,041

The 1,041 pretrial population represented 18.5 percent of the overall incarcerated population of 5,619 inmates.<sup>181</sup>

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<sup>181</sup> Although the ACLU reports that “[a]round half of the people in Hawaii’s jails have not been convicted of a crime”, this percentage may not take into account pretrial defendants who may be held for new offenses, along

For the calendar year 2017, DPS has provided statistics regarding the length of time pretrial defendants tended to remain incarcerated:

Statewide Length of Stay (days)			
Custody Status	Number of Inmates	Mean	Median
Pretrial Felon	2321	69.7	29
Pretrial Misdemeanant	1799	20.6	8
Pretrial Petty Misdemeanant	81	24.5	18

Significantly, and especially when pertaining to defendants' length of pretrial detention, **medians** (rather than **means**, or averages) are more representative of the actual population because the data is not normally distributed. More specifically, there is a small number of pretrial defendants (many who have mental health concerns and await mental health examinations prior to adjudication) who are subject to longer periods of detention. For example, the average length of stay for the 225 individuals who were eventually transferred to the Hawai'i State Hospital (presumably due to mental health concerns) in 2017 is 92 days, much longer than the length of stays for the general population. This population of defendants awaiting mental health examinations tends to skew and increase the **mean** (or average) length of stay in the detention facility.<sup>182</sup>

To address the issue of how long pretrial defendants tend to remain in custody, statistics from the 2017 calendar year show the median length of pretrial incarceration in Hawai'i was 29 days for those charged with felony offenses, 8 days for those charged with misdemeanor offenses, and 18 days for those charged with petty misdemeanor offenses. These statistics suggest that Hawai'i has made marked improvements in recent years to reduce the median length of stay for pretrial offenders. For example, between June 2011 and January 2012, the Council of State Governments Justice Center reported that pretrial releases took, on average, three months.<sup>183</sup> While this improvement is believed to be correlated to the integration

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with other pending adjudications – such as probation and parole violations, immigration detainers, etc. – which provide independent bases for detention.

<sup>182</sup> Similarly, United States Census data reports U.S. household incomes in medians, rather than averages/means, because the relatively few households with tremendous wealth skew the perception of income.

<sup>183</sup> The Council of State Governments Justice Center, *Justice Reinvestment in Hawai'i: Analyses & Policy Options to Reduce Spending on Corrections & Reinvest in Strategies to Increase Public Safety* (Aug. 2014) at 4 (footnote 12,

of evidence-based pretrial risk assessments mandated by JRI initiatives in 2012, more data and study are needed.

The 2017 length of stay statistics may further be broken down by Circuit, demonstrating shorter periods of pretrial detention for defendants on Hawai'i Island and Maui, in comparison with Kaua'i, and to a greater extent, O'ahu:

Facility	Facility Length of Stay (days)			
	Custody Status	Number of Inmates	Mean	Median
HCCC	Pretrial Felon	344	36.3	9
	Pretrial Misdemeanant	317	17.6	7
	Pretrial Petty Misdemeanant	74	22.8	16.5
KCCC	Pretrial Felon	230	64.6	24.5
	Pretrial Misdemeanant	206	32.7	22.5
MCCC	Pretrial Felon	549	47.8	9
	Pretrial Misdemeanant	158	16.6	4
OCCC	Pretrial Felon	1195	89.8	50
	Pretrial Misdemeanant	1117	19.7	8
	Pretrial Petty Misdemeanant	7	42.1	42

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citing CSG Justice Center analysis of Hawaii Department of Public Safety FY2006-FY2011 annual release population data.)



Median lengths of stay may also be broken down by the class of crime charged.<sup>184</sup>

Custody Status	Crime Class	Number Releases	Mean	Median
Pretrial Felon	All Other	681	66	27
	Drug Paraphernalia	175	71	25
	Major Violent	17	405	136
	Missing	4	0	0
	Other Violent	268	75	35
	Property	787	66	36
	Revocation	28	70	34
	Robbery	66	106	69
	Serious Drug	303	64	21
	Sexual Assault	45	100	20
Pretrial Misdemeanant	All Other	1281	20	8
	Drug Paraphernalia	1	137	137
	Missing	6	1	0
	Other Violent	208	20	9
	Property	317	20	8
	Revocation	23	26	14
	Serious Drug	13	16	8
	Sexual Assault	34	43	20

All pretrial detention facilities throughout the State are housing inmates at numbers well over their intended design and operational capacities. In particular, neighbor island facilities are dealing with higher occupancy rates:

DEPARTMENT OF PUBLIC SAFETY - CORRECTIONS DIVISION				
Current Capacities, Head Counts, and Occupancy Rates by Facility				
	As of:	March 12, 2018		
	Design Capacity	Operational Capacity	Inmate Head Count	Occupancy Rate (% of Capacity)
HCCC	206	226	417	184.5%
SNF	90	132	107	81.1%
HMSF	496	992	642	64.7%
KCCC	110	128	197	153.9%
KCF	200	200	132	66.0%
MCCC	209	301	480	159.5%
OCCC	628	954	1215	127.4%
WCCC	258	260	240	92.3%
WCF	294	334	290	86.8%
<b>Total</b>	<b>2,491</b>	<b>3,527</b>	<b>3,720</b>	<b>105.5%</b>

<sup>184</sup> If a defendant is charged with multiple types of offenses, the crime class is determined by the first offense charged. Generally, the first offense charged tends to be the most serious offense charged.

DPS statistics offer a portrait of the detained pretrial population. Self-reported data regarding a pretrial detainee's ethnicity illustrates the ethnic make-up of the pretrial population:

Ethnicity		Custody Status			Custody Status		
		Pretrial Felon	Pretrial Misdemeanant		Pretrial Felon	Pretrial Misdemeanant	
American Indian	Frequency	10	10	Percentage	0.37	0.54	
African American	Frequency	109	95	Percentage	4.01	5.09	
Caucasian	Frequency	733	576	Percentage	26.98	30.85	
Chinese	Frequency	23	20	Percentage	0.85	1.07	
Filipino	Frequency	289	173	Percentage	10.64	9.27	
Guam\Pac Isl	Frequency	22	31	Percentage	0.81	1.66	
Hawn\pt.Hawn	Frequency	896	518	Percentage	32.98	27.75	
Hispanic	Frequency	58	40	Percentage	2.13	2.14	
Japanese	Frequency	82	68	Percentage	3.02	3.64	
Korean	Frequency	31	20	Percentage	1.14	1.07	
Samoan	Frequency	110	60	Percentage	4.05	3.21	
Other	Frequency	90	53	Percentage	3.31	2.84	
Unknown	Frequency	264	203	Percentage	9.72	10.87	

Further, statistics show that approximately 15 percent of the pretrial population held at the pretrial correctional facilities report mental health concerns. Approximately 60 percent of the total incarcerated population (both pretrial and post-conviction) do not have a high school diploma or GED equivalent.

The cost of incarceration is significant. For the fiscal year 2017, DPS has noted the cost of incarcerating the entire population of inmates, both pretrial and post-conviction, was \$278,461,227. While DPS does not separate costs based on a detainees' status, the approximate operational cost for the four Community Correctional Centers, where most pretrial detainees are held, was \$132 million for fiscal year 2017. The daily cost of incarcerating a pretrial defendant (or any inmate) in Hawai'i is \$170 per day.

DPS also monitors statistics on its use of the ORAS-PAT risk assessment tool. First, DPS data portrays an overall picture of ORAS-PAT results, based on percentage of high, moderate or low risk levels. These statistics from 2014-2017 show that approximately 88 percent of defendants assessed with the ORAS-PAT scored in the moderate or high risk levels while only 11 percent scored in the low risk level:

CY	Initial Level				Total
	Blank	Low	Moderate	High	
2014	54	405	1603	1508	3570
2015	105	1064	4174	4347	9690
2016	100	995	3909	3792	8796
2017	95	859	3443	3832	8229
Total	354	3323	13129	13479	30285

DPS reports that 22 percent of the time, numerical risk assessment figures are overridden by Intake staff to increase recommendations for detention:

CY	Override Level				Total
	Blank	Low	Moderate	High	
2014	8	355	1180	2027	3570
2015	32	713	3525	5420	9690
2016	12	677	3201	4906	8796
2017	10	428	2762	5029	8229
Total	62	2173	10668	17382	30285

CY	Direction of Override Change			Total
	Up	Down	None	
2014	735	144	2691	3570
2015	1709	240	7741	9690
2016	1723	245	6828	8796
2017	1761	90	6378	8229
Total	5928	719	23638	30285

DPS further monitors the avenues through which pretrial defendants are released from its facilities:

Release Disposition	Custody Status		Total
	Pretrial Felon	Pretrial Misdemeanant	
Discharged	58	33	91
Acquitted	11	1	12
Cash Bail	200	374	574
Secured Bond	827	261	1088
Conditional Release	2	1	3
Dismissed	75	75	150
Nolle Prosequi	7	5	12
Probation	121	152	273
Administrative Release	15	14	29
Hawaii State Hospital	91	134	225
Release on Own Recognizance	232	134	366
Released to Appear	26	182	208
Released to Other Jurisdiction	10	4	14
Supervised Release	311	82	393
Supervised Release to Program	230	2	232
Supervised Release to Sponsor	113	1	114
Suspended Sentence	0	2	2
Time Served	43	425	468

Statistical data illustrates that too many pretrial defendants are being detained for too long, held in facilities that are well over capacity and at significant financial cost to taxpayers. The need for reform is clear.

#### 4. Overview of National Research and Trends

##### a) National Institute of Corrections

At its inception, the Task Force extensively reviewed the history of bail and national research shaping pretrial processes. The Task Force benefitted from the assistance, insight, and guidance of experts at the National Institute of Corrections. Lori Eville, NIC national expert, discussed the historical course that pretrial release has taken to arrive at present-day conceptions of bail and release. The Task Force was reminded that the goal of a pretrial system should be to maximize: (1) court appearance; (2) public safety; and (3) release. More specifically, the purpose of setting bail is to release the defendant, a determination of no bail is made to detain the defendant, and courts must not use bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot pay for their release.

Ms. Eville emphasized that an effective pretrial system first requires the proper legal foundation, including:

1. A presumption of nonfinancial release on the least restrictive conditions necessary to ensure future court appearances and public safety;
2. Prohibition or restrictions on the use of secured financial conditions of release; and
3. Provisions for detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety.

Ms. Eville set forth the following necessary elements for an effective pretrial system:

1. At the initial police contact, there is an array of release options available following or in lieu of arrest. High functioning jurisdictions use citation releases or summons procedures for non-violent offenses when the individual's identity is confirmed and no factors suggest that the individual may be a risk to the community or will miss an upcoming court date;
2. Experienced prosecutors screen criminal cases expeditiously before initial appearance. Early case screening allows for appropriate charging or timely dismissal as well as early diversion or problem-solving court eligibility determinations;
3. Defense counsel is engaged at first appearance. Defense counsel may use assessments to aid in bail arguments at the initial appearance, offering rebuttal presumptions where appropriate;

4. A collaborative group of stakeholders employs evidence-based decision making to ensure an effective functioning system; and
5. A dedicated Pretrial Services Agency ensures that administration of essential functions occurs under a single organizational goal with trained and coordinated functions.

Finally, Ms. Eville drew from her experience working with similar groups and successful reform efforts across the nation, and assisted the Task Force in mapping the pretrial process in several distinct phases. Ultimately, each phase of the pretrial process presented a potential subcommittee designation. For each pretrial phase, the Task Force: (1) researched all applicable laws and regulations; (2) investigated and reported on current practices; (3) investigated best practices from other jurisdictions; (4) recommended possible alternatives for reform; and (5) established metrics to measure successful application.

#### b) Kentucky Pretrial Services

On the state level, Tara Blair, Executive Officer of Kentucky Pretrial Services, shared her expertise with risk assessment tools. She emphasized that the goals of the pretrial process are to: (1) keep the right defendants in; (2) get the right defendants out; (3) get the defendants to court; and (4) keep the public safe. Ms. Blair noted that while risk is inherent in the pretrial release process, the key is to measure and manage that risk. Evidence-based practices should be embedded in the risk assessment process. For a jurisdiction considering the validity of a risk assessment instrument, the following elements are essential:

1. The instrument should be validated through research to predict risk of failure and re-arrest pending trial;
2. The instrument should equitably classify defendants regardless of their race, ethnicity, gender, or financial status;
3. Factors used in the instrument should be consistent with applicable state statutes; and
4. Factors used in the instrument should be limited to those related either to risk of failure to appear or danger to the community pending trial.

Kentucky uses the risk assessment tool created by the Laura and John Arnold Foundation (“LJAF”) following the compilation of the largest and most comprehensive database of pretrial risk assessment information. The LJAF tool uses a total of nine risk factors, readily obtainable from criminal history and other administrative data, independent of an interview with a defendant:

1. Current offense involves violence;
2. Age at the time of arrest;
3. Any pending charges at the time of arrest;
4. Any prior misdemeanor convictions;
5. Any prior felony convictions;

6. Failure to appear in the past twenty-four (24) months;
7. Failure to appear more than 24 months ago;
8. Prior convictions for a violent offense; and
9. Prior sentence of incarceration.

Moreover, the LJAF tool generates separate scores for different types of risk. For example, the LJAF tool generates one score to predict a defendant's risk of new criminal activity,<sup>185</sup> a separate score to predict a defendant's risk of failing to appear at court,<sup>186</sup> and yet another score to assess a defendant's risk of new violent criminal activity.<sup>187</sup> Ms. Blair noted that interview-dependent risk factors used in Hawai'i, such as employment and residence, were tested by the LJAF and found not to increase the predictiveness of the risk assessment when added to the existing nine factors.

Using the above risk assessment factors, Kentucky pretrial services achieved an overall release rate of all defendants (June 2014 through July 2017) of 66 percent.<sup>188</sup> Of those released, 92 percent were not arrested for new offenses during the pretrial phase,<sup>189</sup> and 83 percent appeared at court hearings.<sup>190</sup>

## 5. Public Testimony

Striving to obtain different perspectives and views on issues related to criminal pretrial practices and procedures, the Task Force solicited input from a broad range of stakeholders. On October 13, 2017, the Task Force held a public meeting to receive testimony from individuals and interested organizations. A press release was issued beforehand to publicize the meeting and maximize participation. The public was given the option of providing live or written testimony and the Task Force benefitted from the active and abundant participation of the community. Representatives from numerous organizations testified, including the Community Alliance on Prisons, Domestic Violence Action Center, ACLU of Hawai'i, Professional Bail Agents of the United States, A-1 Bail Bonds, Amnesty International – Hawai'i Chapter, as well as individual members of the public. *Appendix B*, attached hereto, provides a list of the individuals and organizations that testified in-person, and a compilation of the written testimony submitted.

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<sup>185</sup> Six factors are predictive of increased rates of new criminal activity: (1) pending charge at the time of arrest; (2) prior misdemeanor conviction; (3) prior felony conviction; (4) prior sentence to incarceration; (5) prior violent conviction; (6) failure to appear in past 24 months.

<sup>186</sup> Four factors are predictive of increased failure to appear rates: (1) pending charge at time of arrest; (2) failure to appear in past 24 months; (3) failure to appear more than 24 months ago; and (4) any prior conviction.

<sup>187</sup> Five factors are predictive of increased rates of new violent criminal activity: (1) prior violent conviction; (2) current violent charge; (3) current violent charge and defendant under 21 years of age; (4) pending charge at time of arrest; and (5) any prior conviction.

<sup>188</sup> In Kentucky, 81 percent of low risk defendants, 61 percent of moderate risk defendants and 41 percent of high risk defendants are released.

<sup>189</sup> In Kentucky, 95 percent of low risk defendants, 91 percent of moderate risk defendants and 86 percent of high risk defendants released are not re-arrested during the pretrial phase.

<sup>190</sup> In Kentucky, 90 percent of low risk defendants, 79 percent of moderate risk defendants, and 71 percent of high risk defendants appear at all court dates during the pretrial phase.

## B. Current State of Pretrial Practice in Hawai'i

Following the presentation of research and trends from local and national experts and testimony from public hearing participants, the Task Force divided into six subcommittees, each assigned to a distinct phase of the pretrial process. Subcommittee chairs were assigned as follows:

1. Arrest and Booking  
Chair: Chief Susan Ballard
2. Prosecutorial Decision-Making  
Chair: Justin Kollar, Esq.
3. Jail Screening / Intake Assessment  
Chair: Judge Rhonda Loo
4. Initial Appearance/Defense Counsel  
Chair: William Bagasol, Esq.
5. Judicial Decision-Making  
Chair: Judge Rom Trader
6. Pretrial Services  
Chair: Judge Greg Nakamura

*Appendix C*, attached hereto, lists the subcommittee rosters, meeting dates, authorities cited, organizations consulted, and other information.

The subcommittees were first tasked to investigate, and report in plenary session, current practices for each phase of the pretrial process. The following is a summary of the findings.

### 1. Arrest and Booking Process

Much thought and consideration goes into the decision of whether to arrest, as not every police-citizen contact warrants or results in arrest. Under certain circumstances, officers may counsel without citation or arrest, cite instead of arrest, or refer individuals to diversion programs, if available, applicable, and appropriate.<sup>191</sup>

Because the initial contact between police officers and suspects occurs for a number of reasons and under a variety of circumstances, the type of case, the facts and circumstances of the situation, the existence of evidence establishing probable cause, and department policies and procedures significantly impact the direction of the case and the decisions of the officer. When evaluating the "type of case," officers consider, among other things, the grade and nature of the offense. A non-criminal traffic violation is handled differently than a misdemeanor

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<sup>191</sup> Currently, there are few diversion programs available and they vary from island to island. Such programs are community-driven and require significant coordination and monitoring. For example, the Honolulu Police Department is involved in the Law Enforcement Assisted Diversion (LEAD) project, a community-based pre-arrest diversion program for people whose criminal activity is due to behavioral health issues.

trespass case, a petty misdemeanor disorderly conduct case is handled differently than a felony assault case, and crimes involving violence are handled differently than property-related crimes.

Statutes, court rules and policies also dictate the handling of cases. For example, HRS § 803-6(b) enumerates factors that an officer must be reasonably satisfied are met when considering whether to issue a citation or arrest when dealing with a misdemeanor, petty misdemeanor, or violation.<sup>192</sup> And while officers have discretion in a number of situations,<sup>193</sup> the decision to arrest, cite or divert may be beyond their control completely. For example, by law and court rules, citations are not an option when dealing with felony offenses.

Officers do not unilaterally decide whether to arrest. Sergeants and supervisors are consulted prior to or shortly after effecting an arrest to ensure that sufficient evidence exists to meet the elements of the offense establishing probable cause for the arrest. In some jurisdictions, a second review of the facts and circumstances supporting the arrest is conducted by a lieutenant before the suspect is accepted and processed by the receiving desk.

Once the decision to arrest is made and the arrest is effected, arrestees are transported to central locations where they are booked and processed (e.g., finger printed, mug shots taken, identification verified, etc.). At the time an arrestee is booked and processed, limited information about the individual's background and present economic situation is available to police. In order to preserve and protect the arrestee's constitutional right against self-incrimination, police limit their questioning of arrestees and focus solely on obtaining information to facilitate the booking. Once that is complete, arrestees for offenses other than felonies may post bail and be released.

Bail amounts for misdemeanors, petty misdemeanors, and criminal violations are set by the chief of police of the respective county police department, while bail amounts for felony offenses are set by judges.<sup>194</sup> In the interest of providing arrestees an opportunity to be

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<sup>192</sup> HRS § 803-6(b) states:

- (b) In any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor or violation, the police officer may, but need not, issue a citation in lieu of the requirements of [subsection] (a), if the police officer finds and is reasonably satisfied that the person:
  - (1) Will appear in court at the time designated;
  - (2) Has no outstanding arrest warrants which would justify the person's detention or give indication that the person might fail to appear in court; and
  - (3) That the offense is of such nature that there will be no further police contact on or about the date in question, or in the immediate future.

<sup>193</sup> Every county police department in the State of Hawaii has a Policy or General Order providing for officer discretion and/or alternatives to arrest.

<sup>194</sup> HRS § 804-5 provides:

In cases where the punishment for the offense charged may be imprisonment for life not subject to parole, or imprisonment for a term more than ten years with or without fine, a judge or justice of a court of record, including a district judge, shall be competent to admit the accused to bail, in conformity with sections 804-3 to 804-6. In all other cases, the accused may be so admitted to bail by any judge or justice of a court of record, including a district judge, and in cases, except under section 712-1207, **where the punishment for the offense charged may not exceed two years' imprisonment with or without fine, the sheriff, the sheriff's deputy, the chief of police or**



released at the earliest possible moment after charging and processing, for misdemeanors, petty misdemeanors, and criminal violations, bail amounts are generally set based on the grade of offense charged (misdemeanor, petty misdemeanor, or criminal violation),<sup>195</sup> type of offense (property crime, crime of violence, domestic violence, etc.) and criminal history of the arrestee.<sup>196</sup>

For felony offenses bail is set once a suspect is charged. Police have forty-eight hours from the time of arrest within which to release or obtain charges for the arrestee and take the arrestee before a judge.<sup>197</sup> Only county prosecutors or the Attorney General can file felony criminal charges. Detectives may release an arrestee pending investigation or seek immediate charges in conferral with prosecutors. If an arrestee is released pending investigation, no bail amount is applied. If detectives seek immediate felony charges with the prosecutor,<sup>198</sup> detectives contact the on-call judge to obtain a bail amount. Detectives provide the judge with information available at the time, including the arrestee's criminal history, current charges being sought, general facts of the current case, whether the arrestee has a local, verifiable address, and the arrestee's employment status. The bail amount issued by the judge is then affixed on the charging documents presented to the prosecutor. Once the prosecutor signs the charging documents and charges the arrestee, the detective immediately serves the suspect with the documents. At that point, the opportunity to post bail in a felony case begins. In all cases, the arrestee is then taken to court after being charged, and custody of the arrestee transfers from county police to the DPS Sheriffs Division.

During this entire process, arrestees may make arrangements to post bail. Bail may be posted from the moment the booking process is completed (which can be as short as two hours after arrest for a misdemeanor, petty misdemeanor, or criminal violation) to no more than 48 hours after an arrest for a felony offense. All county police departments are open 24 hours a

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**any person named by the chief of police**, or the sheriff of Kalawao, regardless of the circuit within which the alleged offense was committed, **may admit the accused person to bail.**

(Emphasis added.)

<sup>195</sup> Police are mandated by statute to consider, among other things, the "punishment to be inflicted on conviction" when setting bail amounts. HRS § 804-9 states:

The amount of bail rests in the discretion of the justice or judge or the officers named in section 804-5; but should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor. **In all cases, the officer letting to bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused.**

(Emphasis added.)

<sup>196</sup> Counties vary as to how bail amounts are determined for misdemeanors, petty misdemeanors, and criminal violations. Some counties rely on court suggested guidelines, while others use a set ballpark "range" based on type of offense. The bail amount would be set with consideration being given to the above factors.

<sup>197</sup> HRS § 803-9(5) provides: "It shall be unlawful in any case of arrest for examination . . . To fail, within forty-eight hours of the arrest of a person on suspicion of having committed a crime, either to release or to charge the arrested person with a crime and take the arrested person before a qualified magistrate for examination." This applies to all arrests including misdemeanors, petty misdemeanors, and criminal violations.

<sup>198</sup> Most county prosecutor offices have guidelines as to when an arrestee may be immediately charged (e.g. a person who commits a crime while on probation; persons charged with murder; etc.) If a felony arrestee does not meet immediate charge criteria, he/she is released pending investigation and prosecutors have the opportunity to bring charges against the individual at a later date via grand jury indictment, warrant of arrest, or information charging. All three vehicles result in a warrant upon the finding of probable cause that a crime has been committed and that the suspect is the one who committed the crime. Bail is then set by a judge on each warrant based on information provided by the prosecutor.

day, seven days a week and accept bail payments for any defendant in police custody at any time after bail amounts have been set. However, once a defendant is transferred to the county jail, only the Third Circuit accepts bail payments after business hours. All county police departments accept cash or bail bonds. Because of the current fee structure, credit cards are not presently accepted by some counties. Bail may be posted by the arrestee or by anyone on behalf of the arrestee. Once bail is posted, arrestees are given a specific date to appear in court<sup>199</sup> and then released. Those who are unable to post bail are taken before the court the next working day, when police turn custody of the arrestee over to the Department of Public Safety.<sup>200</sup>

## 2. Prosecutorial Decision Making

Referrals to prosecutors are made in several ways. Typically, an arrest is made by police, the arrestee posts bail, reports are submitted from police to prosecutors, and prosecutors screen the reports for charging. If the arrestee does not post bail, police prepare an expedited “48-hour packet” for submission to a judge.<sup>201</sup> That packet is reviewed by prosecutors as a courtesy and then submitted to the judge. If the judge finds probable cause sufficient to warrant a person of reasonable caution to believe that a crime has been committed, prosecutors then charge and arraign the defendant within the 48-hour time period. If the case is not accepted by the prosecutor or a judge does not find sufficient probable cause, the defendant is immediately released.

At case conferral, police provide the prosecutor with relevant known facts and circumstances. This information may include, but is not limited to:

1. Names and residency status of victims and witnesses;
2. Severity of any injuries and level of force or violence used;
3. Involvement of any weapons;
4. Involvement of illegal drugs;
5. Arrestee’s history of past interactions with law enforcement; and
6. Danger to the victim and to the community posed by the arrestee.

The prosecutor also runs Criminal Justice Information System (“CJIS”) and National Crime Information Center (“NCIC”) record checks on the arrestee to ascertain the arrestee’s criminal

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<sup>199</sup> The courts of the respective jurisdictions provide calendars for the police departments which show when court is open and closed. As a general rule, police set the date of appearance on the next court day approximately four weeks from the date of arrest. However, Family Court cases such as Abuse of a Family or Household Member are set the next court day approximately two weeks from the date of arrest.

<sup>200</sup> In some jurisdictions, judges appear at the police station to review custody statuses and bail amounts during long weekends/holidays. During this process, judges review the facts and circumstances of the arrest and either make a determination to reduce bail, release the arrestee without bail, or confirm the bail amount already set. ISC staff may also enter police cellblocks to interview arrestees and begin their pre-trial custody reports.

<sup>201</sup> HRS § 803-9(5) states: “It shall be unlawful in any case of arrest for examination . . . [t]o fail, within forty-eight hours of the arrest of a person on suspicion of having committed a crime, either to release or to charge the arrested person with a crime and take the arrested person before a qualified magistrate for examination.”

history and history of non-appearance in court, and possible criminal history in jurisdictions outside of Hawai'i.

In addition to the factors set forth above, prosecutors consider whether the case warrants immediate charging or whether additional investigation is appropriate prior to charging. Prosecutors also consider alternatives in deciding how to charge the case -- whether the case should be charged in district court and by preliminary hearing or whether the case should be initiated by information charging or by grand jury.

Some cases referred may be declined. If declined, a letter is sent to the police department with a general statement as to why the case is being declined. The prosecution file is then administratively closed. The decision to decline may be revisited or reconsidered if additional evidence or witnesses become available.

When a case is accepted for prosecution, the case is assigned to a deputy prosecutor for screening and charging. In the First and Second Circuits, the screening and charging deputy is different from the deputy who will eventually litigate and try the case. In the Third and Fifth Circuits, most cases are prosecuted vertically (i.e., the case remains with the same deputy from charging through case disposition.)

Pre-charge diversion programs available for juveniles include Teen Court in the Fifth Circuit and the Positive Optimism Intervention ("POI") Program in the Second Circuit. Post-charge diversion programs include Drug Court, Girls Court, Mental Health Court, Driving While Impaired Court and Veterans Court. The decision to divert cases into treatment court is made after a charging document has been filed and before trial, and after consultation with the diversion program administrators, prosecutors, and defense counsel.

Felony charges may be initiated by three routes:

1. Grand Jury – the prosecutor presents witness testimony and evidence to a grand jury. Following the prosecutor's presentation, the jury deliberates in private and votes as to whether to return a true bill. If a true bill is returned, the indictment is presented to a circuit court judge and the prosecutor argues for a bail amount, citing the factors enumerated above. The judge then sets a bail amount and a bench warrant issues for the defendant's arrest.
2. Information Charging – the prosecutor assembles a package of documents, including a charging document and supporting documents that include police reports and declarations setting forth sufficient evidence to establish probable cause for the charges alleged. The package is submitted to the court and a district court judge reviews the materials and decides whether probable cause exists. If the judge finds probable cause, a bail amount is set (as noted earlier in this report, the prosecutor recommends a bail amount citing the factors listed above), and a bench warrant issues

for the defendant's arrest.

3. District Court Preliminary Hearing – This method is generally used when time is of the essence and the arrestee cannot be safely released into the community and charged at a later time via grand jury or information charging. The preliminary hearing is disfavored in serious crime-against-person cases and certain other cases because, unlike grand jury and information charging, it requires the prosecutor to put on live witness testimony in front of the defendant and subjects witnesses to cross-examination by defense counsel. The preliminary hearing must commence within two days of the arraignment and plea in district court if the defendant is being held in custody. If, after the hearing, the district judge finds probable cause for the charges, the matter is bound over for trial setting in the circuit court. If the State is unable to proceed with the preliminary hearing and the defendant is in custody, then the defendant is then released on his or her own recognizance and the preliminary hearing is set within thirty days.

### 3. Jail Screening and Intake Assessment

#### a) Admission

The jail screening and intake process begins either upon admission to the community correctional center (“CCC”) while awaiting first appearance at the courthouse, or at the police cellblock. In these cases, the ISC interviews the detainees and gathers information.

#### b) Inventory and Identification

Inventory and identification are done at different points in the process in each circuit, but are generally done immediately before or after the assessments are taken at the CCC, or after admission to the CCC if the assessments have been administered at the police department, cell block, or courthouse. The detainee's property is inventoried by an intake officer. The detainee is physically searched, a photo and thumbprint are taken, and an identification wristband is generated.

#### c) Assessments

ISC social workers and human service professionals perform the initial screening functions for detainees newly admitted into a CCC facility, including:

- Misdemeanant screening for court diversion program, release alternative programs (both pretrial and sentenced)
- Pretrial risk assessment (ORAS-PAT)
- Initial security classification
- Prison Rape Elimination Act (“PREA”) screening
- Bail assessment/report

Jail intake staff perform medical and mental health screening in CCCs.

These assessments are usually administered with consent from the detainee obtained through an in-person interview, although the interview may be done over the phone. The information is validated via administrative review of records held in the Criminal Justice Information System (“CJIS”), Offendertrak, and other online criminal databases. The assessments may be conducted at the police department, courthouse, or CCCs. ISC staff receive support from DPS staff in administering various parts of the assessments and, in a few cases, adult corrections officers (“ACOs”), also under DPS, will administer the assessments for ISC staff.

In the First Circuit, a detainee accused of a misdemeanor (“misdemeanor detainee”) is assessed at cell block or the courthouse and, if deemed eligible for a release alternative, initial security classification and PREA screening are not necessary and not administered. First Circuit misdemeanor detainees who are not able to obtain release via bail or release alternative, or are not able to be assessed for any other reason at cell block or district court, complete their assessments upon admission into the CCC with the Assessment and Classification Unit of the ISC.

In the First Circuit, detainees accused of felonies (“felony detainees”) are not assessed at cell block or at district court. Their initial appearance will be at district court and thereafter, they will be transferred to circuit court, which has jurisdiction over felony cases. Given the limited information available at the early district court proceedings, some district court judges appear to defer pre-trial release decisions to the circuit court judge who will then hear the case.

In the Second Circuit, all detainees are assessed at the CCC by an ISC worker. If an ISC worker is unavailable, an ACO will conduct the assessment. Felony and misdemeanor detainees go through the same assessment process.

In the Fifth Circuit, misdemeanor and felony detainees go through the same assessment process. Kaua’i ISC’s pretrial officer conducts administrative research to support the assessments before meeting with the detainees on the arraignment calendar, then administers assessment interviews at the courthouse after arraignment.

Detainees readmitted for a probation violation are not re-screened as they are already being held on allegations of non-compliance with terms and conditions of probation.

d) Misdemeanor Detainee Screening for Court Diversion Program, Release Alternative Programs

HRS § 353-36 allows for pretrial release of certain misdemeanor detainees. Thus, all misdemeanor detainees are screened for eligibility for release upon admission. To be eligible for release, it must be established that the detainee:

- Has not been denied bail and does not have a bail set at more than \$5,000
- Has not been charged with or convicted of or is on probation or parole for a serious crime (HRS § 804-3)
- Has not been arrested or convicted for abuse of family or household members (HRS § 709-906)
- Has not been previously convicted of a violent offense

If a detainee is found to be eligible for release, the detainee's file will be identified for review and approval by the administrator of ISC, deputy director for corrections, and the DPS director.

e) Pretrial Risk Assessment and the Ohio Risk Assessment System  
Pretrial Assessment Tool

The ORAS-PAT was developed by the Center for Criminal Justice Research at the University of Cincinnati to predict a pretrial defendant's risk of failure to appear and danger to the community pending trial. The information scored is obtained through an in-person interview with each defendant. In limited situations, this may be by phone interview and averages thirty to forty-five minutes in length.

HRS § 353-10(3) requires the ORAS-PAT to be completed within three working days of arrest except for defendants for whom a risk assessment is not required as they are likely not eligible for release. Defendants for whom a risk assessment is not required include those who: (1) have detainers or holds; (2) are detained without bail; (3) have violated the conditions of their probation; (4) have had their supervised release revoked; and (5) have already had a prior pre-trial risk assessment completed.

The ORAS-PAT measures seven variables divided into three categories:

1. Criminal History (verified through CJIS or Offendertrak)
  - a. Age at first arrest
  - b. Number of failure-to-appear warrants in the past twenty-four months
  - c. Whether the detainee has had three or more prior jail incarcerations
2. Employment and residential stability (self-reported and verified via contact with family and employer)
  - a. Whether the detainee was employed at the time of most recent arrest
  - b. Residential stability
3. Drug use (self-reported)
  - a. Illegal drug use during the past six months
  - b. Severe drug use problem

The defendant is assigned a point for each of the items the defendant indicates in the positive. The cumulative score assesses the defendant's risk of non-appearance or re-arrest, and directs a recommendation on release. Recommendations are applied in a progressive manner from least to most restrictive. ISC staff may apply the score obtained, along with any override evaluations, to make a different release recommendation than that directed by the tool and score. All overrides must be justified in writing. The risk levels, recommendation options, and available overrides may be summarized as follows:

ORAS Score	Risk Level	Recommendation	Overrides
0-2 points	Low	<p align="center"><b>Release on Own Recognizance (“ROR”)</b></p>	<ul style="list-style-type: none"> <li>• ROR → Supervised Release (“SR”) <ul style="list-style-type: none"> <li>○ Current offense involves a firearm or dangerous weapon</li> <li>○ Current charge is assault or assault history in past 5 years</li> <li>○ There is another pending felony</li> <li>○ Current offense is a pending class A or B felony</li> <li>○ Pretrial supervision revocation has been initiated in the last 6 months</li> <li>○ Probation or parole supervision revoked in past 6 months</li> <li>○ Wanted in National Crime Information Center (“NCIC”), but state is not willing to extradite</li> <li>○ Other compelling reasons</li> </ul> </li> <li>• ROR → No Release (“NR”) <ul style="list-style-type: none"> <li>○ Possible life sentence for current charge</li> </ul> </li> </ul>
3-5 points	Moderate	<p><b>Supervised Release with Conditions:</b></p> <ul style="list-style-type: none"> <li>• To sponsor (when obtained or currently available)</li> <li>• To program</li> <li>• With conditions <ul style="list-style-type: none"> <li>○ Prohibition on guns/weapons</li> <li>○ Prohibition on contact with victim or witness</li> <li>○ Restriction on association with certain persons</li> <li>○ Restriction on travel or geographic movement</li> <li>○ Imposition of a curfew and/or electronic monitoring</li> <li>○ Imposition of substance abuse treatment, drug testing, or mental health treatment</li> <li>○ Requirement of employment or community service</li> <li>○ Prohibition against commission of another crime</li> <li>○ Requirement of appearance for all court proceedings</li> <li>○ Requirement to report to ISC as directed</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• SR → No Release (“NR”) <ul style="list-style-type: none"> <li>○ Qualifies to be held without bail per HRS §§ 804-3 and 804-4</li> <li>○ Possible life sentence for current charge</li> <li>○ Other compelling reasons</li> </ul> </li> <li>• SR → ROR <ul style="list-style-type: none"> <li>○ Other compelling reasons</li> </ul> </li> </ul>
6-7 points	High	<p align="center"><b>No Release</b></p>	<ul style="list-style-type: none"> <li>• NR → SR or ROR <ul style="list-style-type: none"> <li>○ Other compelling reasons</li> </ul> </li> </ul>

The ORAS-PAT was adopted for use by O'ahu ISC in 2012 as one of the best predictive tools then on the market. It was validated in 2014 by Janet Davidson, Ph.D.<sup>202</sup> At that time, Dr. Davidson recommended an additional validation be conducted in the future as she only had six months of data from which to work. DPS is currently developing a request for proposal to solicit vendors to complete a second validation.

f) Medical and Mental Health Screening

Upon admission into the CCC, trained ACO intake staff or a registered nurse with the CCC medical unit conducts a screening to identify whether detainees have special medical or mental health needs. Any positive finding or concern generates an immediate referral to the health care section for evaluation.

Detainees are generally screened for:

- Current and past history of diseases or symptoms and associated treatment/medication
- Current or past history of mental illness
- Dental problems
- Allergies
- Substance and alcohol abuse
- Gynecological problems and pregnancy

Detainees are also observed for

- Behavior
- Body deformities
- Skin conditions

Observations and screening results are documented on the medical/dental/mental health intake screening form and any positive finding generates a referral to the health care section to identify medical or mental health needs. Defendants with developmental disabilities may be referred to the education program. Otherwise, staff may recommend the defendant's assignment to the general population.

A defendant with a positive initial mental health screening receives a post-admission mental health assessment by a qualified mental health professional (e.g., physician, psychiatrist, psychologist, counselor, therapist, social worker, or nurse) within fourteen days of admission to the facility. Defendants with mental health needs may be referred to further mental health evaluation by a licensed mental health professional through a structured interview. The status of medication, suicidal ideation, drug/alcohol use, and emotional response to incarceration are also assessed.

g) Initial Security Classification

Generally, within seventy-two hours of admission into the CCC, ISC staff or ACOs review a defendant's criminal and corrections history to determine the initial recommended security classification for the defendant's housing assignment. In the Fifth Circuit, Kaua'i CCC

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<sup>202</sup> Janet T. Davidson, Ph.D., Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) On a Hawaii Pretrial Population (Aug. 2014), a copy of which is attached hereto as *Appendix D*.



completes this classification within twenty-four hours of admission, with the watch commander making the final housing determination.

h) Prison Rape Elimination Act Screening

The ISC staff, ACOs, or watch commander (in the Fifth Circuit) conduct a PREA screening within seventy-two hours of a defendant's admission into the CCC. This screening measures the risk of victimization and abusiveness through an in-person interview and administrative record review. If a defendant is deemed a potential victim or aggressor, the defendant is flagged, and the CCC warden and PREA coordinator are notified. This information is used to determine appropriate housing assignments.

i) Bail Assessment/Report

Bail assessments and reports are conducted for all eligible pretrial defendants. Bail assessments and reports are statutorily required if there is a court order or if the defendant consents to one.<sup>203</sup> There is no statutory timeframe for when the bail reports must be ordered or prepared. In the First Circuit, they are usually submitted to the court within five business days of new admissions to OCCC or, when pursuant to a motion, at least two days prior to the scheduled hearing. In the Second Circuit, bail reports are usually prepared within two days after they are requested. In the Third Circuit, the information is collected and reports are prepared when possible prior to first appearance. In the Fifth Circuit, they are usually prepared within two weeks after arraignment.

Bail reports include information to assist the judge in making a pretrial release or bail determination. This information includes:

- Instant offenses and information (charge descriptions, bail amounts, and case information)
- Defendant's identification information
- Residence information, including: length of residence, other household residents, other comments, and other previous residences (if most recent residence period is shorter than six months)
- Employment information
- Family and marital status, including contact information for family members
- Criminal record: list of convictions, number of incarcerations, age at first arrest, and number of contempt warrants in the last twenty-four months
- Comments from ISC, parole, or probation staff
- Other comments, including medical/mental health concerns, substance abuse concerns, military status, and victim/witness statement

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<sup>203</sup> Haw. Rev. Stat. § 353-10(b)(8).

#### 4. Initial Court Appearance and the Judicial Decision-Making Process

Attached as *Appendix E* is a flowchart generally summarizing the criminal pretrial process.

##### a) Misdemeanor and Petty Misdemeanor Cases

Initial appearances for arraignment and plea in misdemeanor and petty misdemeanor cases are held in the district court, generally within forty-eight hours of arrest. ISC staff generally meet with defendants held in custody, conduct a face-to-face interview, and prepare a risk assessment addressing the defendant's (1) risk of non-appearance at further court hearings and (2) risk of recidivism. The risk assessment is generated into a short-form bail report that provides the district court with a recommendation to release the defendant on his/her own recognizance, release the defendant under supervision, or not release the defendant.

Attorneys with the Office of the Public Defender generally are provided with a list of recommendations as well as the individual bail reports before they interview clients, discuss the charge, and recommend release or confirmation of bail. Bail matters are typically addressed at initial appearance in district court. Courts appear to have high regard for the recommendation of ISC, either to confirm bail or release the defendant. In district court, the majority of the recommendations do not recommend release.

Many defendants plead guilty or no contest at this early stage. For those who wish to proceed to trial, release is requested by the deputy public defender or other defense counsel. If bail is confirmed, and a defendant is held in custody on a misdemeanor or petty misdemeanor charge, expedited hearings are set. For misdemeanor cases, a jury demand is generally set within two business days. For petty misdemeanor cases, an expedited trial is generally set within three days to one week. Oral motions relating to custody/bail status may be made at these subsequent hearings. Unlike circuit court, no written motions for release are required nor filed. Jail diversion may be considered for individuals who qualify for services through the Department of Health, Adult Mental Health Division.

##### b) Felony Cases

Defendants arrested and held in custody for felony charges go before the district court for their initial appearance, generally the next business day after being taken into custody. At this initial appearance, the ISC risk assessment and bail report have not yet been prepared, and bail is generally not addressed. Defendants are held on original bail amounts. Preliminary hearings are set within two business days.

If a defendant is charged via preliminary hearing and remains in custody, the ISC's ability to prepare and provide bail reports varies by circuit. In the Third Circuit, bail reports are provided following a risk assessment and interview of the defendant. In the First and Fifth Circuits, bail reports are typically not available at the preliminary hearing. In the Second Circuit, reports are available when ordered by the court at the initial appearance.

At the preliminary hearing, if the district court judge makes a finding of probable cause and commits the defendant to the circuit court for further proceedings, district judges often defer the motions for release to be determined by circuit court judges. Once committed to circuit court and while awaiting arraignment and plea in circuit court, there is no opportunity for the custody defendant to seek court-ordered release. By court rule, this may result in a delay of as much as 14 days before the defendant's first appearance in circuit court. During the transition period

from the district court to the circuit court, no hearing is held and these offenders remain detained, unable to seek release other than posting bail or bond. This represents a lost opportunity to address bail.

Whether a case proceeds via preliminary hearing, grand jury indictment or felony information, a felony defendant held in custody will appear in circuit court for a variety of proceedings:

1. Arraignment & Plea
2. Hearings on motions, including bail motions
3. Trial Calls
4. Change of Plea / Trial
5. Sentencing

At circuit court arraignment and plea, custody defendants generally appear by video conferencing in the First and Second Circuits. Defendants appear for arraignment and plea in person in each of the other circuits. By arraignment and plea, defendants charged by complaint have been in custody for one to two weeks. Defendants charged by felony information or grand jury indictment have been in custody for as much as one week.

If a bail report is available at circuit court arraignment and plea and the report recommends that the defendant should be released on the defendant's own recognizance or on supervised release, the circuit court judge will generally grant release. However, few bail reports assess defendants as being a low-risk for non-appearance and recidivism, and, therefore, recommend release. For the majority of custody defendants assessed as either a moderate or high-risk, release is not recommended, and many remain in custody with bail confirmed. Bail motions are not always raised by defense counsel at arraignment and plea, and even when raised, may be denied or deferred to the assigned trial judge. Many felony defendants remain in custody for weeks, awaiting the assignment of public defenders and a subsequent filing and scheduling of any bail motion.

At a hearing on bail motions, the circuit court and counsel are provided with a bail report recommending release on own recognizance, supervised release, or no such release. Often bail motions are scheduled at the trial call, generally held six to eight weeks after arraignment and plea. If a bail motion is granted, defendants are most often placed on supervised release to either a program, an individual, or ISC. Release on own recognizance is rare. Bail reductions are at times granted, though without the benefit of financial information or recommendations by ISC.

Trial weeks are generally set eight to ten weeks following arraignment and plea. If a defendant is found guilty, either by a voluntary entry of a guilty or no contest plea, or by way of verdict at trial, a sentencing is generally set eight to ten weeks after the adjudication.

5. Pretrial Services
  - a) Types of Release

Based on the pretrial standards of the National Association of Pretrial Service Agencies (“NAPSA”) Standards for Pretrial Release, ISC’s release recommendations are considered on a presumption of release under the least restrictive conditions and other alternative release options. This standard is applied on a continuum from lowest level of risk to the highest level of

risk, beginning with Release on Own Recognizance to Supervised Release, Supervised Release to Sponsor/Program, No Release, and No Bail, respectively.

Pursuant to HRS § 804-7.4, a person released on bail, recognizance, supervised release, or conditional release is subject to the following general conditions:

- 1) The person shall not commit a federal, state, or local offense during the period of release;
- 2) The person shall appear for all court hearings, unless notified by the person's attorney that the person's appearance is not required; and
- 3) The person shall remain in the State of Hawai'i, unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court.<sup>204</sup>

Release on Own Recognizance is a recommendation based on the lowest level of assessed risk. A release on Own Recognizance is subject only to the General Conditions listed above.

Supervised Release, including to Sponsor and/or Program, is the release of the defendant pending trial, with the promise to appear for future court hearings, and subject to terms and conditions of release, as ordered by the court and authorized by HRS § 804-7.1. Defendants assessed as posing a moderate risk of pretrial non-appearance and/or re-arrest fall in this category. Pretrial officers recommend Special Conditions of Release that address and mitigate the risk factors identified in the bail assessment. Supervised Release to a Sponsor or Supervised Release to a Program is the granting of Supervised Release to a custodian responsible for the defendant's compliance with court-ordered conditions of release. Both types of supervised release require the responsible party to sign for the defendant's release from custody and sign the Order for Release, acknowledging understanding of their duties as the sponsor or program for the defendant.

If the defendant is granted Supervised Release to Sponsor, the sponsor agrees to (1) provide the defendant with a residence and (2) report any known violation of release to the ISC immediately. Potential sponsors must participate in a sponsor interview and are expected to fully understand the responsibilities of sponsorship prior to accepting this responsibility. They are also asked to complete and sign a sponsor application form.

A recommendation for Supervised Release to a Program is usually made if the defendant requires the structure and special services of a specific program. These types of programs typically include substance abuse treatment programs or other types of treatment programs. The program must (1) provide the defendant with a residence, (2) keep the ISC abreast of the defendant's progress in the program, and (3) report any changes in the defendant's residential and/or treatment status to the ISC, specifically the defendant's termination from the program for any reasons.

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<sup>204</sup> Haw. Rev. Stat. § 804-7.4.

Defendants assessed as posing a high risk for pretrial non-appearance and/or re-arrest are not recommended for release by ISC. If ordered to be held, the defendant will generally have a monetary bail amount set by the court. ISC does not make a recommendation relative to an appropriate bail amount. If the defendant is assessed as high-risk, the charges are of a serious nature, the defendant does not qualify to be held without bail under HRS § 804-3, and/or there is a serious concern for public safety risk for the defendant, the pretrial officer may recommend no release and special conditions to address risks, as authorized by HRS § 804-7.1. ISC tracks these cases and, if bail is posted, ISC supervises the defendant in the community and monitors court-ordered special conditions. A recommendation that a defendant be held without bail is reserved for defendants whose assessed risk level is high and who meet statutory requirements under HRS § 804-3.

#### b) Pretrial Services Provided by ISC

HRS § 353-10 requires ISC to provide supervision and control of defendants ordered under pretrial supervision by the court or the Director. The level of supervision and the frequency of monthly contacts with the defendant is specified by ISC Policy. An ISC supervisor assigns a case to a pretrial officer for supervision upon receipt of a filed court release order. Prior to the first meeting, the officer reviews the case file and bail study for identification of risk factors and background information on the defendant. At the first meeting, pretrial officers review the terms and conditions with the defendant, provide the defendant with a copy of the release order, and the ORAS-PAT is completed/updated as needed. Referrals for services are made if ordered by the court or requested by the defendant.

The most common program services are substance abuse, mental health, and anger management services. Outpatient and residential substance abuse treatment and services include the Big Island Substance Abuse Center (“BISAC”), Salvation Army, Hina Mauka, and Aloha House. Upon receiving a consent to release information, the treatment provider may communicate with the pretrial officer about assessment results, treatment confirmation and attendance, drug tests, medication compliance, and any recommendations for further services. This includes requested written documentation that the pretrial officer may require for the case file.

Conditions for curfew and/or specific prohibited areas are monitored through electronic monitoring. Pretrial officers assess the suitability of the residence for use with the electronic monitoring equipment. The installation and monitoring is provided by the ISC staff to include social service assistants, human service professionals or social workers, and pretrial services supervisors.

Reassessments of defendants may be made after three months of successful compliance under pretrial supervision. A new ORAS-PAT is then completed, and supervision levels and frequency of contacts may be adjusted accordingly. In some situations, pretrial officers are challenged to supervise a defendant in the community who has been assessed as moderate or high risk on the ORAS-PAT and recommended for special conditions of release by ISC to address risk factors, but are released by the court with no special conditions.

#### c) Revocation of Pretrial Release

HRS § 804-7.2 authorizes the ISC pretrial officer to initiate revocation proceedings against defendants who intentionally violate conditions of release.<sup>205</sup> When a defendant

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<sup>205</sup> Haw. Rev. Stat. § 804-7.2(b).

intentionally violates the terms of release, an ISC officer may file a verified application for the issuance of warrant to bring the defendant to court.<sup>206</sup> An ISC officer may file an application for a warrant of arrest when, among other reasons: (1) the defendant has left the circuit without permission, (2) the defendant was arrested and charged for a felony offense while under ISC pretrial supervision, (3) the defendant tested positive for or admitted using illegal substances or alcohol, (4) the defendant failed to report to ISC, or (5) the defendant failed to appear in court for a scheduled court hearing. Under a streamlined procedure, the ISC officer may file the application for a warrant directly with the court and need not have the application filed by the prosecutor or attorney general.

Pursuant to HRS § 804-7.3, the Court must hold a hearing on whether the defendant has violated a condition of release.<sup>207</sup> If the court finds that the defendant violated a reasonable condition imposed on release, the court may impose different or additional conditions upon defendant's release or revoke defendant's release in its entirety.<sup>208</sup>

## VIII. STRENGTHS AND WEAKNESSES OF CURRENT PRETRIAL PROCESS

### A. Strengths of the Current Pretrial System

After investigating each phase of the pretrial process, the Task Force identified established practices that support a high-functioning pretrial system.

#### 1. Efficient and Broad Exercise of Prosecutorial Discretion

Current practices established by prosecutors to aid in charging decisions have developed after decades of experience in each county prosecutor's office, and reflect the prosecutor's mission of seeking justice, not merely convictions. The current practice affords prosecutors discretion to consider a wide range of facts and circumstances in making pretrial custody and bail recommendations. It also provides great flexibility, with multiple reviews, that enable bail to be set in amounts that adequately protect the community and ensure that defendants will appear for court and remain free from new arrests. Current practices allow prosecutors, police, and courts to quickly and efficiently make pretrial custody decisions including setting bail amounts.

#### 2. Availability of Diversion Opportunities

Another highlight of the current system is the opportunity defendants have to participate in diversion programs that offer treatment and social services instead of incarceration. Two examples of these programs for defendants facing non-violent misdemeanor and petty misdemeanor offenses in district court are the Mental Health Jail Diversion program and the newly formed Community Outreach Court.

##### a) Mental Health Jail Diversion

The Department of Health ("DOH"), Adult Mental Health Division ("AMHD"), Pretrial Jail Diversion Program was established in 2002 as a pilot program representing the collaborative efforts of the Judiciary, DPS, and DOH. The program's mission is to provide time-limited mental health and substance abuse treatment services for defendants with serious and persistent

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<sup>206</sup> *Id.*

<sup>207</sup> Haw. Rev. Stat. § 804-7.3.

<sup>208</sup> *Id.*

mental illness, who may have a concurrent substance abuse disorder. The program strives to reduce criminal recidivism by diverting eligible, non-dangerous, mentally ill defendants from incarceration into appropriate levels of community mental health services. The program endeavors to balance the individual service needs of the defendant, the legal requirement of the courts, and the safety needs of the community.

Procedurally, referrals to the jail diversion program are made by ISC staff after an initial risk assessment and interview with the district court defendant. Upon receipt of the referral, jail diversion staff investigate the defendant's criminal and mental health history, assess whether the defendant suffers from a serious and persistent mental illness, and determine eligibility. If the defendant is interested, eligible, and accepted, participation in the jail diversion program is ordered as a term and condition of defendant's supervised release. Jail diversion provides intensive case management services, psychiatric treatment and assistance with housing, public assistance and entitlements and monitoring of legal encumbrances. Participation is a minimum of six months and a maximum of one year. Upon successful completion of the program, the defendant's charges are dismissed. The jail diversion program offers a pathway toward breaking the cycle of criminal recidivism, reducing the criminalization of mental illness, and engaging community resources more efficiently and economically.

#### b) Community Outreach Court

The Community Outreach Court ("COC") started in January 2017. The COC addresses the growing legal needs of the homeless community facing low level non-violent criminal and traffic charges, vehicle registration/driver's license stoppers, and bench warrants. From January 2017 to March 2018, COC resolved 789 low level non-violent cases, 433 vehicle registration/driver's license stoppers, and 133 bench warrants.

COC participation is voluntary, but the defendant must agree to faithfully appear in court, participate in social services, and complete community service work. The prosecutors, public defenders, and the court consolidate the defendant's cases, calendar a court hearing, sentence the defendant, and set a proof of compliance date. Defendants' sentences do not include imprisonment or fines. Instead, defendants are sentenced to community service and required to complete recommended treatment or services.

#### 3. A Statewide Pretrial Services Agency with Experienced, Conscientious Staff

Hawai'i benefits from a statewide pretrial service agency, the ISC. Unlike other jurisdictions that do not have a comparable agency, all ISC offices throughout the state fall under the Director of the DPS. This system helps promote uniform policies and procedures throughout the state, and helps ensure that jails and intake staff have adequate resources to fulfill their responsibilities.

Each ISC office is staffed with dedicated employees trained in conducting risk assessments and preparing bail reports with recommendations concerning detention or release, for use by court and counsel. ISC workers are conscientious and often go beyond expectations in meeting their general responsibilities. Whether going to the police cellblock early in the morning, meeting with custody defendants at court, conducting extensive criminal history checks, contacting potential sponsors, verifying employment and residence information or supervising defendants who are granted release, ISC staff often deal with staffing shortages, heavy caseloads, and stringent time constraints within which to accomplish their tasks.

#### 4. A Unified Statewide Court System

Hawai'i further benefits from a central and unified court system that is organized, trained, supervised, and operates consistently across all circuits. A unified court system is designed to help solve problems and issues that arise when courts are administratively and physically separated. In Hawai'i, all state courts are under the authority of the Chief Justice of the Hawai'i Supreme Court and are centrally administered by the Administrative Director of the Courts. This helps promote uniform policies and procedures throughout the state, and helps ensure that our courts have adequate resources to carry out their responsibilities -- in particular, fully informed, fair and efficient judicial decision-making.

A key resource to an efficient pretrial system is access to information. Judges, attorneys, litigants, and others who access the courts need relevant and timely information to ensure the judicial process is meaningful. The Judiciary has instituted a centralized electronic criminal justice information system accessible to judges, staff, attorneys, defendants, outside agencies and the public.

#### 5. Laws Supporting a High-Functioning Pretrial Justice System

Hawai'i has a statutory scheme highly compatible with a fair and safe pretrial justice system. Our laws have long recognized and required that bail be set in a manner which affords fairness and equal treatment of pretrial defendants. For instance, current laws require a defendant's bail be set at a reasonable amount and take into consideration the defendant's financial ability to pay.<sup>209</sup> Other provisions of HRS Chapter 804 also provide a framework that recognizes the right to bail and narrowly defines the circumstances when bail may be denied.<sup>210</sup> Further, current bail statutes recognize that bail may take a variety of forms other than posting a monetary amount, including release on one's own recognizance, supervised release, and the imposition of a variety of non-financial conditions.<sup>211</sup> Thus, Hawai'i's current bail scheme already provides various alternatives to money bail.

Another strength of the Hawai'i's current statutory landscape is HRS § 353-10, which requires that DPS establish an ISC in each county to "screen, evaluate, and classify" all defendants admitted into the county correctional centers.<sup>212</sup> This provision also requires ISC to "[p]rovide social-medical-psychiatric-psychological diagnostic evaluation" of such detainees,<sup>213</sup>

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<sup>209</sup> See, Haw. Rev. Stat. § 804-9 stating that the "amount of bail . . . should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, not to render the privilege useless to the poor. In all cases, the officer letting to bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused."

<sup>210</sup> Haw. Rev. Stat. § 804-3 and § 804-4.

<sup>211</sup> Haw. Rev. Stat. § 804-7.1.

<sup>212</sup> *Id.*

<sup>213</sup> Haw. Rev. Stat. § 353-10(b)(2).



and “[c]onduct internal pretrial risk assessments on adult offenders within three working days of admission to a community correctional center which shall then be provided to the court for its consideration.”<sup>214</sup> The statute clarifies that a “pretrial risk assessment” refers to “an objective, research-based, validated assessment tool that measures a defendant's risk of flight and risk of criminal conduct while on pretrial release pending adjudication.”<sup>215</sup> ISC is then required to “provide pretrial bail reports to the courts ... the defendant or defendant’s counsel ... [and] to the prosecuting attorney.”<sup>216</sup> Finally, beyond risk assessments, ISC is statutorily required to “provide continuing supervision and control of persons ordered to be placed on pretrial supervision by the court.”<sup>217</sup>

In short, Hawai‘i statutes already provide an established framework that establishes a statewide pretrial services agency with experienced staff, legally required to conduct risk assessments using a validated tool, to prepare and provide bail reports to the court and counsel, and lastly, to supervise pretrial defendants released from custody pending resolution of their case. This statutory scheme provides a solid legal foundation upon which future improvements may be made.

#### 6. Validated Risk Assessment Tool

As noted above, ISC has regularly conducted risk assessments on pretrial defendants using the ORAS-PAT since 2012 to evaluate defendants’ risk of non-appearance and risk of recidivism if released. In 2014, the ORAS-PAT was validated on the Hawai‘i pretrial population, demonstrating a scientific correlation between a defendant’s assessed risks of (1) failure to appear and (2) recidivism, with the defendant’s performance upon release. Hawai‘i’s statutory requirement for the use of a validated risk assessment tool makes clear that defendants’ risk levels must be assessed in an objective and scientifically valid manner. The risk assessment tool is intended to inform the court and the attorneys of all available information that may bear upon whether the defendant may be safely and appropriately released from custody.

#### 7. Face-to-Face Interviews with Defendants Included in the Risk Assessment Process

Hawai‘i’s current risk assessment process includes a face-to-face interview with the defendant. This helps provide relevant information about a defendant, including residence, employment, and identification of potential sponsors, identification of a possible mental health or substance abuse concern, and a defendant’s willingness to seek possible treatment as appropriate. Provided the interview process is objectively used to obtain relevant information, an interview with the defendant can be very helpful. Moreover, in a money bail system, a face-to-face interview presents an opportunity to learn about a defendant’s ability to afford bail. This information helps to determine appropriate bail amounts.

#### 8. Detention and Release Determinations Remain Largely a Judicial Decision

A significant strength of Hawai‘i’s current pretrial process is that release or detention decisions remain largely a judicial decision. When a defendant is detained and unable to post bail, due process requires a meaningful opportunity to address bail before a judge who will

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<sup>214</sup> Haw. Rev. Stat. § 353-10(b)(3).

<sup>215</sup> *Id.*

<sup>216</sup> Haw. Rev. Stat. § 353-10(b)(8)

<sup>217</sup> Haw. Rev. Stat. § 353-10(b)(7).

carefully listen and consider all relevant information. A judicial adjudication is much preferred to a process relying on the use of “algorithms” or “bail schedules” to administratively release or detain defendants. While parties may disagree with a judge’s decision, the legitimacy of the process is protected by having release and detention issues heard by a neutral decision-maker, after considering evidence, arguments, and ultimately, findings set forth before the parties.

9. Motions for Release, Especially for Misdemeanants, are Adjudicated Expeditiously

Especially at the district court level, courts are able to dispose of cases and/or release most misdemeanor, petty misdemeanor defendants at the time of initial appearance. This is largely possible because ISC interviews defendants prior to the initial appearance, at least for First and Third Circuit misdemeanor cases. Furthermore, defense counsel are available for indigent defendants held in custody at initial appearances state-wide. Even in felony cases, oral motions for release are typically allowed by the courts, particularly if there is a recommendation for release. When a written motion for release is filed, all circuits except the First Circuit typically set hearings within a week after filing of the motion.

10. After-Hours Judicial Release of Low-Risk Defendants

Our district courts have long recognized the importance and value of after-hours judicial release of low-risk defendants on weekends and holidays by assigned duty judges. This demonstrates a willingness to be proactive and develop practices that permit non-violent low risk defendants to be released from police cellblock before being transported to court. The practice permits the release of those who do not pose a significant risk of either non-appearance or committing other crimes. There are also other practices, such as conducting district court arraignments for custody misdemeanor and traffic defendants on Saturday mornings, which permit bail matters to be addressed early in the process.

B. Areas in Need of Improvement

The Task Force further discussed some of the perceived weaknesses of the current pretrial system.

1. Insufficient Alternatives to Arrest

At present, the vast majority of defendants enter the criminal justice system by virtue of an arrest by police. While this may be appropriate for most defendants, there are likely many low-risk defendants who commit less serious, non-violent offenses for whom alternatives to arrest are viable. For example, although beneficial programs exist, more could be diverted through citation or referrals to treatment and/or housing resources. If police had more options available and exercised them for low risk-defendants, fewer defendants would be arrested and detained pending resolution of their case. Treating defendants with social services and closely supervised in diversion programs would still keep the community safe.

2. Reliance on Money Bail

Our system relies upon money bail largely to the exclusion of other financially-neutral alternatives. While alternatives such as release on one’s own recognizance and supervised release are available, setting a monetary bail amount is entrenched in our system and has been used for decades as the primary means of quantifying a defendant’s perceived risks of non-appearance, danger and re-offending. This appears to be based on the premise that higher bail

amounts are imposed on defendants posing higher risks and lower amounts set for those posing lower risks.

The use of money bail as a means of managing a defendant's risk is flawed as the setting of money bail alone does not correlate with a defendant's risks of non-appearance, danger, or recidivism. While there may be some correlation between a defendant's incentive to return to court if he or she may face a financial consequence via the forfeiture of bail posted, there is virtually no correlation between the setting of a particular bail amount and whether the defendant will commit further crime or engage in violent behavior when released from custody. Thus, money bail is a poor method of assessing and managing a defendant's risks.

Finally, because financially disadvantaged populations tend to be from indigenous and marginalized communities, employing financially-based criteria for managing court appearances may result in a disproportionate number of poor and indigenous individuals being placed in pretrial detention.

### 3. Disparity Amongst the Circuits in Bail Amounts Set

The amount of bail set in a case quantifies the defendant's perceived risk of non-appearance or re-offending. The lower the risks, the lower the bail amount set. The higher the risks, the higher the bail amount set. While this practice has been in place for decades, there is inconsistency amongst the circuits in bail amounts. Generally, the neighbor island circuits set bail lower than on Oahu for the same offense. For example, typical bail for class C felonies in the First Circuit are often set at \$11,000 while in the Third Circuit it is \$2,000. There is insufficient explanation or justification for such wide disparities.

### 4. Defendant's Ability to Pay

Bail amounts are initially set by police and approved by a judge, but often are not based upon a consideration of the defendant's financial ability to afford bail. Initial bail amounts are set by police based upon guidelines correlating specific amounts with specific offenses. Prosecutors also generally recommend bail amounts based upon the accepted practice in their circuits. Bail must be set on a case-by-case basis, including an individualized assessment of a defendant's ability to pay.

To achieve this goal, information must be gathered to evaluate a defendant's financial circumstances. Current pretrial practice does not adequately delve into the defendant's financial circumstances. This is inherently unfair as a defendant's release from custody is solely based upon the defendant's ability to post a specific amount of money as bail, yet there is no requirement that a defendant's financial situation be considered in setting the bail amount. Currently, HRS § 353-10, which sets forth ISC's requirements in conducting risk assessments, does not require the gathering or provision of information about the defendant's ability to afford a particular bail amount. Given the lack of financial information, courts and counsel are impeded in considering a defendant's financial circumstances in determining bail.

### 5. Limited Hours to Post Bail

In the Third Circuit, defendants may post cash bail on a 24-hour, seven-days-a-week basis, not only while at the police station, but also after they have been charged, appeared in court, and transported to the Hawai'i Community Correctional Center. Bail is posted with the police department and notification is timely made to release the defendant from DPS custody. This option does not exist for other islands. As a result, defendants must either wait to go to

court to request release or contact a bondsman to file a surety bond with the court before they may be released.

#### 6. Inconsistent Risk Assessment and Bail Report Procedures

Inconsistencies in ISC practices among the circuits as to when risk assessments are conducted and bail reports prepared contribute to missed opportunities for addressing pretrial custody and bail early in the pretrial process. Except in the Third Circuit, bail reports are not routinely available at a defendant's initial appearance or preliminary hearing in district court, unless specifically requested, nor are they always available at the circuit court arraignment and plea. Significantly, Hawai'i law requires a **risk assessment** be completed by ISC "within three (3) working days of [defendant's] admission to a community correctional center," but the statute does not provide a time limit for **bail reports** (which are based on such risk assessments) to be provided to the court for bail adjudications.<sup>218</sup> Moreover, inconsistencies amongst the circuits regarding when bail reports are completed appear to be related to staffing levels and the volume of ISC caseloads.

#### 7. Insufficient Staffing and Facilities at ISC

ISC staffing, especially when impacted by vacancies, is inadequate to meet current demands, much less any significant increased future responsibilities consistent with a high-functioning pretrial justice system. Interviewing defendants, conducting risk assessments and preparing bail reports under tight time constraints is labor-intensive. Additionally, for defendants released on supervision, ISC staff must monitor compliance and report violations to the court. ISC personnel and resources need to be increased to ensure that all tasks are performed adequately.

#### 8. Elevated Risk Levels from the Risk Assessment Tool

While it is beneficial to have evidence-based pretrial risk assessments utilizing a validated tool for use in court, research shows that this system artificially elevates risk levels reported, which result in recommendations disfavoring release. Recommendations for release on own recognizance or supervised release tend to represent the minority of recommendations. While other jurisdictions are able to release higher percentages of pretrial defendants and experience successful with court appearance and recidivism rates, Hawai'i should be able to achieve similar results.

#### 9. Need for an Updated Validation of the Risk Assessment Tool

Although the ORAS-PAT was validated in 2014, there have been no similar recent studies to provide additional feedback as to whether the tool is working well. An updated validation study would allow us to determine whether and where changes are warranted in the risk assessment tool used, as well as in the manner in which it is administered and scored.

#### 10. Need for a Tool to Assess Risk of Violence

Currently, the ORAS-PAT assesses a defendant's risk of non-appearance and recidivism. While these risk factors are critical to any evaluation as to whether a defendant should be released, the current tool does not assess the defendant for risk of violence. This is a

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<sup>218</sup> Haw. Rev. Stat. § 353-10(b)(3) (emphasis added).

key determination necessary for both an objective evidence-based determination of risk, as well as the protection of community safety.

#### 11. Inefficiencies at Initial Appearances

Meaningful opportunities to address and decide pretrial custody and bail matters in early stages before the court are largely lacking. Bail matters are rarely addressed at defendants' first appearance, preliminary hearings, and arraignment because relevant information in the form of bail reports is not available. This leads to forgone bail motions and the deferment of bail matters to the subsequently assigned trial judge.

At present, ISC expends significant effort to conduct risk assessments and timely prepare bail reports. However, a significant practical barrier in providing the reports to the court and counsel is that ISC is not permitted to directly file bail reports into the Judiciary Information Management System ("JIMS"). JIMS does not provide non-parties to a criminal case the ability to electronically file such reports. As a result, "work around" procedures have been devised wherein ISC forwards bail reports via email or FAX to either the legal documents branch or to the court and must rely upon Judiciary staff to then upload the report into JIMS. This delay has caused the unavailability of bail reports at arraignment and plea.

Finally, delays in appointing defense counsel impedes the early filing of bail motions in felony cases. The Office of the Public Defender represents the majority of defendants who enter the criminal justice system. Each defendant must be screened for financial eligibility and conflicts which prohibit the office from representation. Especially in the First Circuit, there has been a history of delayed assignment of deputy public defenders. The defendant remains in custody while the assigned deputy files the appropriate bail motion, serves ISC with a copy of the motion, receives a bail report, and appears for the hearing on the motion. More expeditious assignment of counsel is needed.

#### 12. Insufficient Alternatives to Pretrial Detention

Once defendants are arrested and detained as a result of their inability to post bail, courts often are asked to consider alternatives such as supervised release to an individual or to a treatment program. At present, however, there are insufficient alternatives to pretrial detention (in the form of shelter and housing, substance abuse treatment programs, mental health treatment programs and clean and sober facilities). Courts are regularly asked to release defendants who have reported housing, mental health and/or substance abuse needs with no structured plan to address their risks of failing to appear or recidivate. The availability of housing and treatment options would permit more defendants to be safely released and managed in the community.

#### 13. Need for Judicial Education

Judicial education must include scientific research and evidence-based best practices consistent with a high-functioning pretrial system. Judicial decisions that protect the defendant's due process and equal protection rights are mandated by the federal and state constitutions. Ensuring judicial education on evidence-based risk assessment practices, along with other improvements in pretrial procedures, will help judges make appropriate decisions to detain or release.

IX. RECOMMENDATIONS OF THE TASK FORCE

- 1. Revise HRS § 803-6 to reinforce that police and law enforcement officers have discretion to issue citations for traffic offenses, violations, petty misdemeanor and misdemeanor offenses, instead of effecting an arrest. In addition, discretion should be broadened for officers to issue citations in lieu of arrest for appropriate non-violent Class C felonies.**

HRS § 803-6(b), should be amended as follows:

*(b) In any case in which it is lawful for a police officer to arrest a person without a warrant for a non-violent Class C felony, any misdemeanor, any petty misdemeanor or violation, the police officer may ~~[, but need not,]~~ exercise discretion and issue a citation in lieu of the requirements of [subsection] (a), if the police officer finds and is reasonably satisfied that the person:*

- (1) Will appear in court at the time designated;*
- (2) Has no outstanding arrest warrants which would justify the person's detention or give indication that the person might fail to appear in court;*
- (3) That the offense is of such nature that there will be no further police contact on or about the date in question, or in the immediate future; and*
- (4) The offense does not involve domestic violence, sexual assault, robbery, or any other offense enumerated in Chapter 707, HRS.*

The basis for this recommendation is to provide viable alternatives to arrest for low-risk defendants who have not demonstrated a risk of non-appearance in court while still protecting the public from the risk of further crime. While HRS § 803-6 already permits discretion for officers to issue citations for misdemeanors, petty misdemeanors and violations, police have been reluctant to exercise discretion. Many of these defendants could safely be diverted out of police cellblocks, county jails and courthouse holding cells without jeopardizing public safety. In addition, expanding discretion to include non-violent Class C felonies may be appropriate in certain circumstances.

Currently, no other state provides for citations to be issued for felony offenses. Alaska may be considering the expanded use of law enforcement discretion to issue citations for Class C felonies. Like Hawai'i, Alaska has a statutory provision which specifies when a law enforcement officer may issue a citation, as opposed to making an arrest. This provision requires police officers to issue citations for all violations and allows the officer to use discretion in issuing citations for misdemeanors, except that arrest is mandatory when: (1) the officer cannot ascertain the person's identity, (2) the person presents a danger to themselves or others, (3) the crime involves violence or harm to people or property, (4) the person requests to go before the court, and/or (5) the crime involves domestic violence. In those instances, the officer is required to make an arrest and take the person before a judge, who may then release them on bail.

- 2. Expand the use of diversion initiatives to (1) improve communication and coordination between law enforcement and social service agencies and (2) maximize diversion from arrest for appropriate low-risk defendants,**

**including those charged with non-violent, misdemeanor or petty misdemeanor offenses.**

The Task Force aims to provide viable alternatives to arrest for low-risk defendants while still protecting the public from the risk of further crime. This recommendation seeks to prevent the commission of future criminal acts by attempting to assist defendants in resolving systemic concerns (homelessness, substance abuse, mental health, etc.) that may have led to their contact with law enforcement. County police departments and local social service providers must work together to implement, maintain and expand the reach of diversion programs within their communities. While social issues such as homelessness and drug addiction are global, local resources and treatment options are unique to each community. State funding for the expansion of such programs, shelters and treatment centers is critical as these havens serve as an alternative to detention.

The Honolulu Police Department (“HPD”) has recently launched the afore-mentioned Health, Efficiency, Long-Term Partnerships (HELP) program. Police officers in plain clothing who partner with social service providers such as the Institute for Human Services (“IHS”), ALEA Bridge, and the Kalihi Palama Health Center are trained to build rapport with those in need of social services. Police officers are prepared to assess a defendant’s situation and needs. Rather than citing or arresting the defendant, the defendant is placed in contact with shelters and social services programs. Addressing a defendant’s concerns, in turn, serves to reduce the risk of recidivism and the potential for public harm. Studies have found that the programs such as HELP are both cost and time effective and reduce criminal justice costs in most jurisdictions.<sup>219</sup>

Similar to HELP Honolulu, is the afore-mentioned Law Enforcement Assisted Diversion (LEAD) Program. The LEAD Program is a pre-booking/pre-arrest diversion program that refers clients to social services and case management services. LEAD’s stringent screening process excludes defendants with outstanding warrants or defendants charged with violent offenses. Typical LEAD participants are those facing drug related investigations, trespass and park closure citations. A study has found that LEAD participants were 58 percent less likely to be arrested after participating in LEAD compared to control participants.<sup>220</sup> LEAD participants were 39 percent less likely to be charged with a new felony charge compared to control participants.<sup>221</sup> Researchers further concluded that LEAD participants had an 89 percent greater chance of obtaining permanent housing, 46 percent increased chance of receiving employment, and 33 percent greater chance of obtaining income/benefits.<sup>222</sup> The same researchers also found that the LEAD program is cost effective.<sup>223</sup> The average monthly cost of

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<sup>219</sup> Cowell, Broner, and Dupont, 2004, *The Cost-Effectiveness Of Criminal Justice Diversion Programs For People With Serious Mental Health Illnesses Co-Occurring With Substance Abuse: Four Case Studies*, Journal of Contemporary Criminal Justice 20:292, <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>

<sup>220</sup> Susan E. Collins, Heather S. Lonczak, and Seema L. Clifasefi, *LEAD Program Evaluation Recidivism Report* (March 27, 2015), [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf)

<sup>221</sup> *Id.*

<sup>222</sup> Seema L. Clifasefi, Heather S. Lonczak, and Susan E. Collins, *LEAD Program Evaluation: The Impact of LEAD on Housing, Employment and Income/Benefits* (March 31, 2016), [http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing\\_employment\\_evaluation\\_final.PDF](http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing_employment_evaluation_final.PDF)

<sup>223</sup> Susan E. Collins, Heather S. Lonczak, and Seema L. Clifasefi, *LEAD Program Evaluation Recidivism Report* (March 27, 2015), [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf)

the LEAD program at the inception of participation is \$899 per person which gradually reduced to \$532 per person each month.<sup>224</sup> LEAD participants show a reduction in future involvement with the criminal justice and legal system, which further reduces cost. LEAD participants had about 1.4 times fewer jail bookings, spend about 39 fewer days in jail per year, and demonstrated an 87 percent lower chance of prison incarceration.<sup>225</sup> LEAD participants demonstrated an average cost reduction of \$2,100 per person while those in the control group demonstrated an increase by \$5,961 per person.

Another diversion program in its infancy is Community Outreach Court (“COC”), a joint pilot program of the Judiciary, public defender and prosecuting attorney for the City and County of Honolulu. COC works with low risk defendants, primarily homeless persons with non-violent offenses. Prior to each community outreach court session, cases are screened by the public defender and prosecuting attorney for eligibility to resolve the defendants’ cases through the pilot program. The office of the public defender facilitates social service case worker contacts with defendants in need of services that may become part of sentencing, along with community service.<sup>226</sup> Cases can be concluded if defendants comply with court orders, perform community service and/or complete substance abuse and/or mental health treatment. The expansion of diversion programs and alternatives for case disposition, such as HELP, LEAD and COC ensures the efficient, fair and compassionate adjudication of cases while providing essential social services for those in need and reducing institutional costs as well as recidivism.

**3. Provide ISC with necessary funding, personnel, training, facilities, access, information and technical support to meet current and projected future responsibilities in conducting timely risk assessments, efficiently disseminating bail reports and supervising pretrial defendants.**

Additional funds are needed to provide ISC with sufficient resources and personnel to meet their dual responsibilities of (1) conducting timely risk assessments and preparing bail reports and (2) supervising pretrial defendants. Increased positions will allow a more efficient intake and assessment process. ISC staff interviews defendants at police stations, courthouses and correctional centers to obtain pertinent information for risk assessments. Once a defendant is released on conditions, ISC staff monitors the defendant’s compliance with such conditions. DPS and ISC should be consulted and asked to prepare an estimate of resources required to comply with current demand, as well as any potential future demands which may be triggered by other recommendations herein, including a new proposal for the timely preparation of bail reports within two working days.

Further, HPD, the Judiciary and DPS should also consider extending ISC access to detained defendants early in the pretrial process. Hours of access to defendants held in HPD cell block or Judiciary cell block should be expanded so that ISC staff may begin the interview and intake process as soon as possible. HPD, the Judiciary and DPS should further provide dedicated space for ISC staff to interview defendants and administer the risk assessment tool, as well as work space to complete and file written bail reports. Reducing the amount of time ISC staff spend traveling between police departments, courthouses, correctional facilities, and their separate offices would allow staff to more efficiently administer assessments and timely complete and disseminate bail reports in a timely manner.

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> The Judiciary, State of Hawai‘i, *A Report on the Community Outreach Court*, Dec. 2017.

[http://www.courts.state.hi.us/wp-content/uploads/2016/03/Community-Court\\_final-report-2018.pdf](http://www.courts.state.hi.us/wp-content/uploads/2016/03/Community-Court_final-report-2018.pdf)



Finally, ISC must have the authority and capability to electronically file bail reports in the Judiciary Electronic Filing Systems (“JEFS”). Hawai‘i Electronic Filing and Service Rules, including Rule 4.1, should be revised to add ISC as a “trusted party” and directly file bail reports in the Judiciary Information Management System (“JIMS”). The change will ensure the efficient dissemination of bail reports to the court and parties, so that prosecutors and defendants will be fully informed and equipped to address release and detention issues at a defendant’s initial court appearance. The Task Force recognizes that additional study of technical concerns and fiscal issues will need to be resolved.

**4. Expand attorney visiting hours and telephone time at DPS facilities to allow broad access to defendants in custody and avoid infringement of defendant’s right to counsel.**

The Task Force finds that attorneys need more time with and broader access to their clients. Attorneys have reported difficulty in visiting defendants at DPS facilities. Attorneys need access to clients to discuss matters of bail, case preparation and disposition. These recommendations will allow for more expeditious resolution of pretrial detention matters, reduce court appearances, and decrease court congestion.

Inmate visiting hours have been reduced over time. In the First Circuit, the Oahu Community Correction Center (“OCCC”) does not allow visitation after 1:00 p.m. Most court matters are held in the morning, limiting attorney visitation time. Limited attorney visitation hours are also a concern in the Second and Third Circuits. Attorney visits are scheduled by appointment and procedures for requesting an appointment has not been efficient nor consistent.

Finally, DPS has recently implemented the new “GTL” phone system. While DPS continues to work on the new system and defendants are provided an unlimited number of government or court appointed attorney calls, there has been a limitation on the length of such calls. To protect the defendant’s right to the effective assistance of counsel, time limitations should not be placed on attorney-client phone calls.

**5. Provide sufficient information and resources to all participants (courts, ISC, prosecutors, and defense attorneys) to ensure a meaningful opportunity to address bail at the defendant's initial court appearance.**

A high functioning pretrial system requires a meaningful initial court appearance, where release and detention issues can be adjudicated in a timely and substantive manner. Prior to the initial appearance, parties must be provided with sufficient information via 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 to ensure that low risk defendants are released and high risk defendants are detained.

Any well-functioning pretrial system requires the participation of key stakeholders early in the pretrial process, including the public defender. When an attorney is involved early in a case, the defendant's chances for release are increased and defendants tend to spend less time detained. Particularly in the First Circuit, defendants' stays in custody are lengthened while they await assignment of their cases to defense counsel and the filing of release motions. Case assignment must be accomplished in a more efficient manner. If this requires public defenders to be provided with additional resources, these resources should be provided.

Public defenders must determine the financial eligibility of a defendant for services prior to the defendant's initial court appearance. In New Mexico, the Office of the Public Defender employs staff at the jail whose responsibilities are limited to the determination of eligibility. Additional resources could be channeled to establish such an eligibility unit in Hawai'i.

Finally, most courtrooms in Hawai'i have very limited network access and connectivity. High-speed internet connections in court would allow prosecutors and defense counsel real-time access to JIMS/JEFS as well as departmental case management software and other databases. The legislature should provide funding to install high-speed, secure, in-court internet connections. The efficient access to information would accord the opportunity for more substantive arguments and more informed release determinations early on in the pretrial process.

**6. Provide a mechanism for courts to automatically address pretrial detention or release, without the filing of a motion, in situations where bail reports are received after the initial appearance.**

Although significant efforts are made to ensure that all parties are in receipt of the bail report (including results from the defendant's risk assessment) prior to initial arraignment at circuit court, there are times when bail reports are received after the initial appearance. In such cases, especially when the bail report recommends release, an expedited hearing should be held without requiring a filed, written motion.

In the First Circuit, bail matters are now being adjudicated at the defendant's initial arraignment, without requiring the filing of a motion. If a bail recommendation is known before the initial appearance, a bail hearing is scheduled and held. In addition, if a bail report is provided to counsel within a week after arraignment, the First Circuit arraignment court has agreed to set expedited bail hearings if the recommendation is to release the defendant. These hearings are scheduled for the next arraignment date, either on Monday or Thursday. Unless there is a conflict or a defendant privately retains counsel, the public defender automatically provides representation or makes a special appearance for most defendants for these hearings.

In the Second Circuit Court, bail hearings are set approximately two days after arraignment and plea without requiring the filing of a written motion. Similar procedures should be established statewide.

**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. As envisioned, each defendant who has been released from custody should receive a reminder of the next court date and time. Coordination would be required between the Judiciary and ISC to determine the necessary funding, as well as the notification method (phone call, text, email, etc.). The National Center for State Courts Pretrial Justice Center notes that several jurisdictions have successfully adopted similar reminder systems to reduce non-appearance.<sup>227</sup>

**8. Implement and expand alternatives to pretrial detention, including home detention and electronic monitoring, clean and sober residences, structured living facilities, treatment programs and other community-based resources.**

a. Expansion of Home Detention and Electronic Monitoring

The Task Force recommends expanding the use of home detention and electronic monitoring by the ISC as an alternative to incarceration for those who lack the finances for release on bail. HRS Chapter § 804 should be amended to include electronic monitoring and home detention as an alternative to incarceration. More specifically, legislation should be introduced requiring an assessment of cases for the feasibility of electronic monitoring and home detention. Specific criteria should be adopted for judges to assess whether a defendant's risk of non-appearance or recidivism may be mitigated by home detention and electronic monitoring. If the court rules to incarcerate a defendant, the court should provide findings as to why release on home detention or electronic monitoring is not appropriate.

b. Expansion of Residential and Treatment Programs

Certain individuals may be charged with crimes related to their inability to manage their lives because of substance abuse, mental health conditions, or homelessness. Rather than incarceration, defendants should be afforded the opportunity to obtain services and housing. When defendants have substance abuse, mental health or housing concerns that increase their risk for non-appearance and recidivism, releasing them to a structured environment decreases these risk factors. Thus, Courts are more apt to release higher risk defendants into structured environments that address any potential criminogenic factors.

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<sup>227</sup> Similar systems have been established in Coconino County (AZ), Jefferson County (CO), Lafayette Parish (LA), Reno (NV), New York City (NY), Multnomah and Yamhill Counties (OR), Philadelphia (PA), and King County (WA). See, National Center for State Courts' Pretrial Justice Center for Courts, Use of Court Date Reminder Notices to Improve Court Appearance Rates (Sept 2017): <http://www.ncsc.org/~media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx>

Generally, when conditions of release require that a defendant enter a substance abuse or mental health treatment program, the ISC relies upon the defendant's medical insurance to pay for the program. A large majority of defendants do not have access to medical insurance, resulting in limited availability of treatment programs to those in partnership with ISC.

ISC currently contracts with certain residential treatment programs, including Hina Mauka and the Salvation Army on Oahu, the Aloha House on Maui and the Big Island Substance Abuse Council in Hilo. The contracts allow only a limited number of defendants to enter residential programs. Increased funding is imperative to allow more defendants to enter residential treatment programs. ISC is in the process of requesting proposals for treatment program contracts but funding is necessary to take advantage of such alternatives.

No ISC program directly deals with the issue of homelessness. Homelessness and the reasons for homelessness contribute to crime. One strategy is to provide residential programs to homeless defendants which offer a wide range of services and keep them out of jail when they are unable to post even a nominal amount of bail. One model for this is the Mahoney Hale operated by T.J. Mahoney and Associates, servicing criminal defendants in federal court. Mahoney Hale, situated on Oahu, is a center for men and women reentering the community after a lengthy federal prison sentence. It is not a pretrial release program, although the components of Mahoney Hale program could be incorporated into a pretrial release program.

The Mahoney Hale program includes an apartment building where residents can live, cook meals and socialize. Case managers at the program provide direct services or provide referrals for housing, employment, financial assistance, social services, medical and mental health services, sober support and family reunification. Individual and group counseling are provided for substance abuse and mental health issues. Also, there is a transitional skill-building module in which the residents learn how to build healthy relationships, to increase coping skills and self-esteem, develop computer competency and gain job searching skills.

Another model is the Homeless Release Project ("HRP") in San Francisco. The project first started as an outgrowth of a Supervised Misdemeanor Release Program ("SMRP"). The SMRP was implemented by The Center for Juvenile and Criminal Justice ("CJCJ"), a non-profit organization. The SMRP provided for release for persons who were arrested for non-violent offense charges and given citations to appear. A concern was that homeless persons were not eligible for citation release because they did not have a local address. The HRP was developed to address this concern. Under the HRP, if a person is released under the SMRP, the SMRP staff arranges for temporary housing, including a hotel voucher. The HRP case manager is notified of the release and HRP staff accompanies the defendant to all court appearances. After the first court date, a more thorough needs assessment is performed. A care plan is developed. The care plan includes short and long-term goals, such as obtaining temporary or permanent housing, entering a substance abuse treatment program or obtaining medical care. The case manager spends a majority of his or her time outside of court working with clients in shelters, encampments, hotels and the streets. Clients are able to stop by at the CJCJ office for food, clothing, temporary storage and use of the office safe.

In lieu of residential programs, another option is the use of day reporting centers such as that utilized by the Seattle Municipal Court. This program applies to those who had difficulties complying with regular supervised release. Under this program, the defendant must report to the center at set times, sometime daily, until court appearances are no longer required. When the defendant reports to the center, he or she is assessed and referrals are made for social services or community support. This could include food, clothing and housing assistance as well as substance abuse treatment and employment support.

The programs discussed above are examples of pretrial release programs that, if developed, should be placed under the supervision of ISC.

**9. ISC should conduct regular reviews and surveys of 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, defendant's bail or release is rarely addressed. In order to afford the pretrial detainee greater and continuing opportunities to be released, ISC should conduct periodic reviews of the pretrial detainee's status.

HRS § 353-10, relating to ISC, should be modified to require that ISC make periodic reviews of the status of pretrial detainees in order to reassess whether a detainee should remain in custody. In addition or alternatively, DPS policies and procedures should be modified to provide for these periodic reviews and reassessments. Under this option, the ISC would make recommendations to the courts, and upon motion, the courts could determine whether or not to modify the previously issued bail order.

HRS § 353-36(a) grants the director of DPS the power to grant the "release of a misdemeanor on recognizance to prevent overcrowding when a community correctional center has reached capacity, as determined by the director." The term "misdemeanant" includes persons who are charged with a misdemeanor or petty misdemeanor. Under HRS § 353-36(c), the "authority to release a misdemeanor pursuant to this section is granted solely for the purpose of managing the population of the community correctional centers." If HRS §363-36(a) is used to allow a pretrial detainee's opportunity for release, it could be modified to allow for release even when the community correctional center is not at its capacity and DPS policies may be modified to require review on a periodic basis rather than only when there is change in a pretrial detainee's status.

The following recommendations pertain to the suggested amendment of HRS § 353-10 which would require the ISC to:

- 10. Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center.**
- 11. Inquire and report on the defendant's financial circumstances.**
- 12. Evaluate the defendant's risk of violence.**
- 13. Integrate victim rights by considering a victim's concerns when making pretrial release recommendations.**
- 14. Include the fully executed pretrial risk assessment as part of the bail report.**
- 15. Periodically review and the further validate the risk-assessment tool to evaluate the effectiveness of the tool and the procedures associated with its administration at least every 5 years. The findings of any such review should be publically reported.**

The Task Force recommends that HRS § 353-10 be revised as follows:

**Section 353-10, HRS. Intake Service Centers.**

(a) *There shall be within the department of public safety, an intake service center for adults in each of the counties to screen, evaluate, and classify the admission of persons to community correctional centers. Each center shall be directed and managed by a manager and shall be staffed by a team of psychiatrists, social workers, technicians, and other personnel as may be necessary. The director of public safety may appoint full-time or part-time professional and clerical staff or contract for professional services.*

(b) *The centers shall:*

*(1) Provide orientation, guidance, and technical services;*

*(2) Provide social-medical-psychiatric-psychological diagnostic evaluation;*

*(3) Conduct internal pretrial risk assessments and prepare and provide a bail report to the court on adult offenders within ~~three~~ two working days of admission to a community correctional center ~~[which shall then be provided to the court for its consideration]~~; provided that this paragraph shall not apply to persons subject to county or state detainers, holds, or persons detained without bail, persons detained for probation violation, persons facing revocation of bail or supervised release, and persons who have had a pretrial risk assessment completed prior to admission to a community correctional center. For purposes of this [paragraph], “pretrial risk assessment” means an objective, research-based, validated assessment tool that measures a defendant’s risk of flight, and risk of criminal conduct, and risk of violence or harm to any person or general public while on pretrial release pending adjudication. The pretrial risk assessment tool and procedures associated with its administration shall be periodically reviewed and subject to further validation at least every 5 years to evaluate the effectiveness of the tool and the procedures associated with its administration. The findings of any such review shall be publically reported;*

*(4) Provide correctional prescription program planning and security classification;*

*(5) Provide other personal and correctional services as needed for both detained and committed persons;*

*(6) Monitor and record the progress of persons assigned to correctional facilities who undergo further treatment or who participate in prescribed correctional programs;*

(7) Provide continuing supervision and control of persons ordered to be placed on pretrial supervision by the court and persons ordered by the director; and

(8) Make inquiry with the defendant concerning their financial circumstances and report any information in the bail report;

([8] 9) Provide pretrial bail reports within 2 working days to the courts on adult offenders that are consented to by the defendant or that are ordered by the court. A complete copy of the executed pretrial risk assessment delineating the scored items, the total score, any administrative scoring overrides applied and written explanations for administrative scoring overrides, shall be included in the report. The pretrial bail reports shall be confidential and shall not be deemed to be public records. A copy of a pretrial bail report shall be provided only:

(A) To the defendant or defendant's counsel;

(B) To the prosecuting attorney;

(C) To the department of public safety;

(D) To any psychiatrist, psychologist, or other treatment practitioner who is treating the defendant pursuant to a court order;

(E) Upon request, to the adult client services branch; and

(F) In accordance with applicable laws, persons, or entities doing research.

The basis for these recommendations is to improve clarity and consistency in our current system.

Recommendation 10 would revise HRS § 353-10(b)(3) to require ISC to conduct risk assessments within two (2) working days rather than the three (3) days currently required. Additionally, the current version of HRS § 353-10(b)(8) would be revised to require ISC to include the risk assessment and provide a bail report to the court within two (2) working days.

For felony defendants who are arrested and charged via complaint and preliminary hearing, this two (2) day requirement is key. When a defendant is arrested, Hawai'i Rules of Penal Procedure Rule 5(c)(3) requires the district court to conduct a preliminary hearing within two days after the defendant's initial appearance.<sup>228</sup> Requiring risk assessments **and** bail reports to be completed in two, rather than three, days would enable bail to be addressed at the earliest phases of the pretrial process, including at felony preliminary hearings. The current three day requirement for risk assessments (not bail reports)<sup>229</sup> forgoes this opportunity to

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<sup>228</sup> Haw. R. P. Pro. Rule 5(c)(3).

<sup>229</sup> Haw. Rev. Stat. § 353-10 requires ISC to "[c]onduct pretrial risk assessments on adult offenders within three working days of admission to a community correctional center which shall then be provided to the court for its

address bail early on. Felony defendants charged by way of preliminary hearing are relegated to wait until arraignment and plea in circuit court, which occurs generally 10 days later, for an opportunity to address bail and release.<sup>230</sup> Requiring both risk assessments and bail reports to be available one day sooner will make relevant information available earlier in the process and provide a meaningful opportunity for courts to adjudicate a defendant's release or detention.

In New Jersey, the criminal justice reform statute requires pretrial services staff to assess defendants and prepare recommendations for the court and counsel's consideration at a bail hearing held within 48 hours of the defendant's jail entry. Similarly, expediting the bail report process in Hawai'i will result in an earlier and more meaningful opportunity for a defendant to request release.

Recommendation 11 would add a new provision to HRS § 353-10(b)(8), by requiring ISC to inquire and report on a defendant's financial circumstances. As set forth fully above, federal courts have held that a defendant's financial circumstances and possible alternative release conditions must be considered prior to detention.<sup>231</sup> Hawaii's statutes also instruct all officers setting bail to "consider [not only] the punishment to be inflicted on conviction, [but also] the **pecuniary circumstances of the party accused**."<sup>232</sup> At present, little, if any, inquiry is made concerning the defendant's financial circumstances. Courts must be provided with information regarding the defendant's financial circumstances when addressing bail. Given the volume of cases and compressed time frame within which assessments must be conducted, financial information bearing upon a defendant's ability to afford bail likely would result from the defendant's self-reporting. Absent access to data bases regarding property, tax returns, income/expense statements, asset/liability filings or other sources, and due to time constraints, ISC would not be expected to conduct an in-depth investigation to verify this financial information. This recommendation would, however, provide the court with some, albeit perhaps

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consideration." There is no correlating time requirement for ISC to provide a bail report (which includes a recommendation for release or no release, based on the risk assessment) to the court.

<sup>230</sup> HRPP Rule 10(a) regarding Arraignment and Plea reads in relevant part: "A defendant who has been held by the district court to answer in circuit court shall be arraigned in circuit court within 14 days after the district court's oral order of commitment . . ."

<sup>231</sup> See, *Hernandez v. Sessions*, 872 F.3d 976, 991 (A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests. Since the government's purpose in conditioning release on the posting of a bond in a certain amount is to "provide enough incentive" for released detainees to appear in the future, we cannot understand why it would ever refuse to consider financial circumstances: the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance. Nor can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances. . . Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government's current policies fail to provide "adequate procedural protections" to ensure that detention of the class members is reasonably related to a legitimate governmental interest.); *O'Donnell v. Harris County*, 882 F.3d 528, 541 (2018) ("Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'")

<sup>232</sup> Haw. Rev. Stat. § 804-9 (emphasis added).



limited, information concerning the defendant's financial conditions to form an individualized determination of a bail amount which is fair, reasonable and comports with existing law.

Recommendation 12 would revise HRS § 353-10(b)(3) to require ISC to evaluate the defendant's risk of violence. At present, the ORAS-PAT 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 address risk of violence. Decisions to release or detain must take into account whether the defendant is a danger to a complainant or the community.

Recommendation 13 would integrate victims' rights into the pretrial system by requiring that ISC consider victims' concerns when making pretrial release recommendations. When a defendant is charged with a crime against persons (as opposed to crimes against property), particularly crimes involving domestic violence or violation of restraining orders and protective orders, the time period immediately after police intervention is a volatile and dangerous time for victims. Defendants who are charged with these offenses may be more likely to re-victimize or stalk their victims. Risk assessment processes must take these factors into consideration in order to prevent further violence. ISC should take into consideration the defendant's history of involvement with the victim (including prior police contact involving victim and arrestee), the status of their relationship, and any prior criminal history of the defendant.

Recommendation 14 would require ISC to include the fully executed pretrial risk assessment as part of the bail report. ISC and correctional center staff who administer the ORAS-PAT are allowed to employ overrides under current regulations, and these overrides frequently have the effect of increasing the restrictiveness of the release recommendations. To increase transparency, we recommend that ISC provide to judges and the parties, as part of the bail report, the completed risk assessment, including the score and written explanations of any overrides applied.

Recommendation 15 would require periodic review and the further validation of the risk-assessment tool to evaluate the effectiveness of the tool and the procedures associated with its administration at least every five years. The findings of any such review should be publicly reported.

In 2012, Hawai'i joined the ranks of these other states and began using a validated risk-assessment tool as required by HRS § 353-10. This tool, the ORAS-PAT, has been validated not only in Ohio in 2009 from where it originated, but also here in Hawai'i in 2014.<sup>233</sup> Regular validation studies of the ORAS-PAT or any other tool utilized to conduct pretrial risk assessment is vital to ensure Hawai'i is using a reliable tool and process. Pre-trial risk assessments, including the ORAS-PAT, are primarily designed to provide an objective assessment of a defendant's likelihood of failure to appear or reoffend upon pre-trial release.

However, this Task Force's investigation into the current use of the ORAS-PAT gave rise to some concern. When administered, a substantial majority of the defendants assessed under the ORAS-PAT were characterized at high or moderate risk levels, often by way of subjective overrides that tended to increase their risk scores. Although DPS policy indicates that ISC workers are required to provide written explanations for their overrides, it is unclear what form

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<sup>233</sup> See, Letessa, E.J.; Lemke, R.; Makarios, M.; Smith, P.; and C.T. Lowenkamp, *The Creation and Validation of the Ohio Risk Assessment System Final Report*, University of Cincinnati, School of Criminal Justice, Center for Criminal Justice Research (July 2009); Janet T. Davidson, Ph.D., *Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) on a Hawai'i Pretrial Population* (August 2014).

this must take, or whether the judges know about any overrides that have been applied to increase the restrictiveness of the release recommendation. These concerns raise questions about the appropriate application of the tool, and of the effectiveness of the tool itself. Further evaluation of the ORAS-PAT, beyond mere validation, is merited. This evaluation should examine the ORAS-PAT tool, the procedures associated with its administration and the manner in which such recommendations are relied upon by judges. The results of any validation study and any comprehensive evaluation of the ORAS-PAT should be reported publicly upon completion.

Finally, meaningful and sustainable improvements to the pretrial system can only be achieved when ISC is provided with sufficient additional resources and personnel to carry out its mission. Without proper resources, it is unrealistic and irresponsible to saddle ISC with significantly more responsibilities, under more stringent time constraints. The Task Force respectfully requests that the legislature give serious consideration to ISC's anticipated request for additional resources required to accomplish these new mandates.

**16. Judges should receive regular education and training concerning scientific research, evidence-based principles, risk assessments and best practices relating to criminal pretrial justice matters. This should include training concerning the risk assessment tool and the process utilized by ISC.**

A high-functioning pretrial system requires not only objective risk assessment information, but also judges who are sufficiently trained to systematically evaluate such information. Judges must be educated with the latest pretrial research, evidence-based principles and best practices. Judges must know the components of a high-functioning system, including procedures which have worked in other jurisdictions. Improvements on both fronts will go a long way toward a fairer system which maximizes the release of low-risk defendants, but also keeps the community safe.

In particular, courts rely on release recommendations made pursuant to the use of a pretrial risk assessment tool. Reforms recommended by this Task Force may warrant even greater reliance on such recommendations. Prudence would dictate that judges have a thorough understanding of the tool used, the scoring system and any overrides effectuated which may factor into the release recommendation. No risk assessment tool is infallible and courts must also be aware of the limitations of any utilized risk-assessment tool or its application.

Other jurisdictions enacting bail reforms have identified the importance of educating judges about these matters. For example, as reported in the *Maryland Daily Record* (March 12, 2018), two recent studies on the impact of new pretrial release reforms each recommended that judges be provided detailed information about risk assessments, alternatives to detention and best practices across the country. The article notes:

One of the studies, published by the Maryland Office of the Public Defender and funded by Open Society Institute, sent 64 volunteers to observe bail reviews in multiple jurisdictions last year as the rule went into effect July 1. The observers found inconsistent outcomes between jurisdictions and judges, which led to a series of recommendations to provide judges with more resources to encourage release, risk assessment tools, education for judges and the community, and bringing defendants into the courtroom rather than relying on video conferencing at bail reviews.

The other study, funded by the Prince George's County and Baltimore City NAACP chapters and conducted by graduate students from the Princeton University School of Public Health and International Affairs, made similar recommendations, though their methodology of analyzing court data differed from the first study.<sup>234</sup>

Similarly, in Ohio, recent recommended reforms have specifically included that “all of the municipal court and common pleas court judges in Cuyahoga County should attend a Judicial Summit and Training on best practices for bail and pretrial release.”<sup>235</sup>

The landscape of pretrial justice is evolving in Hawai'i and elsewhere. In our system which relies on judges to make appropriate decisions to release or detain pretrial defendants, the quality of the decisions is only as good as the information provided and the judgment and knowledge of the decision-maker. Comprehensive education on all pretrial matters is needed to ensure that judges make decisions consistent with evidence-based research and practices to maximize release of appropriate defendants without jeopardizing public safety.

The following recommendations pertain to the suggested amendment of HRS Chapter 804.

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<sup>234</sup> Heather Cobun, *Studies Conclude Cash Bail Down but Reform Still Needed*, *The Daily Record* (Maryland, March 11, 2018); <https://thedailyrecord.com/2018/03/11/bail-study-public-defender>.

<sup>235</sup> See, *Cuyahoga County Bail Task Force Report and Recommendations* (March 16, 2018) at 20.

17. **Require monetary bail to be set in reasonable amounts based upon all available information, including information concerning the defendant's financial circumstances.**

The Task Force recommends that HRS § 804-9 be revised as follows:

**804-9. Amount**

*The amount of bail rests in the discretion of the justice or judge or the officers named in section 804-5; and shall be set in reasonable amounts based upon all available information, including the offense alleged, possible punishment upon conviction and the offender's financial ability to afford bail. Bail amounts should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor. [~~In all cases, the officer letting to bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused.~~]*

This recommendation would reiterate and emphasize the legal mandate that monetary bail be set in reasonable amounts based upon all available information, including information concerning the defendant's financial circumstances. As set forth fully above, federal courts have held that a defendant's financial circumstances and possible alternative release conditions must be considered prior to detention.<sup>236</sup> The current language of HRS § 804-9 already instructs all officers setting bail to "consider . . . the **pecuniary circumstances of the party accused.**"<sup>237</sup> This revision to HRS § 804-9 makes clear that information regarding a defendant's financial circumstances, when available, is to be considered in the setting of bail.

Moreover, a noted concern in the current pretrial system is that bail amounts are not set uniformly across the circuits. A further critique is that bail amounts are sometimes not set on an individual, case-by-case basis, considering the circumstances of the defendant. In any pretrial system which employs money bail, it is imperative bail is set in amounts which the defendant is able to afford. While county and state law enforcement officers have the discretion to set appropriate amounts of bail, it stands to reason that relatively similar bail amounts should be ordered for similarly situated defendants statewide. Recent anecdotal observations in the First Circuit suggest a possible trend of bail settings in felony cases in amounts similar to those on

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<sup>236</sup> See, *Hernandez v. Sessions*, 872 F3d. 976, 991 (A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests. Since the government's purpose in conditioning release on the posting of a bond in a certain amount is to "provide enough incentive" for released detainees to appear in the future, we cannot understand why it would ever refuse to consider financial circumstances: the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance. Nor can we understand why the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances. . . . Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government's current policies fail to provide "adequate procedural protections" to ensure that detention of the class members is reasonably related to a legitimate governmental interest.)

<sup>237</sup> Haw. Rev. Stat. § 804-9 (emphasis added).

the neighbor islands. While there is no data to confirm whether this is accurate, these observations are encouraging and hopefully evidence an evolving recognition and commitment by police and prosecutors to set bail in reasonable amounts which reflect the defendant's ability to post.

18. **Permit monetary bail to be posted with the police, other law enforcement agency, or the county correctional center where the defendant is held, on a 24/7 basis.**

The Task Force recommends that HRS § 804-7 be revised as follows:

***804-7 Release after bail.***

~~*[When bail is offered and taken the prisoner shall be discharged from custody or imprisonment.]*~~

*Any defendant for whom a monetary amount of bail has been set by the police, other law enforcement agency or the court shall be permitted to post said bail amount at the police department, law-enforcement agency or county correctional center where he or she is detained. Said monetary bail shall be payable on a 24 hours a day and 7 days a week basis. Upon posting or payment of bail, the defendant, his representative or agent shall be provided a bail receipt and the defendant shall be released from custody forthwith.*

This recommendation seeks to expand the timeframe in which bail may be posted and defendant released. This Task Force's investigations revealed that only in the Third Circuit, defendants may post cash bail on a 24 hours a day, seven days a week basis. Bail is posted with the Hawai'i Island police department and notification is then made to release the defendant from DPS custody. This option does not exist for any of the other islands and prevents defendants who are able to post cash bail to do so timely and be released. As a result, defendants must either wait to go to court to request release or contact a bondsman to file a surety bond with the court before they may be released. Defendants who are able to post bail or bond should not be detained simply because of an administrative barrier requiring that bail or bond be payable only during normal business days/hours. Similarly, in Ohio, the Cuyahoga County Task Force on Bail recently completed its work and made recommendations including adoption of "payment systems that allow defendants to post money bail at any time of the day or night and using any reliable payment system."<sup>238</sup> Hawai'i should follow suit.

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<sup>238</sup> See, *Cuyahoga County Bail Task Force Report and Recommendations* (March 16, 2018) at 18.

## 19. Require prompt bail hearings.

The Task Force recommends that HRS § 804 be amended to add a new provision:

804-1.1 Right to a prompt hearing. [NEW PROVISION]  
Upon formal charge and detention, the defendant shall have a right to a prompt hearing concerning release or detention and whether any condition or combination of conditions will reasonably assure the defendant's appearance as required and the safety of any other person and the community.  
At the hearing, the defendant shall have the right to be represented by counsel, and, if financially unable to obtain representation, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The defendant may be detained pending completion of the 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. This Task Force's investigations revealed that the current system is inconsistent as to whether and when a pretrial defendant is accorded a bail hearing. Often, opportunities to hold prompt hearings early in the proceedings are missed and result in defendants being unnecessarily detained until a meaningful bail hearing is held days or weeks later. Many of these individuals are believed to be low-risk defendants who could be safely and appropriately released.

Prompt bail hearings have been a major component to many pretrial justice initiatives. In Ohio, reforms recommended include:

. . . having centralized-bail hearings rather than having judges in each of the 13 municipal courts in the county make their own bail determinations. Such an arrangement would provide for more prompt and consistent bail decisions and allow for defendant to have quicker access to an attorney. It would also limit the use of bond schedules that are based solely on the charges against a suspect rather than the risk of a defendant failing to show up for court or causing trouble if released from jail.<sup>239</sup>

While there is strong support for "prompt" bail hearings, there was some discussion as to what this means. A few Task Force members suggested following other jurisdictions that have specific time limitations for hearing pretrial release decisions that may provide clarity and consistency. Some jurisdictions set a time limit between 48 hours after commitment to jail and five (5) days after the date of arrest<sup>240</sup>. These proposals, however, were not voted on by the

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<sup>239</sup> See, *ACLU of Ohio Urges Prompt Adoption of Bail Reform Recommendations*, Cleveland.com, posted March 16, 2018.

<sup>240</sup> See, N.J. Stat. § 2A:162-17 ("Except as otherwise provided under sections 4 and 5 of [P.L.2014, c.31 \(C.2A:162-18](#) and [C.2A:162-19](#)) concerning a hearing on pretrial detention, a court shall make, pursuant to this section, a

entire Task Force and the Task Force makes no recommendation as to more specific time requirements.

- 20. Eliminate the use of money bail and require defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor and non-violent misdemeanor offenses, with certain exceptions.**

The Task Force recommends that HRS § 804 be amended to add a new provision:

804-1.2 Monetary bail, non-violent offenders. [NEW PROVISION]

(1) Any defendant arrested and charged with a traffic offense, a violation or non-violent petty misdemeanor or non-violent misdemeanor offense shall be released on their own recognizance conditioned upon their appearance in court and any other least restrictive non-financial condition necessary to assure their appearance in court and to protect the public, except this shall not apply if:

(a) the offense involves assault, terroristic threatening, sexual assault, abuse of family and household members, violation of a temporary restraining order, violation of an order for protection, driving under the influence, negligent homicide or any other crime of violence; or

(b) one or more of the following apply:

1) the defendant has a history of non-appearance within the last 24 months;

2) the defendant has at least one prior conviction for a misdemeanor or felony crime of violence;

3) the defendant is pending trial or sentencing at the time of arrest;

4) the defendant is on probation, parole or conditional release at the time of arrest;

5) the defendant is also concurrently charged with a violent petty misdemeanor, a violent

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pretrial release decision for an eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail." However, the Task Force notes at least one bill before the New Jersey legislature seeking to modify their pretrial release statute, including a proposal to extend the time for pretrial release hearings to 96 hours. See also, New Mexico Court Rules 7-401 NMRA ("The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than (a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or (b) first appearance or arraignment, if the defendant is not in custody.")

misdemeanor or any felony offense arising from the same or separate incident; or

6) the defendant presents a risk of danger to any other person or the community.

(2) If any of the exceptions in (1)(a) or (1)(b) apply, bail may be set in a reasonable amount and if the defendant is unable to post said bail, the defendant shall be entitled to a prompt bail hearing.

This recommendation would establish a new provision to eliminate the use of money bail and require defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor and non-violent misdemeanor offenses with certain exceptions. Eliminating the use of money bail for low-risk non-violent defendants, with certain exceptions, and requiring release on own recognizance under minimal conditions would ensure that defendants who may be safely released pending trial are indeed released.

Many jurisdictions across the nation have shifted away from money bail systems and have instead adopted evidence-based practices which evaluate defendant risks through the use of validated risk assessment tools. Jurisdictions such as Arizona, Connecticut, Colorado, Kentucky, New Jersey, Rhode Island, Utah and Washington D.C all have incorporated the use of risk-assessment tools as part of their pretrial process, with impressive results.

It should be noted that the Task Force did consider a broader related, “no cash bail” alternative, limiting detention only to circumstances when (1) a defendant is charged with a “serious” crime; (2) the prosecution demonstrates there is a serious risk of flight, danger to the community, or reoffense; and (3) the court finds that no combination of conditions will eliminate, reduce, or mitigate the risks presented. Ultimately, this Task Force did not reach consensus on the “no cash bail” proposal, a synopsis of which is attached as *Appendix F*, to offer this perspective to the legislature for future deliberations. Nevertheless, the Task Force recognizes the benefits of a risk-based system over a purely financial system, especially for lower level offenses.

In “A Framework for Pretrial Justice - Essential Elements of an Effective Pretrial System and Agency,” the National Institute of Corrections (“NIC”) reported:

The expected outcomes of bail decision-making are maximized rates of court appearance and public safety. Research in criminal justice and other disciplines has demonstrated that decisions about individual behavior are best made using actuarial risk assessment. Actuarial assessments calculate potential risk by using factors shown empirically to be related to the assessed risk. Predictions made using these assessments tools are far more accurate than those based on clinical (i.e.; professional) judgment.<sup>241</sup>

Basing judicial decisions to release or detain pretrial defendants on scientific research has been shown to maximize release of certain defendants without jeopardizing public safety.

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<sup>241</sup> Pretrial Justice Institute, *Issue Brief: Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants*, (2015) Washington, D.C.: Pretrial Justice Institute.



For example, as reported in “Pretrial Reform in Kentucky”, a 2013 report by their pretrial services:

Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release. When looking at release rates by risk level, the data shows that judges are following the recommendations of the pretrial officer. In CY [calendar year] 2011, 85% of low risk defendants were released, 67% of moderate risk defendants were released and 51% of high risk defendants obtained pretrial release.

Since the passage of HB 463 Pretrial Services data has shown a 10% decrease in the number of defendants arrested and a 5% increase in the overall release rate. Overall release rates have not shown a significant increase, however the data shows a substantial increase in non-financial releases and releases for low and moderate risk defendants. The non-financial release rate has increased from 50% to 66%, the low risk release rate has increased from 76% to 85% and the moderate risk release rate has increased from 59% to 67%. Furthermore, pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.<sup>242</sup>

In Washington D.C., which is often recognized as the gold standard of pretrial justice reform, 80 percent of pretrial defendants are released on their own recognizance. Of these, 90 percent of released defendants appear at all of their scheduled court appearances and 91 percent remain arrest-free while pending trial.<sup>243</sup> The major reason for this success is its use of a validated risk-assessment tool to gauge the defendant’s risks and then make recommendations about the least restrictive non-financial release conditions. Beyond this, they commit significant resources in the form of a pretrial services agency staffed by 350 people, 75 percent of whom are case workers, with an annual operating budget of \$65 million.<sup>244</sup> In New Jersey and Colorado, cash bail is sparingly used, and instead the focus is on the use of evidence-based risk assessments.<sup>245</sup>

At the core of our current system are the laws governing money bail, release and detention. Some of these laws are inconsistent with many of the fundamental principles underlying our criminal justice system, such as the presumption of innocence, due process, equal protection, right to counsel, right to confrontation and that liberty is the norm and detention

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<sup>242</sup> Pretrial Reform in Kentucky, Pretrial Services, Administrative Office of the Courts, Kentucky Court of Justice (January 2013) at 16.

<sup>243</sup> See, Dave Roos, *Cash Bail Punishes Poor, But What’s the Alternative?* “How Stuff Works” February 14, 2018.

<sup>244</sup> *Id.*

<sup>245</sup> See, The Washington Post: “When it comes to pretrial release, few other jurisdictions do it D.C.’s way,” [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.64985a6efb6f](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.64985a6efb6f); New York Times: “New Jersey Alters its Bail System and Upends Legal Landscape,” <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>; Colorado Public Radio “Local Judges Are Driving Bail Reforms Across Colorado,” <http://www.cpr.org/news/story/local-judges-are-driving-bail-reforms-across-colorado>; and “What Bail Reform Could Look Like in New York,” <https://www.wnyc.org/story/what-bail-reform-could-look-like-new-york>.

is the very limited exception. The Task Force recommends, at least for lower level offenses, a shift away from money bail.

**21. Create rebuttable presumptions regarding both release and detention and to specify circumstances in which they apply.**

The Task Force recommends that HRS § 804-3 be revised as follows:

**804-3 Bailable offenses.**

(a) "Serious" means murder or attempted murder in the first degree, murder or attempted murder in the second degree, ~~[or] a class A [or B] felony, [except forgery in the first degree and failing to render aid under section 291C-12,]~~ or a Class B or C felony involving violence or threat of violence to any person and "bail" includes release on one's own recognizance, supervised release, and conditional release.

(b) ~~[Any person charged with a criminal offense shall be bailable by sufficient sureties; provided that bail may be denied where the charge is for a serious crime, and:]~~ There shall be a rebuttable presumption that any person charged with a criminal offense, other than a serious offense, shall be released or admitted to bail under the least restrictive conditions required to ensure their appearance and to protect the public, unless the prosecution demonstrates by clear and convincing evidence:

- (1) *There is a serious risk that the person will flee;*
- (2) *There is a serious risk that the person will obstruct or attempt to obstruct justice, or therefore, injure, or intimidate, or attempt to thereafter, injure, or intimidate, a prospective witness or juror;*
- (3) *There is a serious risk that the person poses a danger to any person or the community; or*
- (4) *There is a serious risk that the person will engage in illegal activity.*

If the prosecution demonstrates by clear and convincing evidence one or more of the foregoing serious risks exists, the defendant shall be detained if the court finds that no condition or combination of conditions is sufficient to reasonably eliminate, reduce or mitigate the risks presented.

(c) Under subsection (b)(1) a rebuttable presumption arises that there is a serious risk that the person will flee or will not appear as directed by the court where the person is charged with a criminal offense punishable by imprisonment for life with or without possibility of parole. For purposes of subsection (b)(3) and (4) a rebuttable presumption arises that the person poses a serious danger to any person or community or will engage in illegal activity where the court determines that:

- (1) *The defendant has been previously convicted of a serious crime involving violence or threat of violence against a person*

*within the 10 year period preceding the date of the charge against the defendant;*

*(2) The defendant is [~~already on bail on~~] pending trial or sentencing for a felony charge involving violence or threat of violence against a person; or*

*(3) The defendant is on probation or parole for a serious crime involving violence or threat of violence to a person.*

*(d) If, after a hearing the court finds that no condition or combination of conditions will reasonably assure the appearance of the person when required or the safety of any other person or community, bail may be denied.*

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.

The following excerpt from “A Framework for Pretrial Justice - Essential Elements of an Effective Pretrial System and Agency,” by Lisa Pilnik, explains the importance of the legal framework underpinning a high-functioning system, including a presumption of nonfinancial release on least restrictive conditions:

The pretrial legal framework—composed of bail statutes, state and Federal constitutional provisions, and applicable case law—establishes the rules for pretrial release and detention. Bail law defines the purposes and types of bail; the defendant populations eligible and ineligible for bail consideration; and the roles and responsibilities of courts, pretrial services agencies, and other stakeholders in bail decision-making. The proper legal framework greatly facilitates maximizing release, court appearance, and public safety. This framework should include:

1. **A presumption of nonfinancial release on the least restrictive conditions** necessary to ensure future court appearance and public safety.
2. Prohibition or restrictions on the use of secured financial conditions.
3. Provisions for detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety. Detention without bail must include robust due process protections for detention-eligible defendants and those detained.

All three of these components are interrelated and must exist within a legal framework to achieve maximized rates of release,

appearance, and public safety. For example, courts are far less likely to utilize formal preventive detention when secured financial conditions are allowed. Presumptive nonfinancial release—along with real and practical supervision options—keeps systems from applying preventive detention to an unnecessarily large defendant population or resorting to high bond amounts for higher-risk defendants.<sup>246</sup>

An Ohio task force similarly recommended a presumption of release for certain offenses, unless the prosecutor or the court objects based upon individual circumstances.<sup>247</sup> These offense included: traffic offenses, driving under license suspension, non-jailable offenses and offenses that were not defined as “crimes of violence.”<sup>248</sup>

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

The Task Force recommends HRS §§ 804-4, 804-5 and 804-7.1 be revised as follows:

***804-4 When a matter of right.***

*(a) If the charge is for an offense for which bail is allowable under, the defendant may be admitted to bail before conviction as a matter of right and under the least restrictive conditions required to ensure the defendant’s appearance and to protect the public. Except for section 712-1207(7) [Solicitation of Prostitution where defendant shall be held without bail pending a hearing], bail shall be allowed for any person charged under section 712-1207 only subject to the mandatory condition that the person observe geographic restrictions that prohibit the defendant from entering or remaining on public property, in Waikiki and other areas in the State designated by county ordinance during the hours from 6 p.m. to 6 a.m.; and provided further that nothing contained in this subsection shall be construed as prohibiting the imposition of stricter geographic restrictions under section 804-7.1. The right to bail shall continue after conviction of a misdemeanor, petty misdemeanor, or violation, and release on bail may continue, in the discretion of the court, after conviction of a felony until the final determination of any motion for a new trial, appeal, habeas corpus, or other proceedings that are made, taken, issued, or allowed for the purpose of securing a review of the rulings, verdict, judgment, sentence, or other proceedings of any court or jury in or by which the defendant has been arraigned, tried, convicted, or sentenced; provided that:*

*(1) no bail shall be allowed after conviction and prior to sentencing in cases where bail was not available under*

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<sup>246</sup> Lisa Pilnik, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, National Institute of Corrections (Feb 2017) at 10.

<sup>247</sup> See, *Cuyahoga County Bail Task Force Report and Recommendations*, at 8.

<sup>248</sup> *Id.*

section 804-3, or where bail was denied or revoked before conviction;

(2) no bail shall be allowed pending appeal of a felony conviction where a sentence of imprisonment has been imposed; and

(3) no bail shall be allowed pending appeal of a conviction for a violation of section 712-1207, unless the court finds, based on the defendant's record, that the defendant may be admitted to bail subject to the mandatory condition that the person observe geographic restrictions that prohibit the defendant from entering or walking along the public streets or sidewalks of Waikiki or other areas in the State designated by county ordinance pursuant to section 712-1207 during the hours from 6 p.m. to 6 a.m.

Notwithstanding any other provision of law to the contrary, any person who violates these bail restrictions shall have the person's bail revoked after hearing and shall be imprisoned forthwith.

(b) The court shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the court finds:

(1) By clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and

(2) That the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the court makes these findings, the court shall order the release of the person in accordance with section 804-7.1 under the least restrictive conditions required to ensure the defendant's appearance and to protect the public. No defendant entitled to bail, whether bailed or not, shall be subject, without the defendant's written consent, to the operation of any sentence passed upon the defendant, while any proceedings to procure a review of any action of the trial court or jury in the premises are pending and undetermined, except as provided in section 641-14(a) or section 712-1207.

**804-5 By whom allowed.**

In cases where the punishment for the offense charged may be imprisonment for life not subject to parole, or imprisonment for a term more than ten years with or without fine, a judge or justice of a court of record, including a district judge, shall be competent to admit the accused to bail, in conformity with section 804-3 to 804-

6. *In all other cases, the accused may be so admitted to bail by any judge or justice of a court of record, including a district judge, and in cases, except under section 712-1207, where the punishment for the offense charged may not exceed two years' imprisonment with or without fine, the sheriff, the sheriff's deputy, the chief of police or any person named by the chief of police, or the sheriff of Kalawao, regardless of the circuit within which the alleged offense was committed, may admit the accused person to bail. The court may impose conditions of release or bail which are the least restrictive conditions required to ensure the defendant's appearance and to protect the public.*

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**804-7.1. Conditions of release on bail, recognizance, or supervised release.**

*Upon a showing that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer named in section 804-5 may deny the defendant's release on bail, recognizance, or supervised release.*

*Upon the defendant's release on bail, recognizance, or supervised release, however, the court may enter an order:*

*(1) Prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order should be deemed to prohibit any lawful and ethical activity of defendant's counsel;*

*(2) Prohibiting the defendant from going to certain described geographical areas or premises;*

*(3) Prohibiting the defendant from possessing any dangerous weapon, engaging in certain described activities, or indulging in intoxicating liquors or certain drugs;*

*(4) Requiring the defendant to report regularly to and remain under the supervision of an officer of the court;*

*(5) Requiring the defendant to maintain employment, or, if unemployed, to actively seek employment, or attend an educational or vocational institution;*

*(6) Requiring the defendant to comply with a specified curfew;*

*(7) Requiring the defendant to seek and maintain mental health treatment or testing, including treatment for drug or alcohol dependency, or to remain in a specified institution for that purpose;*

*(8) Requiring the defendant to remain in the jurisdiction of the judicial circuit in which the charges are pending unless approval is obtained from a court of competent jurisdiction to leave the jurisdiction of the court;*

*(9) Requiring the defendant to satisfy any other condition reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person or community; or*

*(10) Imposing any combination of conditions listed above or any other least restrictive non-financial conditions required to assure the defendant's appearance and to protect the public.*

*The judicial officer may revoke a defendant's bail upon proof that the defendant has breached any of the conditions imposed.*

This recommendation would require a court, when setting conditions of release, to set the least restrictive conditions required to assure the defendant's appearance and protection of the public. As noted above, the purpose of bail is threefold: (1) to maximize the defendant's release, (2) to assure the defendant's appearance at court and (3) to protect the public. By requiring conditions of release to be the least restrictive to assure the defendant's presence and protection of the public, we ensure that the true purposes of bail are met. Moreover, pretrial defendants, who are presumed innocent, would not face "over-conditioning" by the imposition of unnecessary and burdensome conditions.

**23. Under the office of the Chief Justice, create a permanently funded Criminal Justice Institute, a research institute dedicated to examining all aspects of the criminal justice system.**

The criminal justice system is a large, complex system in which many individuals and organizations operate and interact. The Task Force has found that these interactions based on individual cases generally follow common pathways. However, when cases are examined in detail, there are a myriad ways cases can differ. This creates many different data points within common categories. For example, an altercation on the street between two strangers that is intervened by a police officer can result in a warning issued, or a citation or arrest of one or both parties. Each of these actions by the police officer will create a sequence of events that branches off in a variety of ways depending on the actions of persons and organizations that follow. Citations and arrests will proceed to court. Arrests will involve booking, setting of bail, court hearings, and possibly pretrial detention. Multiply this by thousands of incidents and the scale of data increases geometrically. In the past, the criminal justice system has relied on the courts to settle each individual case, and the criminal justice system was designed to resolve matters on a case-by-case basis. Now the State is faced with the need to understand this complex system in a more comprehensive way in order to ensure the protection of individual rights, increase efficiencies and control costs. This requires the collection and analysis of data.

Criminal justice organizations collect data that they have identified as important to their internal purposes. The Task Force has found that there are gaps in the data which makes a comprehensive understanding of the system difficult. For example, the police departments track the number of citations issued and arrests made and the Judiciary maintains a count of court cases processed, but there is no attempt to compare the two sources of data to track the outcomes. As another example, there are anecdotal reports of large differences in caseloads among the circuits and differences between the lengths of time it takes each circuit to process similar cases, but there have not been any studies of why these differences exist. As communities change, as new laws are passed, as new methods of policing emerge, new court precedents are set, the criminal justice system also changes. How these changes ripple through the system is not well understood.

It has become apparent that internal operations of one agency significantly affect the rest of the system. For example, during our deliberations it appeared that one of the bottlenecks in adjudicating cases in the First Circuit is the financial screening for eligibility and case assignment of public defender services. This delays court hearings while the public defender's office reviews files and makes determinations of the many referrals for service. Mechanisms need to be developed to discover these kinds of obstacles to the efficient operation of the entire system.

To address these types of issues, private organizations, the federal government and many states have created permanent criminal justice research institutes. The responsibilities of these institutes range from examining broad policy issues, such as at the Washington State Institute for Public Policy. There are also several private organizations such as the Vera Institute in New York City which has conducted research and pioneered pretrial programs for decades. There is even a national institute specializing in pretrial issues, the Pretrial Justice Institute.

The Washington State Institute for Public Policy ("WSIPP") conducts research on a broad range of issues including criminal justice, health, education, transportation, and a focus on the effectiveness of programs. It also conducts cost benefit analyses of programs. In criminal justice, it has conducted studies on evidence based programs, prisoner reentry, and



many others.<sup>249</sup> Since 1990, WSIPP has conducted 209 studies in the criminal justice area. Some are scholarly works such as a Review of Studies of Adult Sex Offender Recidivism.<sup>250</sup> Other research looked at the performance of state programs such as prison work release.<sup>251</sup>

The Vera Institute was a pioneer in bail reform. Started in New York City in 1961, the Vera Scale was the first pretrial tool that attempted to quantify bail evaluations. Today the Institute conducts a wide range of programs and research across the country, including mass incarceration and racial disparities.<sup>252</sup> A recent research article documents the mechanism of how Black Americans end up being incarcerated at four times the rate of White Americans and explores some of the historical context of racial disparities.<sup>253</sup>

More specific to this Task Force is the Pretrial Justice Institute. Funded by the National Institute of Justice, it conducts research and coordinates pretrial reforms across the country.<sup>254</sup> Originally started by a grant from the Department of Justice to the National Association of Pretrial Services Agencies to do technical training, the Pretrial Justice Institute has evolved into a broader research institute that conducts research and leads projects to improve pretrial activities nationwide.

In the past 20 years, there has also been a strong movement towards evidence-based practices, in large part based on the work of sociologists and other scientists.<sup>255</sup> These works have developed tools for evaluating defendants<sup>256</sup>, and intervention programs to treat criminal behavior and behaviors that are closely related to crime such as drug use.<sup>257</sup> These science-based efforts also indicate a need for Hawai'i to develop the capacity to monitor and evaluate its own programs that adopt such evidence based practices. For example, there has been recent research into implicit bias which indicates that assessment tools thought to be impartial have built-in racial bias.<sup>258</sup> Several Hawai'i criminal justice agencies use evidence based methods. The ISC uses the ORAS-PAT. Probation, Parole and Corrections use the Level of Service Inventory-Revised ("LSI-R"). Data from the Interagency Council on Intermediate Sanctions ("ICIS") indicate a possible bias towards Hawaiians. The ICIS June 2017 report on recidivism by defendants released between 2013 and 2016 indicates that 65 percent of Hawaiians and part

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<sup>249</sup> See, <http://www.wsipp.wa.gov/>

<sup>250</sup> See, [http://www.wsipp.wa.gov/ReportFile/1162/Wsipp\\_Adult-Sex-Offender-Recidivism-A-Review-of-Studies\\_Executive-Summary.pdf](http://www.wsipp.wa.gov/ReportFile/1162/Wsipp_Adult-Sex-Offender-Recidivism-A-Review-of-Studies_Executive-Summary.pdf)

<sup>251</sup> See, [http://www.wsipp.wa.gov/ReportFile/998/Wsipp\\_Does-Participation-in-Washingtons-Work-Release-Facilities-Reduce-Recidivism\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/998/Wsipp_Does-Participation-in-Washingtons-Work-Release-Facilities-Reduce-Recidivism_Full-Report.pdf)

<sup>252</sup> See, <https://www.vera.org/>

<sup>253</sup> See, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy\\_downloads/for-the-record-unjust-burden-racial-disparities.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy_downloads/for-the-record-unjust-burden-racial-disparities.pdf)

<sup>254</sup> See, <http://www.pretrial.org/about/>

<sup>255</sup> An Introduction to Evidence Based Practices:  
[http://www.jrsa.org/pubs/reports/ebp\\_briefing\\_paper\\_april2014.pdf](http://www.jrsa.org/pubs/reports/ebp_briefing_paper_april2014.pdf)

<sup>256</sup> Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States;  
<https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Assessment-Instruments-Validated-and-Implemented-in-Correctional-Settings-in-the-United-States.pdf>

<sup>257</sup> Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices;  
<https://www.gmuace.org/documents/presentations/2009/2009-presentations-drug-treatment-for-offenders.pdf>

<sup>258</sup> (Propublica, May 23 2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>)

Hawaiians are rearrested versus an overall recidivism rate of 50.5 percent. This discrepancy merits urgent and immediate examination.<sup>259</sup>

The Criminal Justice Research Institute should be under the office of the Chief Justice. A board of directors composed of the Chief Justice, a representative of the governor's office, a member of the legislature and the director of DPS should oversee the Institute. The director of the institute should be a Ph.D. level researcher with experience in the criminal justice field. In addition, the Institute should have a minimum of two staff members with research backgrounds along with support staff. Larger, more complex research projects that require more staff can be conducted by the University of Hawai'i or another appropriate entity.

In developing the metrics for this report, the Task Force recognized that collecting data, developing metrics requires deep understanding of the interactions of the various agencies in the system. The institute should have the authority to examine all areas of the criminal justice system including police, prosecutors, defense counsel, courts, pretrial services, probation and parole, jails and prisons. It should also examine how mental health services and drug treatment services intersect with the criminal justice system.

There are four ways such an institute can benefit the state.

1. Collect data to monitor the overall functioning of the criminal justice system
2. Monitor evidence-based practices
3. Conduct cost benefit analysis on various areas of operation
4. Monitor national trends in criminal justice

There is a need for broad based research into the how the system operates, as well as the development of measures of effectiveness and efficiency. For example, in 2014, the Council of State Governments conducted a broad review of Hawai'i's correctional system to find ways to reduce the prison population.<sup>260</sup> Currently, there is no agency to continue this work. This Task Force has also found that there are principles and methods to developing metrics that require research planning and incremental development. In 2003, the Vera Institute produced a paper detailing how governments can develop metrics to measure the fairness and effectiveness of the criminal justice system.<sup>261</sup> This paper describes how using several metrics in a "basket" improves the accuracy of the measure. It also describes how using a variety of sources of information also improves accuracy. Besides using "administrative data" which is generated by the various government agencies, the paper recommends doing surveys of groups of people to discover other information not available through "administrative data."

The Institute can also help to develop outcome measures to determine if various programs are making positive contributions to the safety of the community. In a collections of essays on measuring criminal justice, John Dilulio describes what he calls the four civic ideals of criminal justice: doing justice, promoting safe communities, restoring victims and promoting

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<sup>259</sup> 2016 Recidivism Report, Interagency Council of Intermediate Sanctions, Figure 19, page 18, <https://icis.Hawai'i.gov/wp-content/uploads/2017/06/Hawai'i-Recidivism-Report-2016.pdf>

<sup>260</sup> Justice Reinvestment in Hawai'i; <https://csgjusticecenter.org/wp-content/uploads/2014/08/JR-in-HI-Analyses-and-Policy-Options.pdf>

<sup>261</sup> Measuring Progress Toward Safety and Justice: A Global Guide to the Design of Performance Indicators Across the Justice Sector, Vera Institute, November 2003, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/measuring-progress-toward-safety-and-justice-a-global-guide-to-the-design-of-performance-indicators-across-the-justice-sector/legacy\\_downloads/207\\_404.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/measuring-progress-toward-safety-and-justice-a-global-guide-to-the-design-of-performance-indicators-across-the-justice-sector/legacy_downloads/207_404.pdf)

noncriminal options.<sup>262</sup> Each of these broad areas invites a range of measures which will inform decision makers.

Inefficiencies and bottlenecks in the system, as discovered by this task force and noted elsewhere in this report, can be more closely examined and solutions developed.

Evidence-based practices, which are the state of the art in many fields including medicine, psychology, nursing, mental health treatment, education and other clinical fields, hold great promise for increased effectiveness of programs. However, implementation is very technical and requires close support of line staff.<sup>263</sup> The Institute can develop expertise in implementation and evaluation of evidence-based practices.

The state has an interest in measuring the returns on its financial investment in the criminal justice system. Cost benefits analysis can inform the state on how well programs perform against this bench-mark.<sup>264</sup>

The Institute can monitor promising national trends. There is a tremendous amount of research being conducted across the nation and the Institute can be tasked with monitoring this information flow, testing promising ideas locally and recommending further adoption.

#### **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.” In short, we are to make recommendations which permit an assessment of whether reforms, suggested by this group or others, are effective in improving the quality of pretrial justice in Hawai‘i.

This Task Force recommends that a centralized statewide criminal pretrial justice data reporting and collection system be created. Without limitation, this data reporting and collecting system should include the following:

1. Identify all current databases utilized by various departments and agencies to track criminal pretrial information;
2. Determine administrative and technological feasibility of aggregating and sharing current data;

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<sup>262</sup> Performance Measures for the Criminal Justice System; <https://www.bjs.gov/content/pub/pdf/pmcjs.pdf>

<sup>263</sup> Implementation Science in Criminal Justice; <http://www.icjia.state.il.us/articles/implementation-science-in-criminal-justice-how-implementation-of-evidence-based-programs-and-practices-affects-outcomes>

<sup>264</sup> Cost Benefit Analysis of Criminal Justice Reforms; <https://www.ncjrs.gov/pdffiles1/nij/241929.pdf>

3. Identify critical gaps in data and information collection which are required for a robust assessment of criminal pretrial justice matters. This should include information relating to arrests, monetary and non-monetary conditions of release, bail amounts, risk assessments, information gathered, risk assessment scores, bail report recommendations, bail hearings, judicial decisions to release and conditions imposed, judicial decisions to detain, concordance between bail report recommendation and decision, length of stay and pretrial supervision. To measure how well a defendant's assessed risk correlates with their actual risk, data must be gathered on whether they appear in court, commit other crimes or engage in violent conduct when released from custody.
4. Adapt or increase current resources necessary for a centralized statewide criminal pretrial justice data reporting and collection system;
5. Review and analyze data and information annually or as otherwise determined by the legislature to evaluate the effectiveness of our pretrial system and to identify possible improvements; and
6. Issue public reports to inform all criminal justice stakeholders and the public about the functioning of our system.

Other jurisdictions that have embarked upon pretrial justice reform demonstrate that regular and consistent gathering of data and other information is critical. Without appropriate data, it is nearly impossible to determine what impact any reforms, whether in isolation or collectively, are having on each stage of our system. As such, a systematic approach to gathering and analyzing data across every phase of our pretrial system is necessary. From the initial police encounter, to the defendant's initial court appearance (where release or detention decisions are made), to defendant's performance while on pretrial release, identifying and collecting information is critical.

The following excerpt from the 2017 National Institute of Corrections report, "A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency" is instructive:

Performance measurement is an evidence-based practice in community corrections and a habit of high performing organizations. These agencies define and measure success with the right metrics, identifying practices that work, need improvement or are nonproductive.

In 2010, the National Institute of Corrections' Pretrial Executives Network identified the need for consistent and meaningful data to track individual pretrial services agency performance. National data specific to pretrial agency outcomes and performance would help individual agencies measure their effectiveness in achieving goals and objectives and in meeting the expectations of their justice systems. Consistent with public- and private-sector best practices, pretrial services agency performance measures would tie into the individual agency's mission, local justice system needs, state and local bail laws, and national pretrial release standards.

Responding to this need, in 2011, NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Field*, a compilation of the PEN's suggested performance metrics. NIC believes these measures enable pretrial service agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals. The measures also are compatible for any pretrial services agency whose mission statement is linked to maximizing release, court appearance, and public safety.

#### Suggested Measures

1. **Appearance Rate:** The percentage of supervised defendants who make all scheduled court appearances.
2. **Safety Rate:** The percentage of supervised defendants who are not charged with a new offense during the pretrial stage.
3. **Concurrence Rate:** The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.
4. **Success Rate:** The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.
5. **Pretrial Detainee Length of Stay:** The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.<sup>265</sup>

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<sup>265</sup> Lisa Pilnik, Barbara M. Hankey, Elizabeth Simoni, Spurgeon Kennedy, Lelan J. Moore, Jaim Sawyer, A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency, National Institute of Corrections (2017); <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf>.

The Pretrial Services Agency (“PSA”) for Washington, D.C., reported in 2015 using the following performance measures:

1. The percentage of defendants who remain arrest-free during the pretrial release period.
2. The percentage of defendants who make all scheduled court appearances during the pretrial period.
3. The percentage of defendants who remain on release at the conclusion of their pretrial period without a pending request for removal or revocation due to non-compliance.

In order to determine whether any set of reforms has had a positive impact on Hawai‘i’s pretrial justice system, it is critical that the necessary data be systematically collected and analyzed so that objective conclusions may be drawn. Without devoting appropriate resources and attention to metrics, we will have no way of knowing whether our system is fairer and safer as a result. Developing metrics should be an ongoing activity of the criminal justice system. This Task Force recommends that this be the starting point of an ongoing effort to develop a meaningful set of metrics.

**25. The Task Force respectfully defers to the HCR 85 Task Force regarding the future of a jail facility on Oahu.**

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”). This Task Force was directed to consult with the HCR 85 Task Force and “make recommendations regarding the future of a jail facility on Oahu and best practices for pretrial release”.

This Task Force respectfully offers no recommendations concerning an Oahu jail facility. It is our considered judgment that until the legislature has had an opportunity to consider our findings and recommendations, along with not only the HCR 85 Task Force’s final report, but also input by criminal justice stakeholders and the public concerning possible reforms, we are unable to provide any meaningful recommendations concerning “the future of a jail facility on Oahu.” As the requirements of any such facility likely will be dictated by the nature and size of the pretrial population it serves, any criminal pretrial justice reforms which may potentially impact this population should first be implemented and evaluated. Accordingly, we defer any such recommendations to the HCR 85 Task Force.

## X. CONCLUSION

The recommendations in this report seek to achieve a more efficient and just pretrial system that upholds Hawai'i's laws while preserving our community principles and local values. Some of these reforms will require statutory changes; others, education, policy and ideological shifts. Our recommendations are interdependent on each other and are proposed for implementation as a whole. True comprehensive pretrial reform, however, will only be possible through the further collaborative efforts and strong support of all three branches of government: to legislate and prioritize resources for change, to execute in everyday operations the guiding principles herein, and from the bench, to embrace the prospect of change – that we can, and must, move towards a more equitable system of case-by-case adjudication.

The Task Force is grateful for the collaboration of so many of its community stakeholders and for the opportunity to embark on this worthwhile mission. We recognize that our work in improving pretrial justice is just the beginning and hope that the changes proposed will spark conversations for reform in the years to come.

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# HOUSE CONCURRENT RESOLUTION

REQUESTING THE JUDICIARY TO CONVENE A TASK FORCE TO EXAMINE AND MAKE RECOMMENDATIONS REGARDING CRIMINAL PRETRIAL PRACTICES AND PROCEDURES TO MAXIMIZE PUBLIC SAFETY, MAXIMIZE COURT APPEARANCES, AND MAXIMIZE PRETRIAL RELEASE OF THE ACCUSED AND PRESUMED INNOCENT.

1 WHEREAS, the United States Supreme Court declared in *United*  
2 *States v. Salerno*, 481 U.S. 739, 755 (1986), that "[i]n our  
3 society, liberty is the norm, and detention prior to or without  
4 trial is the carefully limited exception"; and  
5

6 WHEREAS, Article I, section 12, of the Hawaii State  
7 Constitution provides, "Excessive bail shall not be required,  
8 nor excessive fines imposed", and further provides, "The court  
9 may dispense with bail if reasonably satisfied that the  
10 defendant or witness will appear when directed, except for a  
11 defendant charged with an offense punishable by life  
12 imprisonment"; and  
13

14 WHEREAS, section 804-9, Hawaii Revised Statutes, provides  
15 that "[t]he amount of bail rests in the discretion of the  
16 justice or judge or the officers named in section 804-5; but  
17 should be so determined as not to suffer the wealthy to escape  
18 by the payment of a pecuniary penalty, nor to render the  
19 privilege useless to the poor. In all cases, the officer  
20 letting to bail should consider the punishment to be inflicted  
21 on conviction, and the pecuniary circumstances of the party  
22 accused"; and  
23

24 WHEREAS, House Concurrent Resolution No. 85 (2016)  
25 requested that the Chief Justice establish a task force to study  
26 effective incarceration policies; and  
27

28 WHEREAS, the Chief Justice has established the task force,  
29 which issued an interim report in December 2016, in which it





1 proclaimed, "Hawaii must chart a new course and transition from  
2 a punitive to a rehabilitative correctional model"; and  
3

4 WHEREAS, the task force has referenced a Vera Institute of  
5 Justice conclusion that "just a few days in jail can increase  
6 the likelihood of a sentence of incarceration and the harshness  
7 of that sentence, reduce economic viability, promote future  
8 criminal behavior, and worsen the health of those who enter -  
9 making jail a gateway to deeper and more lasting involvement in  
10 the criminal justice system at considerable costs to the people  
11 involved and to society at large"; and  
12

13 WHEREAS, the American Bar Association Criminal Justice  
14 Section Standards for Criminal Justice: Pretrial Release  
15 sections 10-1.2, 10-1.4, and 10-5.3 (2007) provide that "the  
16 judicial officer should assign the least restrictive  
17 condition(s) of release that will reasonably ensure a  
18 defendant's attendance at court proceedings and protect the  
19 community, victims, witnesses or any other person", and  
20 financial conditions "should not be employed to respond to  
21 concerns for public safety", nor should financial conditions  
22 result "in the pretrial detention of the defendant solely due to  
23 an inability to pay"; and  
24

25 WHEREAS, the American Council of Chief Defenders Policy  
26 Statement on Fair and Effective Pretrial Justice Practices  
27 (June 4, 2011) explains standards that "require public defenders  
28 to present judicial officers with the facts and legal criteria  
29 to support release, and where release is not obtained, to pursue  
30 modification of the conditions of release"; and  
31

32 WHEREAS, the National District Attorneys Association's  
33 National Prosecution Standards, Third Edition, with Revised  
34 Commentary, provides that "[a] prosecutor should not seek a bail  
35 amount or other release conditions that are greater than  
36 necessary to ensure the safety of others and the community and  
37 to ensure the appearance of the defendant at trial" and "[t]hese  
38 provisions recognize a respect for the presumption of innocence  
39 and therefore state a clear preference for release of defendants  
40 pending trial"; and  
41

42 WHEREAS, research suggests that pretrial services should  
43 include adequate and timely pretrial assessments of the accused  
44 that are focused on assessing risk of not appearing and risk to



1 public safety, and that the criminal justice system include  
2 viable options of appropriate supervision for different types  
3 and levels of risks; and  
4

5 WHEREAS, in recent years, several other states have  
6 undertaken significant reforms to their criminal pretrial  
7 practices and procedures, including Alaska, Arizona, Colorado,  
8 Kentucky, Maryland, Nevada, New Jersey, New Mexico, and Utah;  
9 and  
10

11 WHEREAS, the Hawaii State Bar Association, through its  
12 Judicial Administration Committee, conducted a Criminal Law  
13 Forum in September 2016, during which it thoroughly discussed  
14 criminal pretrial issues among a diverse group of judges,  
15 prosecutors, and criminal defense attorneys, and featured  
16 speakers from the Honolulu Police Department, Intake Service  
17 Center of the Department of Public Safety, National Institute of  
18 Corrections, United States Pretrial Services Office of the  
19 District of Hawaii, and Arizona Administrative Office of the  
20 Courts; and  
21

22 WHEREAS, the Judicial Administration Committee recommended  
23 establishment of a criminal pretrial task force to examine and  
24 make recommendations regarding criminal pretrial practices and  
25 procedures; and  
26

27 WHEREAS, an examination of potential revisions to criminal  
28 pretrial practices, procedures, and laws would improve public  
29 safety while protecting state and federal constitutional  
30 principles regarding the presumption of innocence, liberty, and  
31 right to non-excessive bail, and lower costs throughout the  
32 criminal justice system; and  
33

34 WHEREAS, the task force will make recommendations regarding  
35 the future of a jail facility on Oahu and best practices for  
36 pretrial release, and any such recommendations should be  
37 considered by or coordinated with the Criminal Pretrial Task  
38 Force; now, therefore,  
39

40 BE IT RESOLVED by the House of Representatives of the  
41 Twenty-ninth Legislature of the State of Hawaii, Regular Session  
42 of 2017, the Senate concurring, that the Judiciary is requested  
43 to convene a Criminal Pretrial Task Force to:  
44



- 1 (1) Examine and, as needed, recommend legislation and  
2 revisions to criminal pretrial practices and  
3 procedures to increase public safety while maximizing  
4 pretrial release of those who do not pose a danger or  
5 a flight risk; and  
6
- 7 (2) Identify and define best practices metrics to measure  
8 the relative effectiveness of the criminal pretrial  
9 system, and establish ongoing procedures to take such  
10 measurements at appropriate time intervals; and  
11

12 BE IT FURTHER RESOLVED that the task force be comprised of  
13 members that represent the various perspectives of public  
14 officials with significant roles in the criminal pretrial system  
15 and include:  
16

- 17 (1) The Chief Justice or the Chief Justice's designee, who  
18 shall serve as the chairperson of the task force;  
19
- 20 (2) A judicial officer representative of each Circuit  
21 Court;  
22
- 23 (3) A member of the House of Representatives, appointed by  
24 the Speaker of the House of Representatives;  
25
- 26 (4) A member of the Senate, appointed by the President of  
27 the Senate;  
28
- 29 (5) A court administrator representative of each Circuit  
30 Court;  
31
- 32 (6) A representative of the Department of the Attorney  
33 General;  
34
- 35 (7) A representative from one of the various Intake  
36 Services Center of the Department of Public Safety;  
37
- 38 (8) A representative of the Prosecuting Attorney's Office  
39 of each county;  
40
- 41 (9) A representative of the Office of the Public Defender  
42 for the State of Hawaii;  
43



- 1 (10) Four representatives appointed by the Hawaii
- 2 Association of Criminal Defense Lawyers, including one
- 3 representative from each county;
- 4
- 5 (11) A representative of each county police department;
- 6
- 7 (12) A representative of the Department of Health;
- 8
- 9 (13) The Chairperson of the Board of Trustees of the Office
- 10 of Hawaiian Affairs, or the Chairperson's designee;
- 11 and
- 12
- 13 (14) A member of the public who has knowledge and expertise
- 14 with the criminal pretrial system appointed by the
- 15 Director of Public Safety; and
- 16

17 BE IT FURTHER RESOLVED that no member be made subject to  
 18 chapter 84, Hawaii Revised Statutes, solely because of that  
 19 member's participation as a member of the task force; and  
 20

21 BE IT FURTHER RESOLVED that the Judiciary and the  
 22 Department of Public Safety are requested to provide  
 23 administrative support to the task force; and  
 24

25 BE IT FURTHER RESOLVED that the task force, with the  
 26 assistance of the Legislative Reference Bureau, is requested to  
 27 submit a report of its findings and recommendations, including  
 28 any proposed legislation, to the Legislature no later than  
 29 twenty days prior to the convening of the Regular Session of  
 30 2019; and  
 31

32 BE IT FURTHER RESOLVED that, upon request of the task  
 33 force, the Legislative Reference Bureau is requested to assist  
 34 in the preparation of the report; provided that the task force  
 35 submits a draft, including any other information and materials  
 36 deemed necessary by the Bureau, to the Bureau no later than  
 37 August 1, 2018, for the preparation of the report; and  
 38

39 BE IT FURTHER RESOLVED that certified copies of this  
 40 Concurrent Resolution be transmitted to the Chief Justice of the  
 41 Hawaii Supreme Court, Attorney General, Public Defender of the  
 42 State of Hawaii, Director of Health, Director of Public Safety,  
 43 Chairperson of the Board of Trustees of the Office of Hawaiian  
 44 Affairs, Chief of Police of each county police department,



1 Prosecuting Attorney of each county, and the Hawaii Association  
2 of Criminal Defense Lawyers.

3  
4  
5  
6



## APPENDIX B

### PUBLIC COMMENTS HCR134 TASK FORCE MEETING OCTOBER 13, 2017 (updated 7/31/18)

The following persons submitted oral or written comments for the public comment portion of the October 13, 2017 meeting. Written comments are noted as attachments, including supplements submitted through July 31, 2018.

Robert Merce (Attachment B-1)

Nicholas Lindblad, A-1 Bail Bonds (Attachment B-2)

Ainsley Dowling, American Civil Liberties Union, Hawai'i Chapter (Attachment B-3)

Beth Chapman, President, Professional Bail Agents of the United States and Owner, Da Kine Bail Bonds (Attachment B-4)

Kat Brady for Community Alliance on Prisons (Attachment B-5)

Sylvia Cabral via email (Attachment B-6)

Pamela Ferguson-Brey for Crime Victims Compensation Commission, State of Hawai'i (Attachment B-7)

E. Ileina Funakoshi via email (Attachment B-8)

Nancy Kreidman, M.A., for Domestic Violence Action Center (Attachment B-9)

James Lindblad, A-1 Bail Bonds (Attachment B-10)

James Lindblad, A-1 Bail Bonds, supplement dated 12/8/2017 (Attachment B-11)

James Lindblad, A-1 Bail Bonds, supplement dated 7/7/18 (Attachment B-12)

In-person comments, no written submittal:

Duane (Dog) Chapman, Da Kine Bail Bonds

Beatriz Cantelmo, Amnesty International, Hawai'i Chapter

Ernesto (Sonny) Ganaden

Marci Lopes

Erica Scott, ACLU People Power

Robert K. Merce  
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808-732-7430

Testimony Before the Criminal Justice Pretrial Task Force  
Honorable Rom A. Trader, Chair  
Aliioli Hale Room 101  
October 13, 2017  
1:00 p.m.

Dear Chair Trader and members of the Criminal Pretrial Task Force:

My name is Bob Merce. I am a retired attorney and serve as vice-chair of House Concurrent Resolution 85 Task Force that was created in 2016 to study correctional best practices and make recommendations to the Legislature on ways to improve Hawaii's correctional system. I appreciate the opportunity to speak with you, but I want to emphasize that I am testifying today in my individual capacity, and that the views I express are my own, and do not necessarily represent those of the HCR 85 Task Force.

I am very pleased that the Legislature created the Criminal Pretrial Task Force and I am even more pleased that such diverse, knowledgeable, and experienced groups of people are serving on it. I hope my remarks will help with the very important work you are doing.

#### **A. Bail Reform**

In view of the fact that the first ten paragraphs of HCR 134 HD 1 (2017) reference bail in one way or another, I assume that bail reform will be one of the issues that your Task Force will address. And that would be appropriate for several reasons.

First, the bail system used in Hawaii and most other American jurisdictions has rightly been criticized because, as the Criminal Justice Policy Program at Harvard Law School has said:

The core critique of money bail is that it causes individuals to be jailed simply because they lack the financial means to post a bail payment. Jailing people on the basis of what amounts to a wealth-based distinction violates well-established norms of fairness as well as constitutional principles. It can also lead to significant levels of unnecessary jailing, which imposes intensely negative consequences on individuals, communities, and the justice system.<sup>1</sup>

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<sup>1</sup> *Moving Beyond Money: A Primer On Bail Reform*, Criminal Justice Policy Program, Harvard Law School, October 2016, <http://cjpp.law.harvard.edu/publications/primer-bail-reform>. See also Francesca Forrest, *Guilty Until Proven Innocent: The Problem With Money Bail*, Federal Reserve Bank Of Boston 2015 Communities and Banking Series, May 27, 2016; Jessica Morris, *Alternatives to Pretrial Incarceration: Creating A More Just Justice System Through Bail*

In a similar vein, the Civil Rights Division of the U.S. Department of Justice has referred to cash bail as the “criminalization of poverty” and urged judges and lawyers to safeguard the principles of equal protection and due process by eliminating bail and bond practices that cause indigent defendants to be incarcerated solely because they cannot afford to pay for their release.<sup>2</sup>

Second, I have spoken to criminal defense lawyers who have seen first hand how the inability to make bail can devastate not just the person who is incarcerated, but his or her whole family. They have told me how spending even a short time in jail awaiting trial has caused their clients to lose their jobs and homes, and caused profound financial and emotional damage to families that can take years to repair, if it can be repaired at all.

Third, studies have shown that “just a few days in jail can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who enter—making jail a gateway to deeper and more lasting involvement in the criminal justice system at considerable costs to the people involved and to society at large.”<sup>3</sup>

Fourth, effective bail reform would significantly reduce correctional costs. As of July 31 of this year there were around 1166 pretrial detainees statewide.<sup>4</sup> It costs \$152 per day to incarcerate a person at OCCC.<sup>5</sup> Assuming the cost is roughly the same at the state’s other jails, we are spending \$177,000 per day or \$65 million per year just to house pretrial detainees.

Additionally, PSD is planning to build a new, 1255 bed jail for men only on Oahu.<sup>6</sup> The new jail is being designed to house 959 “detention inmates”.<sup>7</sup> According to PSD, detention inmates are “people who have been charged with a crime(s) and are still going through the court process” (i.e. pretrial detainees) and “people who have been found guilty of a crime(s) and

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*Reform in Massachusetts*, Roosevelt Institute, January 31, 2015 (noting that defendants who are incarcerated during the pretrial period are over three times more likely to be sentenced to prison than defendants who were released pretrial).

<sup>2</sup> Open letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice, Civil Rights Division, United States Department of Justice, March 14, 2016, <https://www.justice.gov/crt/file/832461/download>.

<sup>3</sup> *Incarceration's Front Door: The Misuse of Jails in America* (New York: Vera Institute of Justice, 2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>.

<sup>4</sup> Department of Public Safety spreadsheet, July 2017.

<sup>5</sup> Email from George King, PSD statistician, September 11, 2017.

<sup>6</sup> Progress Report, *Planning for the Future of the Oahu Community Correctional Center*, Department of Accounting and General Services and Department of Public Safety, February 1, 2017. Appendix A, pages 1-2 (hereinafter cited as “Progress Report”).

<sup>7</sup> Id.



received a sentence of one year” (sentenced inmates).<sup>8</sup> Of the 959 detention inmates, about one-third or 316 are forecast to be sentenced inmates, and two-thirds, or 643, are forecast to be pretrial detainees.<sup>9</sup> PSD estimates that the new jail could cost as much as \$673 million,<sup>10</sup> or \$536,000 per bed. If the 642 pretrial detainees were released through sensible pretrial procedures instead of being housed at the jail, the number of beds needed for the new jail would drop from 1255 to 613 (a 51% reduction), and the State would save around \$344 million in construction costs. It would also save hundreds of millions more in operating and personnel costs over the life of the jail. Releasing pretrial detainees who are not dangerous or a flight risk makes good economic sense.

I do not have any specific recommendations on how Hawaii’s bail system should be reformed. I will leave that to you, but I hope that as you work on the issue you are committed to the principle that **the only pretrial detainees who should be in our jails are those extremely few men and women who are too dangerous to be released, or are a flight risk. All other pretrial detainees should be released pending trial.**

## B. Length Of Stay

Bail reform is necessary, but it will not do much good unless we concurrently reduce the amount of time pretrial detainees spend in jail. The Hawaii Justice Reinvestment Initiative (JRI) studied case processing in Hawaii and found that between 2006 and 2011 the average length of stay for inmates released on their own recognizance (ROR) increased from 38 days to 51 days, and the average length of stay for prisoners who received supervised release (SR) increased from 84 days to 102 days, or just over three months.<sup>11</sup>

They also found that the length of stay for Honolulu County compared unfavorably with other counties. A 2008 study comparing data on 39 large U.S. counties, found that Honolulu had *the longest average length of stay in jail for those ultimately released during the pretrial stage.*<sup>12</sup> Of the 39 counties, 32 were able to release defendants under non-financial conditions in 15 days or fewer, but Honolulu’s average length of stay for the same type of defendants was 71 days.<sup>13</sup>

In May, 2017, the HCR 85 Task Force’s Program subcommittee met via Skype with Bree Derrick, Program Director of the Council of State Governments whose analysts built the data collection platform for Hawaii’s Justice Reinvestment Initiative. In preparation for the meeting Ms. Derrick obtained data from PSD which shows that between December 2011 and December 2016 the pretrial population for Honolulu increased by 8 percent. The data also showed that the prisoners who were released on their own recognizance or on supervised release, spent almost twice as many days in jail as those released on bail or bond:

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<sup>8</sup> Progress Report, Appendix A, page 1.

<sup>9</sup> Id.

<sup>10</sup> Progress Report, page 4.

<sup>11</sup> Marshall Clement, Andy Barbee, Robert Coombs, *Justice Reinvestment In Hawaii: Analysis and Policy Framework*, Counsel Of State Governments Justice Center (January 17, 2012).

<sup>12</sup> Id.

<sup>13</sup> See *Justice Reinvestment in Hawaii*, note 11 supra.

<u>Type of Release</u>	<u>Percent</u>	<u>Days To Release</u>
■ Bail/Bond	48%	38 Days
■ ROR	16%	85 Days
■ Supervised Release	37%	97 Days

From conversations I've had with experienced defense attorneys, it appears that the long length of stay is caused in large part by a pretrial process that requires felony defendants who cannot afford the bail set at the HPD cell block upon arrest, to appear first in district court where bail reduction is rarely granted, and then wait for a week or more for arraignment in circuit court, and to then go through the bail reduction hearing process which can take a long time, particularly if the court has to wait for the bail report to be completed.

I strongly encourage your Task Force to not only reform the bail system, but to reform the pretrial process so that from the moment of arrest the focus is on making a sound but quick pretrial release risk assessment and to releasing defendants within hours or days, rather than weeks or months.

### **C. Pretrial Diversion**

Finally, many jurisdictions are reducing their pretrial caseload by diverting the mentally ill and low-level, non-violent offenders to treatment programs rather than processing them through the criminal justice system. Hawaii is in the process of instituting a pilot diversion program in Chinatown based on the highly successful Law Enforcement Assisted Diversion (LEAD) program that was started in Seattle and has spread across the country. The HCR 85 Task Force's Program Subcommittee met with Heather Lusk of the Hawaii LEAD Program and Kris Nyrop, LEAD national support director. I was very impressed with LEAD and believe that it has tremendous potential for reducing Hawaii's jail and prison population, reducing recidivism, and making our communities safer. I hope you will support LEAD and its eventual expansion throughout Oahu and the state.

Thank you again for giving me the opportunity to testify and I look forward to your recommendations. If I can be of any help, or you would like further information on any of the issues I have touched on, please do not hesitate to contact me.



Robert K. Merce



# GOT BAIL?

www.gotbailhi.com

**A-1 Bail Bonds**  
 550 Halekauwila St, Suite 303  
 Honolulu, HI 96813  
 p: 808.522.1960  
 f: 808.522.1972

Dear Task Force:

To maintain public safety, maximize court appearances, and nurture social justice for the disenfranchised, I propose an approach that starts with the defendant, then works backwards. By first assessing the needs of the defendant, the courts may then craft a plan personalized for the success of the individual.

This starts with an assessment of the OCCC population, broken down by bail status. It's critical to know this breakdown first so that solutions may be targeted effectively. Surprisingly, in San Francisco approximately 90% of pretrial detainees are held due to probation revocation proceedings, imposition of a suspended sentences, or violation of terms of release<sup>1</sup>. Only after knowing this breakdown, can stakeholders effective target solutions. Understanding OCCC's inmate makeup is the first step in effectively offering solutions with the highest impact.

It is important to bring attention to my view that there is no objective which trumps public safety. Eligibility for pretrial release should be determined after a thorough review of a defendant's risk factors. If granted eligibility for release, a defendant should be advised of the 3 most commonly used release methods: 1) cash bail, 2) commercial surety (bail bond), and 3) pretrial release through the intake service center.

To maximize court appearances, I believe the courts should rely heavily on commercial surety. An overwhelming body of evidence supports this stance. For example, in 2007 a study of the 75 most populated counties in America found that failure to appear (FTA) rates on unsecured releases were twice as high as those through commercial surety<sup>2</sup>. Secondly, commercial surety will save money in two significant ways. First, no additional human resources, material buildings, or budget is necessary to support commercial surety, since it is a private sector industry. Second, since appearance rates are especially high through commercial surety, taxpayers save on the rarely recognized \$1,775 cost of a FTA<sup>3</sup>.

Lastly, to further social justice, I encourage all stakeholders embrace the concept of personalization. Each defendant has a unique mix of needs and a hybrid approach of pretrial

<sup>1</sup> *Riana Buffin and Crystal Patterson v. The City and County of San Francisco and The State of California*; Case No. 15-CV-4959, 2015

<sup>2</sup> Bureau of Justice Statistics Bulletin, *Prisoners in 2007* December, 2008, NCJ 224280

<sup>3</sup> Morris, Robert G. (January 2013). *Differences in Failure to Appear, Recidivism/Pretrial Misconduct, and Costs of FTA*. The University of Texas at Dallas

**Attachment B-2**

release and commercial surety should be explored. For example, in Maui, it's already common for defendants to post bail through a commercial surety, but also have to check in with the intake service center. Crafting release guidelines on a "case-by-case" basis allows the intake service center to increase supervision while a commercial surety guarantees appearances in court. I believe this hybrid approach offers the best opportunity to: 1) safely release more pretrial defendants, 2) increase the likelihood of appearance in court, and 3) provide individualized supervision requirements to foster further equity in the pretrial release process.

Warmest regards,

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is stylized and appears to read 'N. Lindblad'.

Nicholas Lindblad

Reference # 1

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*Attorney for Plaintiffs Riana Buffin and Crystal Patterson*

**THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

_____	)	
RIANA BUFFIN and CRYSTAL	)	
PATTERSON, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Case No. 15-CV-4959
v.	)	(Class Action)
	)	
THE CITY AND COUNTY OF SAN	)	
FRANCISCO and THE STATE OF	)	
CALIFORNIA,	)	
	)	
Defendants.	)	
_____	)	

**CLASS ACTION COMPLAINT**

**Introduction**

This case is about San Francisco’s wealth-based pretrial detention scheme, which operates to jail some of San Francisco’s poorest residents solely because they cannot pay an arbitrary amount of money. Named Plaintiffs Riana Buffin and Crystal Patterson were arrested within the past 48 hours and are currently imprisoned in the county jail solely because they are too poor to pay the amount of money generically set by the fixed “bail schedule” used by San Francisco.



22. Those arrestees too poor to purchase their freedom are, as a matter of policy, detained for two-to-five days without ever having appeared in court. An arrestee's first appearance in county court occurs at least two business days after arrest, not including weekends and holidays.

23. After an arrest, San Francisco does not deviate from its bail schedule.

24. In San Francisco, approximately 18,000 individuals are booked in county jail every year. At any given time, approximately 85% of county jail inmates are being detained pretrial.

25. On a typical day, approximately 50 new arrestees are locked in the county jail. Although they have not yet been proven guilty of the crime for which they have been arrested, there are more than 100 individuals at any given time who are being detained solely because they cannot afford money bail.

26. Approximately 90% of pretrial detainees are held due to probation revocation proceedings, imposition of a suspended sentence, or violation of terms of release. Even discounting this percentage, more than 1,800 individuals are detained annually solely due to their wealth-status. Such individuals would not be jailed were it not for Defendants' wealth-based pretrial detention scheme.

27. Wealthy arrestees in San Francisco can purchase immediate release by providing the scheduled amount of cash. Some remain detained for varying lengths of time until they or their families are able to borrow sufficient amounts of money or arrange for third-party payment. Others, like the named Plaintiffs, who are too poor even to find anyone to pay the money bond for them, are kept in jail until the resolution of their case.

## REPORT PROPER

Private sector bonding is utilized by the courts to arrange for financially secured release pending trial of persons charged with crimes.

County Pretrial Services Agencies providing unsecured releases of such persons, routinely present three serious problems:

### I. A HIGH FAILURE TO APPEAR RATE:

Any system is only as good as it is workable. A method of releasing persons pending trial works if it gets those released back to court, and there can logically be no exceptions to this rule, since this is the primary purpose of any release system.

The determining factor then, in assessing the effectiveness of the pretrial release program is: how good is it at getting persons back to court?

For Pretrial Release Agencies the answer is: not good at all. Numerous very credible studies establish this fact:

- U.S. Department of Justice, through its Federal Bureau of Justice Statistics, measures performance of the two systems against each other. Their research was conducted in the nation's 75 most populous counties and their formal report was published at the end of 2007. *They found that failures to appear on unsecured releases were twice as high as those on surety bond.*
- The American Legislative Exchange Council did a similar study in the three most populous counties in California and found: *"A defendant is more than twice as likely to fail to appear for trial if released on government secured release without financial security than if released on a private surety bail program."*
- Thomas H. Cohen, a highly recognized statistician with the U.S. Department of Justice, in 2009 completed a comprehensive comparison of secured vs. unsecured release and their respective appearance performances. He concluded: *"...this analysis showed that defendants released through surety bond were less likely to*

## INDEX OF REFERENCES

- #1., on page 3: Bureau of Justice Statistics  
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- #2., on page 3: American Legislative Exchange  
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Surety Bail and the Problem of  
Missed Court Appearances and  
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Washington, D.C. 20531
- #4., on page 3: Helland and Tabarrok, The  
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Versus Private Bail Enforcement  
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- #5., on page 4: Bureau of Justice Statistics  
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From Bail Jumping; Journal of  
Law and Economics, Vol. XLVII  
University of Chicago



Reference # 3

1

# RESEARCH REPORT

## PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

### DIFFERENCES IN FAILURE TO APPEAR (FTA), RECIDIVISM/PRETRIAL MISCONDUCT, AND ASSOCIATED COSTS OF FTA\*

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Prepared by:

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January 2013

\* This study was completed on behalf of the Dallas County (Texas) Criminal Justice Advisory Board (CJAB).

#### DISCLAIMER

No attempt by the research investigator, Professor Robert Morris, or the University of Texas at Dallas, will be made to explain the reasons behind the findings presented within this report. Nor will recommendations be made as to how the county should, or should not, respond to these findings. The information presented is driven solely by the data provided by Dallas County and caution should be used in any attempt to generalize these findings to other counties. The computer programming written to extract the data for analysis, as well as those used to establish model estimates, will be made publically available upon request to ensure research transparency and objectivity. Any audit of this programming by a qualified professional/s is welcomed. Contact Robert G. Morris, Ph.D. with questions: [morris@utdallas.edu](mailto:morris@utdallas.edu)

## DC Statistics

DC which eliminated bail many years ago has the highest incarceration rate in the US<sup>1</sup>.

DC has the highest number of arrests per capita in the US. It is more than double the US average<sup>2</sup>.

The DC jail population is 89.2% black<sup>3</sup>.

The DC PSA website claims it eliminated bail to reduce jail population, reduce recidivism, enhance public safety, and to be “fair”. However, the results 10 years later prove it is not working.

CD PSA utilizes a Monetary taxpayer funded pretrial services division. Money is definitely being exchanged for pretrial release. Instead of the “user” of the service paying, it is now law-abiding taxpayers who are forced to fund it.

- 2016 DC Pretrial Services **cost is over \$62 million**<sup>4</sup> to law-abiding taxpayers and cost continues to grow each year. The cost is up by more than 50% since 2008.
- DC Pretrial employees supervised 14,142 defendants in 2014. Since there were 345 employees, that’s an **average of only 40 defendants per pretrial employee** with an average **annual compensation of over \$125,000!**<sup>4</sup>
- **The cost is more than \$4300 per defendant!**
- DC Pretrial performed **over 2 million drug tests** on defendants in 2014. Pretrial advocates complain bail is not fair because defendants are “presumed innocent”. If they are “innocent”, why are they drug tested at taxpayer expense? **How is that constitutional?** Were the results used as evidence against those forced to take drug tests? Who is the crony drug testing vendor that is getting all the money?
- DC Pretrial personnel **average compensation is over \$125,000 per year!!** That’s **far more than probation or other types of law enforcement**. And far more than the average taxpayer earns!
- In 2017, the outgoing DC police chief, Kathy Lanier, said the **DC pretrial system is “beyond broken”**.
- FBI Statistics/Bureau of Justice Statistics reports about 11 million arrests per year. If only 1/3 of those arrested went into a DC pretrial program, the **taxpayer cost would be almost \$16 billion per year!!**
- **DC has a monetary bail system**. Unfortunately, **it is the law abiding taxpaying citizen who pays! How is that for “fairness”?!**
- In 2016 Pretrial Services **grew to 373 employees**. **Up 8%** from the prior two years even though arrests continue to decline.

- In FY 2008, there were nearly 12,000 defendants in general supervision and community court programs, and PSA maintained an average daily caseload of over 3,300 in these programs.
- In FY 2008, the Lab conducted 3,230,671 drug tests on 502,395 urine samples of persons on pretrial release, probation, parole, and supervised release, as well as DC Family Court respondents.
- In FY 2008, PSA’s budget was approximately \$50 million, which supported a staff of 350 employees.

State	Area	Population	Violent crime	Property crime	total	crime rate	
US	2008	304,059,724	1,382,012	9,767,915	11,149,927	3.7%	
US	2015	321,418,820	1,231,566	7,993,631	9,225,197	2.9%	-26.4%

DISTRICT OF COLUMBIA	2008	591,833	8,509	30,211	38,720	6.5%	
DISTRICT OF COLUMBIA <sup>5</sup>	2015	672,228	8,531	31,435	39,966	5.9%	-10.9%

1. <https://www.prisonpolicy.org/global/2016.html>
2. <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-69>
3. <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20June%202017.pdf>
4. <https://www.psa.gov/sites/default/files/FY%202016%20CBJ%20Budget%20Submission%20Final%201-26-2015.pdf>
5. <https://ucr.fbi.gov/crime-in-the-u.s>

## NYC Statistics

The NYC pretrial division is part of the Indigent Defense Funding budget. I reviewed the 2015 and 2013 reports and budgets and cannot find a separate budget for the pretrial division. However, they are funded through state and city taxes. They have over 200 employees. There is no line item that I can see for CJA. It would be nice to know how much they are receiving so a cost per defendant could be discerned.

The 2015 report notes:

- NYC budget for indigent defense funding for 2017 is \$255 million<sup>1</sup>.
- CJA conducted 240,994 defendant interviews. This number includes defendants who declined the interview and refused to answer some questions. It does not note how many.
- There were 294,699 prosecuted cases.
- 70% of non-disposed cases at arraignment for defendants were released through ROR. Approximately 110,000 defendants received ROR. Some received ROR post arraignment
- There are over 12,000 outstanding bench warrants.
- Male defendants reported they had full-time “activity” (full time student or full-time employment) in 46% of the cases
- Female defendants reported just 38%.
- 83% of cases were male
- CJA recommended just 31% of adults for ROR
- 49% were not recommended due to risk scores – CJA does not use charge severity as a determinant. Non-recommendation was the same for both misdemeanor and felony charges
- Bail was set in just 29% of cases not disposed at arraignment
- Bail was set in 17,451 non-felony cases and 25,256 felony cases
- Bail was made at arraignment for about 2500 felony defendants and about 2300 non-felony
- 8900 felony posted bond post arraignment and 5600 non-felony.
- 23% of desk tickets failed to appear, 14% felony FTA and 11% non-felony FTA
- Interestingly the CJA provided no failure to appear data for bonds made though I’m sure they have it.
- 636 defendants were admitted to supervised release. They successfully completed about 83% of the time.

2013 notes:

- CJA conducted 286,158 interviews (46,000 more than 2015)
- There were 347,476 prosecuted cases (about 58,000 more than 2015)
- 50% of interviews were not recommended for release due to score
- About the same percentages did not have full time “activity” as 2015 – around 44%
- 2200 defendants were admitted into supervised release. Not sure why there was a steep decline in 2015. About 85% successfully completed
- 31% of defendants recommended for ROR – 48% not recommended

- Bail was set in 30% of cases – ROR 68% at arraignment
- Bail was made at arraignment in about 2700 felony and 2400 non-felony
- About 8000 felony and 6800 misdemeanor defendants posted bond post arraignment
- 24% of desk tickets failed to appear, 12% felony FTA and 15% non-felony

1. <http://council.nyc.gov/budget/wp-content/uploads/sites/54/2017/03/098-MOCJ-1.pdf>
2. [file:///C:/Users/ken.berke/Downloads/AnnualReport15%20\(2\).pdf](file:///C:/Users/ken.berke/Downloads/AnnualReport15%20(2).pdf)

## Florida Statistics

- 28 counties in Florida already have a taxpayer funded pretrial services program costing **Florida taxpayers over \$30 million** per year. *(OPPAGA 2015)*
- **61%** of the counties with a taxpayer funded pretrial program have a **higher** than average incarceration rate. *(Florida County Detention Report – March 2017)*
- In 2015, there were **773,000 arrests in Florida** which equates to 2200 arrests per day. *(2015 UCR-FBI)* Florida County Detention Q1 2017 Report noted 3939 misdemeanor pretrial defendants. Therefore, **the clear majority of non-violent minor offense defendants are released pretrial within 24 hours.**
- **Over 90%** of average daily jail population is comprised of pretrial Felony offenders, holds or sentenced.
- **Less than 2 tenths of a percent (0.0014)** of the Florida population is in jail pretrial.
- Florida crime and jail population **rates have declined substantially** since the 1990's. *(UCR-FBI 2015 Report)*

## NJ Statistics

- NJ Bail reform advocates claim reform is working simply because there are about 15% less defendants in jail.<sup>1</sup>
- From July 31, 2015 to January 1, 2017 **NJ jail population declined by 28% before there was any reform.**<sup>1</sup>
- To date, **NJ has not published any failure to appear rates** or any rearrest/recidivism rates since reform began. How can it be working when the purpose of bail is to ensure defendants appear for all court dates?
- Many NJ law enforcement and local officials **stated publicly that “reforms” are not working.**
- NJ State Assemblyman Bob Andrzejczak recently wrote a letter to California **warning the reform implemented is “an absolute disaster”.** **Crime rate has increased 13% since January 2017 and cost to taxpayers has increased exponentially.**
- The NJ Program Administrator has **already requested additional funding**, just five months after implementation, because they will have an **unfunded negative balance.**<sup>2</sup>
- Prior to reforms, an economic impact study was conducted by Dr. Darius Irani of the Regional Economics Studies Institute at Towson University. He testified that the estimated cost to operate all changes implemented with **NJ reform would cost over \$300 million annually.**
- The NJ Attorney General has requested the **Arnold Foundation revise** its “scientifically validated” pretrial assessment (PSA) **just 5 months into reform** implementation. Why? It is **allowing violent offenders to be released without any bail or supervision.**<sup>3</sup>
- There has been a recent increase in the NJ jail population that may be due to the AG revision.<sup>1</sup>
- **If a PSA is already “scientifically validated”, how can it be revised?**

1. <http://www.njcourts.gov/courts/assets/criminal/cjrsummaryrpts.pdf>
2. [https://www.judiciary.state.nj.us/pressrel/2017/SenateBudgetCommitteeRemarks\\_May\\_4\\_2017.pdf](https://www.judiciary.state.nj.us/pressrel/2017/SenateBudgetCommitteeRemarks_May_4_2017.pdf)
3. [http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6\\_Introductory-Memo.pdf](http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6_Introductory-Memo.pdf)

## Hawaii

year	total pop	sentenced	% Total	Felony PT	% Total	Misd PT	% Total	Violations	% Total	Arrests
June 30, 2012	3811	2157	57%	761	20%	163	4%	716	19%	46,797
June 30, 2016	4065	2121	56%	906	24%	133	3%	891	23%	58,747 (2015)
August 31, 2017	3774	1555	41%	1024	27%	157	4%	1027	27%	

Jail Data <http://dps.hawaii.gov/publications/annual-reports/psd-annual-reports/>

Arrest Data <https://www.ucrdatatool.gov/>





Agency: Criminal Pretrial Task Force  
Hearing Date/Time: Friday, October 13, 1:00 p.m.  
Place: Aliiolani Hale  
Re: HCR 134 Criminal Pretrial Task Force

Dear Judge Trader and Task Force Members:

The ACLU of Hawai'i has been conducting a bail study, both gathering publicly available information from the Judicial Information Management System eCourt Kōkua for the period between January and June of 2017, and looking for patterns and practices explaining the large proportion of pretrial detainees in Hawai'i jails, which are grossly overcrowded. The ACLU of Hawai'i will be releasing its bail study later this year. The report will be more comprehensive than the present testimony, where we only briefly highlight four major concerns about the current pretrial system, which systematically deprives individuals, who should be presumed innocent until proven guilty, of their freedom without adequate due process of law. We hope you will consider these concerns as you develop recommendations for the Legislature.

**First**, the current pretrial system fails to adequately individualize the bail process even though Hawai'i law and due process require that, at a minimum, ability to afford money bail be considered.<sup>1</sup> Based on our investigation, including attending bail hearings and interviewing public defenders, ability to pay is rarely, if ever, considered in determining the appropriate bail amount. Additionally, the initial bail amount set by the judge more often than not matches the bail amount set on the arrest warrant, even though such amount is set without an individualized assessment of a defendant's flight risk, danger posed to the community, or ability to pay. In the First Circuit, Circuit Courts inappropriately defer to the amount set in the arrest warrant nearly one hundred percent of the time. Similarly, a system that relies on *de facto* bail schedules is not sufficiently individualized either. For example, in the First Circuit, a defendant charged with a single class C felony offense will more often than not face a bail amount of exactly \$11,000 or \$15,000. We are also aware of bail guidelines that have been adopted and used in other circuits.

**Second**, the Task Force should consider and address overreliance on money bail. We found that in 93 percent of cases in the First Circuit between January and June of 2017 money bail was set at the initial bail hearing. In only less than ten percent of cases was non-financial release afforded. Many other jurisdictions on the county and state level have moved away from cash bail and towards non-financial release options. For example, in New Jersey, during the

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<sup>1</sup> H.R.S. § 804-9 ("The amount of bail . . . should be so determined as not . . . to render the privilege useless to the poor."); see also *Hernandez v. Sessions*, \_\_\_ F.3d \_\_\_, 2017 WL 4341748, \*10 (9<sup>th</sup> Cir. Oct. 2, 2017) ("Detention of an indigent for inability to post money bail is impermissible if the individual's appearance at trial could reasonably be assured by one of the alternate forms of release." (citations and quotation marks omitted)).

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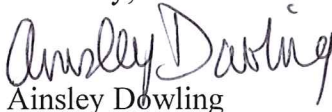
same time period that our study took place, cash bail was imposed in only nine cases.<sup>2</sup> In considering alternatives to money bail, the task force should consider the conditions being imposed for release. Bench warrants indicate that release conditions are often too burdensome for defendants, leading many defendants released on bail to be re-arrested for technical violations. Less burdensome methods of ensuring appearance have had great success in other jurisdictions. Multnomah County, Oregon, was able to decrease their failure to appear rates by 41 percent just by using automated phone call reminders.<sup>3</sup> Looking into how other states and counties utilize their pretrial services may be helpful in determining what conditions can ensure appearance while also minimizing the failure to comply rate.

**Third**, the task force should also consider how the Ohio Risk Assessment System Pretrial Assessment Tool (“**ORAS-PAT**”) is being used in Hawai‘i. To our knowledge, the ORAS-PAT was not adapted to Hawai‘i’s unique geographical circumstances, where flight risk to another state is minimal. Perhaps, a risk assessment tool that focuses on re-arrest and danger to the community rather than on flight risk is worth exploring, especially considering Hawai‘i’s high rate of homelessness and the role residential stability plays in assessing risk under the ORAS-PAT. Additionally, providing a copy of the completed ORAS-PAT to the parties and the judge would contribute to a better understanding of the defendant’s circumstances and lead to a more transparent and individualized bail setting process.

**Fourth and finally**, we suggest investigating how prosecutors use defendants’ pretrial detention to induce guilty pleas in Hawai‘i. Studies have shown that everything else being equal, defendants who are detained before trial are 25 percent more likely to plead guilty than those who are not detained pretrial.<sup>4</sup>

We hope your task force will consider our recommended areas of reform and appreciate the opportunity to testify.

Sincerely,

  
Ainsley Dowling  
Legal Fellow  
ACLU of Hawai‘i

  
Mateo Caballero  
Legal 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 mission 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 over fifty years.*

<sup>2</sup> Pretrial Justice Institute, *Where Pretrial Improvements Are Happening*, July 2017, 10.

<sup>3</sup> Harv. L. School Crim. Justice Pol’y Program, *Moving Beyond Money: A Primer on Bail Reform*, Oct. 2016, at 16.

<sup>4</sup> *Id.* at 7.



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Hawaii Criminal Pre-trial Taskforce Public Meeting  
October 13, 2017

To whom it may concern:

My name is Beth Chapman. I Chair the Board of Directors and I am the President of the Professional Bail Agents of the United States (PBUS). I also have the good pleasure of serving as the acting president of the Hawaii Bail Agents Association. My husband Duane, "Dog" Chapman and I, were the stars of our first show, "Dog the Bounty Hunter," which ran for eight seasons on A&E. We also had a show "Dog and Beth: On the Hunt," on CMT for four seasons. PBUS is a national association which represents bail agents' interests before the business community, citizens and government entities. I have been in the bail bond business for nearly 30 years and have been operating in the state of Hawaii for 17 years while my husband has been in the business for over 40 years and nearly 30 of those in Hawaii. We chose to raise our family here and conduct our business here because we love Hawaii and its people.

I appreciate the opportunity to bring the combined experience of thousands of bail bond agents to the table in this conversation as the state of Hawaii considers reform in this area. We, as an industry, have worked in hand with the judicial system in the United States since the inception of our country. Cash or guaranteed surety bail is the most cost effective, efficient, and performance effective tool to ensure the appearance of the defendant to court and good behavior while awaiting trial. It is also the only system which is user funded and does not require the taxpayer to foot the bill for mistakes and ill choices of those who break the law. With that being said, I would like to highlight a few policy considerations and practices which I and the bail bond industry feel are of the utmost importance to the balance of public safety and the rights of the accused.

### **Cost and Performance of Non-Monetary Release**

States which have implemented bail reform after following similar taskforce meetings like what Hawaii is currently engaging have enacted policies which have been a detriment to the safety needs of the public and have shifted the cost burden to the taxpayers.

Proponents of a "risk assessment" and a system which requires the "least restrictive means of release" continue to point to the system in Washington D.C as the pinnacle of pre-trial release programs. They laud it as a successful system which should be mimicked. The numbers, however, simply do not justify the hype. Washington D.C. has a little over 700,000 citizens and the cost of running their "free" pre-trial system is a whopping \$65 million dollars a year. However, the numbers get even worse when you consider the number of defendants processed by D.C. They, much like HPD, process between 16,000 and 20,000 defendants which puts the cost, per defendant, between 3,250 and 4,062. That is the cost to detain, process, or release and supervise just one defendant. Remember, right now that cost is being borne completely by the offender and bail industry not by the taxpayer. But when you remove cash or surety bail the total cost shifts to the taxpayer.



The initial projections pitched to the New Jersey legislature put the cost of the new system at around 20 million; however, current projections have now approached 300 million. We in Hawaii know all too well the pain of following false projections as we are currently suffering with the light rail boondoggle. We must take precautions from every other state that has dealt with bail reform and know that the cost projections have always missed the mark. We cannot invite another boondoggle onto the shoulders of the good people of Hawaii.

Even if we were to put the cost aside and just look at the results in what matters the most, namely the safety of the citizens, Washington D.C. fails tremendously. The crime rate in D.C. is at the top 3% in the nation. Only 3% of other cities in the nation are more dangerous than Washington D.C. In D.C., 1 in 79 people will become the victim of a violent crime and 1 in 21 will become the victim of a property crime. Again, proponents point to what they consider the success of Washington D.C. because they don't have very many people in jail awaiting trial. However, with those terrible crime statistics maybe there should be more criminals in jail.

This trend is not isolated only to D.C., New Jersey just implemented a policy which requires "least restrictive release" a "risk assessment" and one which removed judicial discretion completely and the results have been disastrous. Crime rates have skyrocketed and more people are being victimized as a result. It has even prompted members of law enforcement to proclaim publicly that "we can't protect you anymore".

Detective Joe Indano of South Plainfield, New Jersey voiced his frustration and stated, "Nobody's afraid to commit crimes anymore. They're not afraid of being arrested, because they know at the end of the day, they're going to be released. Its catch and release. You're chasing around the same people over and over again. They're being released and going back and offending and now you have more people as victims."

However, the frustration doesn't just stop at law enforcement. Lawmakers are discovering that they were sold a bill of goods and even those who advocated for the reform are now speaking up against other states following New Jersey's example. New Jersey Assemblyman Bob Andrzejczak (D) even went so far as to send a letter, which I have attached, to California Speaker of the House Rendon urging him to reconsider passing similar reforms in California. He said in that letter that since the law went into effect in January it has been an "absolute disaster" and that "This law is victimizing law abiding citizens everyday".

In New Mexico, the Supreme Court decided to implement similar bail reforms without the legislature and it has caused havoc in that state. The move has prompted a coalition of citizens, bail industry members, and lawmakers to file a lawsuit against the state's Supreme Court. It has also prompted New Mexico Senator Bill Sharer to call for the resignation of Chief Justice Daniels.

This argument about bail reform has not only been fought in the legislative chambers across the country but also in the court room. Already the 5th circuit, 9th circuit, and 11th circuit have taken challenges by bail reformers against the current system and currently the 11<sup>th</sup> has ruled against the presumption of free bail. Arguments have been heard in the 9<sup>th</sup> and 5<sup>th</sup>. It is important to note that the 5<sup>th</sup> circuit justices' arguments in the O'Donnell v. Harris County case seem to suggest that the scope of the relief by the lower court (non-monetary release of all misdemeanor defendants) went too far and that removal of judicial discretion is a dangerous slippery slope.

### **Presumption of Innocence Pre-Trial**

The conversation revolving around bail has become centered on the rights of the offender and preferring the offender over the law abiding citizen. Proponents would have you believe that there are countless individuals "languishing" in jail because they cannot afford bail. However, bearing extraordinary circumstances; a vast majority of people in jail are there because they broke the law. They have also broken the trust of society and justice must be served. The constitution guarantees that the accused is innocent until proven guilty. The criminal justice system guarantees that society will have its opportunity to bring the charges against a defendant and the defendant will have his day in court. It is the responsibility of the state to balance the rights of the accused with the necessity of societal justice. This does not imply an

implicit trust in the offender and that his or her presumption of innocence extends to pre-trial release, in fact it should be regarded oppositely and has been held in many courts that way.

As the Alliance of California Judges stated in their May 9, 2017 opposition letter to SB10:

“The bills inject the concept of the presumption of innocence into a context in which it simply doesn’t belong. The proposed legislation would require judges to consider the presumption of innocence in making pretrial release decisions. This provision makes no sense. While the presumption of innocence is at the heart of our criminal justice system, it’s a concept that applies at trial, not in the context of rulings on bail. Both the United States and California Supreme Courts have long maintained that the presumption of innocence ‘has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.’ (Bell v. Wolfish (1979) 441 U.S. 520, 533; see also In re York (1995) 9 Cal.4th 1133, 1148.)”

Bail bonding adds a layer of personal accountability in the form of monetary interest by the accused, their friends and family, or a bondsman willing to put up a portion of his business so the offender may be released. In short, if someone has a personal financial stake in the accused, they will do everything to ensure they stay out of trouble and show up for court. And, in the event they miss court those with financial interest will do anything to help find them so as to avoid losing that financial interest. It is a system which has worked effectively for over 200 years in this country and one with a high success rate most topping 90% return rates. Most pre-trial programs see a return rate of a dismal 50%-75%. In Hawaii, when the legislature allowed emergency release we saw failure to appear rates of upwards of 50%. That compares with 3%-7% in most bail bond companies.

### **Rights of the Victim Frequently Disregarded**

Some of the most egregious results of bail reform policies across the country have been the victimization of law abiding citizens and the preference of the criminal over the victim in many cases. Often, the needs of the offender and attention to their situation have taken the precedence to that of the victim. It has been said in places like D.C. and New Jersey that the offender is released from jail even before their victim is released from the hospital. Other victims who suffer property crimes at the hands of offenders who commit multiple crimes are victimized more frequently under non-monetary release policies.

Catherine Keller, a victim of serial home invasion criminal Dawud Ward in New Jersey expressed her frustration and said, “I was totally disgusted that he just kept on being released and two days later he is doing to someone else’s house and he is doing the same thing. The system is broken.”

Victim’s rights would take a back seat in the initial bond setting hearing as well. Most of these policies require a hearing within 24-48 hours in an evidentiary setting to determine if non-monetary release should be exempted in favor of detention or monetary release. This is done because the laws require the “least restrictive release” and remove judicial discretion in favor of what becomes a “probable cause hearing” to require something more restrictive. The laws require the state to prove that the offender is a threat which would result in them calling testimony from witnesses in the initial bond setting hearing. This is a fine point that is always missed in the initial discussions of bail reform but one which re-victimizes the truly innocent. Could you imagine the trauma of suffering at the hands of a criminal then being required to re-live that trauma again within 24-48 hours just to prove that your assailant truly is a threat?

That is the reality for victims when you remove judicial discretion.

### **Risk Assessment verses Judicial Discretion**

What has occurred recently is those who see the criminal as the victim of circumstance, rather than society as the victim of crime, now want society to foot the bill for the mistakes of the criminal. They want society to blindly trust that everyone arrested can be trusted to be released from jail for free and with no accountability. Unfortunately, we know that

rarely do you catch someone the first time they commit a crime. So, even though we may be looking at a “first time” offender in the eyes of the legal system, it is most likely that we will never know of the other crimes they have committed but were never caught. It is unwise and dangerous to release someone charged with a crime, without any accountability, and simply trust in a hope and a prayer that they won’t reoffend while they are out.

Of course, we cannot possibly know who will reoffend or who will ultimately fail to appear, so the wisest move is to treat every offender with the least amount of trust and work our way up from there. However, the proponents of bail reform laud the “risk assessment” as the only tool to truly evaluate the risk of an offender. Generally these assessments are comprised of 7-13 questions combined with statistical information to try to ascertain the risk level of an individual. But, no matter how scientific they try to make it sound, at the end of the day it remains a guess. The safety of the public and the assurance of justice ride on an educated guess from an antiquated computer program. The mistrust of the “risk assessment” tool led Nevada Governor Sandoval to veto their bail reform bill stating that “there is no evidence that risk assessments work”. Even in New Jersey, the Attorney General who was one of the main proponents of their reform admitted that the risk assessment tool they are using from the Arnold Foundation was flawed.

The risk assessment tools are a great tool to have at the disposal of the judges when setting bail but should never be the determining factor. I think it should be fair to point out that the Arnold Foundation, Governor Chris Christie, and Attorney General Chris Porrino are all being sued in New Jersey for the flawed implementation of the risk assessment tool which led to the death of Christian Rogers. This is both a deprivation of constitutional rights and a products liability case. Christian’s alleged killer was released under the bail reform policy and three days later gunned down Christian while he was walking home. This was without provocation, in cold blood, and in the middle of the day. A look at the rap sheet of the alleged shooter, Jules Black, will show that this man was a risk. He was arrested on gun related charges and, in the least, should have been out only on secured bond with some kind of supervision.

Personal responsibility has taken a backseat in these discussions and it is being replaced with guilt on society that we are keeping the down trodden suppressed by jailing criminals and holding them accountable to face their consequences. There is no doubt that there are some special circumstances where an individual has suffered inappropriately under the current system. But, those situations should be looked at individually and fine tuning of the law should be implemented to fix those problems. To take a few examples and superimpose massive, dangerous reform to an effective system and have a “broad brush” approach will only further remove personal responsibility of the offender and transfer the costs and danger of the criminal to law abiding citizens. Protecting the welfare of law abiding citizens should be good enough reason for anyone to tread very lightly in instituting these massive and dangerous reforms.

The private bail industry has a long and historic partnership in the criminal justice system. The purpose of bail is to ensure the appearance of the defendant in Court. Private bail has done this for generations in the United States with an astounding record of reliability and accountability at no cost to the taxpayer. Bail agents not only have a financial interest in making sure a defendant appears in Court, but they also have a fiduciary commitment to the Courts, taxpayers, and victims of crime. The Hawaii Bail Agents Association and the PBUS respectfully requests that you take the time to review the ramifications of these types of policies and include industry experts which have tremendous experience in the discussion. We ask that common sense rules and parameters be put in place that will protect public safety and use taxpayer dollars in the most efficient and effective manner. Please take a moment to watch a brief video regarding pretrial release (<https://youtu.be/9-tCa3GKrQ8>).



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## **Non-Monetary Release Recommendations-**

Although we support the commercial bail industry and feel monetary bail is the best option for the criminal justice system, we understand the need for certain occasions when non-monetary or "own recognizance" bonds are necessary or preferred. At no time do we as an industry feel that judicial discretion be removed from the equation totally.

The commercial bail industry stands by the below core principles for own recognizance (OR) and non-monetary release:

- Eligible- Non-monetary release as a first option for violation of traffic laws, and look at what traffic laws can be completely de-criminalized
- Eligible- Non-monetary release as a first consideration for first time offenders with no criminal history
- Eligible- Non-monetary release as a first consideration on individuals with no failures to appear (FTA)
- Not Eligible- Non-monetary option for an individual currently out on a bond for a felony or misdemeanor
- Not Eligible- Non-monetary option for someone convicted of a felony in the past 3 years or misdemeanor in the past 1 year
- Not Eligible- Non-monetary release option for someone with multiple cases or in multiple counties
- Not Eligible- Any release on crimes where there is a victim should be guaranteed and supervised
- Not Eligible- Any defendant who has previously failed to appear on an OR bond on a criminal charge shall only be released with secured bail and would not be eligible for another OR bond for at least one year
- Not Eligible- Any defendant currently released on a secured bond for a felony offense would not be eligible for non-monetary release
- Not Eligible- Any defendant currently on a non-monetary bond would not be eligible for a second non-monetary bond in any county
- Not Eligible- Any defendant who has been charged with a sexual assault on a child/minor causing great bodily harm would not be eligible for non-monetary release
- Not Eligible- Any defendant who has been convicted of a charge of escape in the last five years would not be eligible for non-monetary release
- Most importantly, a policy should be created that stops unlimited non-monetary release for any defendant





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July 3, 2017

Dear Speaker Rendon,

I am a democratic member of the New Jersey Assembly representing Legislative District 1. Prior to joining the Assembly, I served in the Iraq War as a sergeant in the Army's 25th Infantry Division until my discharge following an injury which led to the amputation of my left leg from a grenade explosion in 2009. As a result, I was awarded the Purple Heart and Bronze Star; my recovery was featured on a 2009 episode of The Oprah Winfrey Show.

As you may know, New Jersey passed and has implemented a bail reform policy similar to California's SB10 which you are considering. I supported the legislation when presented to our Assembly and advocated for its passage. The law went into effect this past January and it has been an absolute disaster. The public safety needs of citizens in New Jersey has suffered far greater than could have been imagined. The costs to the state have increased exponentially and, even worse, the constitutional rights of many of the accused are being infringed.

We were told that there would be no danger to citizens because the dangerous criminals would not be released and on "low level" criminals would be eligible. The reality is that dangerous and career criminals are released daily within hours of arrest. We should never have considered free bail to those who commit crimes where a citizen has been victimized. We may only catch a criminal once out of a multitude of crimes in which they commit. They are simply not afraid of committing crimes against citizens and as a result our crime rate has increased at least 13% since January. This law is victimizing law abiding citizens every day.

We were also misled as to the cost of implementation and continuation of this policy. It has become apparent to us now that the cost of incarcerating those held awaiting trial were greatly exaggerated. Additionally, we have transferred the cost of "free" bail to the taxpayer rather than the offender. The bail system supported many functions of the court and the cost of re-arresting multiple offenders and bail jumpers was borne by the offenders themselves rather than the taxpayers. Now we are making taxpayers pay to release criminals back into their neighborhoods and with no accountability. The state does not have the resources to properly monitor these people out on bail so we don't. This is a powder keg and our citizens are suffering because of it.

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Not only are our citizens suffering but now even the accused are being denied their constitutional right to pre-trial release as a result of the new laws. The eighth amendment to the Constitution of the United States guarantees an accused the right to "reasonable bail". However, in New Jersey, many are being denied that right. This is not just happening to dangerous criminals it is happening to low level offenders as well. The risk assessment system is simply not working. In January, a convicted child predator was arrested for attempting to lure a 12 year old girl to his house for "sexual things". The risk assessment determined he was not a threat and was released. The police chief of Little Egg Harbor was so distressed by this that he appealed the release all the way to our supreme court and was denied. The man was released back into the same neighborhood where the "would be" victim resides. The only recourse for law enforcement was to post on Facebook a warning to the community.

I am not "in the bag" of any industry or special interest. I fully thought this was the right thing to do because of the arguments we heard. I am writing to you because I have experienced this first hand and it has been a disaster. I am trying to rectify a problem in New Jersey that we caused and hopefully encourage you not to make the same mistake. Please listen to the experts on this issue and look at the examples before you because the safety and financial interests of your citizens are at stake. Thank you for your time.

Sincerely,

  
Bob Andrzejczak  
Assemblyman, First Legislative District



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**CEO**

Mark Zahner

April 11, 2017

The Honorable Rob Bonta  
California State Assembly  
State Capitol  
Sacramento, CA 95814

**RE: AB 42 – Oppose**

Dear Assemblyman Bonta:

On behalf of the California District Attorneys Association (CDA A), I regret to inform you that we are opposed to your measure, AB 42. This bill would dismantle California’s longstanding bail system, replacing it with a costly and cumbersome alternative that we believe will have a negative impact on public safety. While we agree that California’s bail system should be reviewed and opportunities for thoughtful improvement identified, this bill simply goes too far, too fast.

As you know, Chief Justice Tani Cantil-Sakauye has put together a Pretrial Detention Reform Work Group to study current pretrial detention practices and provide recommendations for potential reforms. This work group is expected to report back to the Chief Justice with recommendations by December 2017. In light of that timeline, we believe that any legislative efforts to repeal and replace the current bail system are premature.

California’s current pretrial release procedures help to ensure that dangerous defendants are not released to commit new crimes and harm victims and witnesses before trial. Under these procedures, the court already has wide discretion to release a defendant on his or her own recognizance, or to reduce bail for defendants that do not pose such risks. Whatever the deficiencies in the current system, it hardly seems prudent to take it apart and start from scratch.

AB 42 focuses on the costs of incarceration and hardships to the defendant caused by pretrial detention, but wholesale pretrial release has many other costs. When a defendant fails to appear, there is no bail agent with motivation to go find the defendant. The police have no additional resources to find and arrest defendants who fail to appear – and even those who are apprehended after failing to appear are only be subject to a maximum five-day flash incarceration, following a civil contempt hearing.

There are also tremendous logistical problems with the proposed pretrial release scheme. Under the bill, when Friday is a court holiday, a Wednesday arrestee must be charged by Thursday. So, when someone is arrested on Wednesday at



11:00 p.m., the police must complete reports, present them to the district attorney on Thursday, and expect the district attorney to make a careful charging decision in time for an afternoon court arraignment. This compressed timeline will undoubtedly result in the release of dangerous individuals.

Even when given a full two days before arraignment, AB 42 makes it extremely onerous to achieve pretrial detention for dangerous defendants. The district attorney must file a written motion at arraignment, containing myriad required allegations, and be expected to prove those allegations in a contested hearing – all of this within 48 hours of the arrest. The existing bail schedule system allows judges to exercise discretion to raise or lower bail for violent felons, in a sensible period of time.

Changing the pretrial release system to address actual injustices is a laudable goal. However, these changes should be careful and measured, particularly for offenses greater than misdemeanors and low-level felonies.

I greatly appreciate your consideration of our concerns. If you would like to discuss these issues further, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sean Hoffman", with a horizontal line extending to the right.

Sean Hoffman  
Director of Legislation



# Alliance of California Judges

May 9, 2017

## Directors

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Hon. John Adams  
*Education Coordinator*

The Honorable Rob Bonta  
Member of the State Assembly  
State Capitol, Room 2148  
Sacramento, CA 95814

Re: Assembly Bill 42

Dear Assemblymember Bonta:

As President of the Alliance of California Judges, a group of more than 500 judges and retired judges from across the state, I write to express our strong opposition to Assembly Bill 42 and Senate Bill 10, bills that would radically alter the current bail system.

Our member judges make thousands of rulings on bail issues every day. We recognize that not everyone has the ability to post bail pending trial. We address that concern by adjusting bail amounts and releasing defendants on their own recognizance or on pretrial release under appropriate circumstances. We know that our current bail system needs further reform. But the proposals contained in these bills are simply too drastic, and the effects on public safety and court congestion could be catastrophic.

We note at the outset that these bills run counter to the letter and the spirit of the California Constitution as amended by Proposition 8, the Victim's Bill of Rights, which passed with 83 percent of the popular vote in 1982. Prop 8, which the Legislature voted, with only one dissenting vote, to put on the ballot, added the following language to Article I, § 12:

“In fixing the amount of bail, the court shall take into **consideration the seriousness of the offense charged, the previous criminal record of the defendant**, and the probability of his or her appearing at the trial or hearing of the case.”  
[Emphasis added.]

If that constitutional mandate weren't clear enough, the voters passed Proposition 9, “Marsy's Law,” in 2008. Prop 9 added the following language regarding bail to Article I, § 28 of the Constitution:

“In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous

criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. **Public safety and the safety of the victim shall be the primary considerations.**

“A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.” [Emphasis added.]

The proposed bills strip judges of the authority to set bail in the majority of cases, and they substitute a different set of priorities for judges to follow in those cases for which they could still set bail. This new vision for bail cannot be reconciled with the Victim's Bill of Rights and Marsy's Law in our state constitution.

We highlight just a few of the other serious concerns we have with these two bills:

- **The bills would heighten the risk to public safety.** Those arrested for selling drugs, committing identity theft, vandalizing homes and businesses, stealing huge sums of money, or burglarizing dozens of businesses would all presumptively be granted pretrial release—without having to appear before a judge, post bail or submit to any conditions upon release. These bills also inexplicably exclude residential burglary from the list of crimes for which arrestees are not to be considered for release without judicial authorization.
- **These proposals would create more congestion in our busiest courts.** Under the proposed legislation, judges in most cases could set bail or impose pretrial release conditions such as electronic monitoring only after a hearing. We can expect that prosecutors will be requesting lots of these hearings. Our arraignment courts—already the busiest courts in the entire judicial system—would become completely clogged with bail hearings.
- **The bills completely upend the way in which we handle arrest warrants, to the detriment of the court system and the arrestees themselves.** By eliminating the judge's ability to set a bail amount when issuing a warrant, the proposed legislation virtually ensures that wanted suspects will not be brought to justice in a timely manner, if at all. Moreover, those arrested on warrants could not be released until a judge makes an individualized ruling that considers the arrestee's ability to pay. Arrestees who might otherwise simply pay their bail and be released from custody will instead languish until their cases can be heard.

- **The bills place an undue—and wholly unrealistic—burden on the prosecution.** The bills would require in some cases that the prosecuting agency be prepared for a contested hearing with live witness testimony in less than 24 hours, at risk of a dangerous felon being set free. The bills also create a presumption of release pending trial that law enforcement will seldom be able to rebut within the timelines contemplated by the bill, even when the court is faced with a violent criminal facing serious felony charges.
- **The bills inject the concept of the presumption of innocence into a context in which it simply doesn't belong.** The proposed legislation would require judges to consider the presumption of innocence in making pretrial release decisions. This provision makes no sense. While the presumption of innocence is at the heart of our criminal justice system, it's a concept that applies at trial, not in the context of rulings on bail. Both the United States and California Supreme Courts have long maintained that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." (Bell v. Wolfish (1979) 441 U.S. 520, 533; see also In re York (1995) 9 Cal.4th 1133, 1148.)

AB 42 and SB 10 are well-intended attempts to address the fact that the bail system affects persons of differing income levels differently. But nearly every county now has a pretrial services division in place to screen defendants and recommend their release on appropriate conditions, without bail, when doing so does not pose a serious danger to the public or a significant risk of non-appearance. A bill mandating a pretrial release program in every county, and perhaps providing some limited funding for that purpose, would be a sensible response to the problem. These twin bills go way too far, and their effect would be a near shutdown of the court system and a serious risk to public safety. We urge that these proposals be reconsidered and substantially amended.

Sincerely,



Hon. Steve White  
President

cc: ACJ Board of Directors





July 17, 2017

The Honorable Robert M. Hertzberg  
California State Senate  
State Capitol  
Sacramento, CA 95814

**RE: Senate Bill 10 (Oppose)**

Dear Senator Hertzberg,

On behalf of the KlaasKids Foundation staff, volunteers and crime victims throughout California, I strongly oppose Senate Bill 10. Beyond its obvious threat to public safety and its fiscal ambiguity, it is a clear violation of the Victim's Bill of Rights, and Marsy's Law. In the final analysis it kneecaps California's community of victims.

In 1982, California voters overwhelmingly approved of Proposition 8, otherwise known as the Victim's Bill of Rights. The nation's first ever Victim's Bill of Rights clearly states that, "In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial of hearing of the case." However, SB 10, as written, only contains information about the current offense and, with exceptions, will allow, "Recommendations on conditions of release for the person immediately upon booking."

Proposition 9 (Marsy's Law) provided the constitutional right of victims to be notified and informed before any pretrial disposition of the case and to be heard upon the request of the victim at any delinquency proceeding involving a post-arrest release decision. SB 10 fails to explicitly account for the right of the victim to be notified or to be heard as part of such an appearance. Furthermore, the speed at which defendants are rushed back onto the streets makes it impossible to facilitate the rights afforded victims under Marsy's Law.

SB 10 will make it very difficult for crime victims to come forward knowing that their assailant will be back on the streets within hours of being arrested. Without a monetary incentive to appear at court dates, many victims will never receive justice.

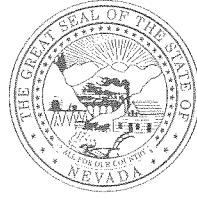
The KlaasKids Foundation vehemently opposes SB 10. We acknowledge that California's bail system is in need of repair, but do not believe that Senate Bill 10 is the answer. It is ill conceived, and completely disregards public safety and the needs of crime victims. SB 10 follows the current trend in criminal justice legislation by focusing on the needs of defendants and criminals at the expense of crime victims.

Sincerely,

Marc Klaas  
President, KlaasKids Foundation

P.O. Box 925  
Sausalito, CA 94966  
415.331.6867  
info@klaaskids.org

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## Office of the Governor

May 26, 2017

The Honorable Jason Frierson  
Speaker of the Nevada State Assembly  
The Nevada Legislature  
401 South Carson Street  
Carson City, NV 89701

### **RE: Assembly Bill 136 of the 79<sup>th</sup> Legislative Session**

Dear Speaker Frierson:

I am herewith forwarding to you, for filing within the constitutional time limit and without my approval, Assembly Bill 136 ("AB 136"), which is entitled:

AN ACT relating to criminal procedure; revising provisions governing factors to be considered by the court in deciding whether to release a person without bail; prohibiting a court from relying on a bail schedule in setting the amount of bail after a personal appearance by a defendant; and providing other matters properly related thereto.

AB136, while commendable in some respects, would incorporate a new and unproven method for determining whether a criminal defendant should be released from custody without posting bail. No conclusive evidence has been presented showing that the risk assessment methods proposed by AB136 are effective in determining when it may or may not be appropriate to release a criminal defendant without requiring bail. Decisions made by judges during the bail phase of a criminal prosecution are of the utmost importance. It is not clear that the provisions of AB136 will enhance the ability of Nevada's judges to make these determinations in a manner that balances the interests of justice and public safety.

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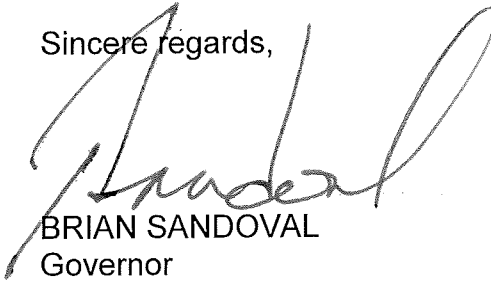
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For these reasons I veto AB136 and return it without my signature or approval.

Sincere regards,



BRIAN SANDOVAL  
Governor

*Enclosure*

*cc: The Honorable Mark Hutchison, President of the Senate (without enclosure)*  
*The Honorable Aaron Ford, Senate Majority Leader (without enclosure)*  
*The Honorable Barbara Cegavske, Nevada Secretary of State (without enclosure)*  
*Claire J. Clift, Secretary of the Senate (without enclosure)*  
*Susan Furlong, Chief Clerk of the Assembly (without enclosure)*  
*Brenda Erdoes, Esq., Legislative Counsel (without enclosure)*



CRIME VICTIMS UNITED  
OF CALIFORNIA

May 23, 2017

The Honorable Ricardo Lara  
Chair, Senate Appropriations Committee  
State Capitol, Room 5050  
Sacramento, CA 95814

**RE: SB 10 (Hertzberg) – Oppose**

Dear Chairman Lara:

On behalf of Crime Victims United of California (CVUC), I must respectfully oppose SB 10 (Hertzberg) related to bail and pretrial release.

CVUC will be the first to tell you that the current bail and pretrial system in California are not perfect. As a matter of fact, CVUC has serious concerns with the current system and its failures to adequately provide for victims' rights provided under Proposition 9. However, CVUC nonetheless strongly supports the use of monetary bail as a means of accountability, as a backstop to ensure offenders' appearance at hearings and as a deterrent to further victimization. CVUC is open to changes to the current bail and pretrial release system and is willing to work with stakeholders to improve the system and address system concerns that have been highlighted in recent years. Notwithstanding the concerns and deficiencies with the current system as they relate to victims, as an overarching perspective CVUC is highly concerned about the increasing interest in relying almost exclusively on pretrial release in our criminal justice system. Of the utmost importance as part of any reform is it must ensure victim and overall public safety are the primary considerations and the defendant's appearance at court proceedings. We are concerned that the SB 10 and other proposals under consideration fail to sufficiently ensure these critical priorities are addressed. To argue that the new proposed framework is better for victims than the current system is and victims should therefore be less concerned fails to consider that both the current and proposed systems are flawed when it comes to victims – it shouldn't be a matter of leveraging one over another. They both need to be revised. Victims are made such based on another's actions against them – not of their own will. This is lost in the current debate in favor of considerations for the offenders' who victimized them in the first place.

First and foremost, SB 10 fails to explicitly provide for the rights afforded victims under Proposition 9, Marsy's Law. More specifically, Proposition 9 provided the constitutional right of victims to be notified and informed before any pretrial disposition of the case and to be heard upon the request of the victim at any delinquency proceeding involving a post-arrest release decision. Despite voters' approval of these rights under Proposition 9 in 2008, SB 10 fails to account for these constitutional rights. And although we appreciate that under SB 10 a person charged with a serious or violent felony or domestic violence must go before a judge before being released, the bill fails to explicitly account for the right of the victim to be notified or to be heard as part of such an appearance. Further, as discussed in greater detail below, the 48 (or less)

timeframe under which to notify and allow a victim to be heard is wholly insufficient to meaningfully account for these rights.

With regard to the risk assessment tool contemplated under the bill, CVUC is highly concerned it will not sufficiently assess the risk to the victim or public safety posed by an offender for a number of reasons. First, there is currently no tool that we are aware of that incorporates as factors things such as serious injuries inflicted, multiple victims, a victim's impact statement, an offender's use of a weapon, or an offender's prior criminal history. Further, the current framework laid out in SB 10 is inconsistent under Penal Code Section 1275(a)(1) and 1318.3(b)(6) where under 1318.3(b)(6) states that undue weight should not be given to factors such as the offender's criminal history. This is unacceptable as an offender's criminal history is a critical consideration in determining his risk to the victim and overall public safety. Further, in hindering the ability to consider an offender's prior history the bill in turn hinders the ability to consider the prior criminal impact on the victim. The bill should not diminish the importance of this factor, and the associated victim impacts, from being considered and any tool utilized must prioritize consideration of an offender's criminal history and associated victimization to ensure an accurate assessment of the risk to the victim and public are undertaken.

Also problematic, the short amount of time associated with the risk assessment being conducted will inevitably negate the ability to conduct a meaningful assessment to ensure victim and public safety. Additionally, the short time frame will lead to violation of the victim's rights under Proposition 9 as there will not be sufficient time to include the victim in the proceedings, ensure their perspectives and concerns are entered into the record, and more. As an example, for an offender who is arrested on a Wednesday evening where Friday is a court holiday the offender would be brought to court on Thursday leaving less than 24 hours to ensure the victim is notified, much less able to participate in such a short timeframe. Other statutes relating to victim notification where victims have the opportunity and right to be notified and/or heard, particularly in situations of offender release from custody, are 15 or more days (as an example, Penal Code 646.92). Ultimately, to the extent that the assessment is not complete or available during such a short time frame, the bill provides that the offender shall be released – entirely contrary to the suggestion that the bill takes into account the risk to the victim and public safety. The absence of a robust assessment whatsoever will inevitably lead to serious harm for many victims and the overall public going forward. This approach in no way ensures victim and public safety is protected and is a seriously flawed loophole.

Relative to “non-violent” offenses, SB 10 provides that an offender shall be released without any hearing or appearance before a judge. It should be noted that the term “non-violent” is a misnomer as it includes offenses that are serious and potentially violent including crimes such as stalking; violation of a protective or restraining order; criminal threats; solicitation of a serious crime; conspiracy to commit a violent crime; and more. While a violation of a protective or restraining order may not be a violent offense, it could certainly be a precursor to one that would not be considered under this construct. It would essentially allow these offenders who push the limits of the framework to bypass the fact that the bill purportedly attempts to protect domestic violence victims through a hearing or appearance before a judge, but for actual injury being inflicted the victim would be violated and continue to fear for her safety without any assurance that such violations would not be more sufficiently considered in such pretrial release actions for the protection of the victim, which is supposed to be the primary consideration.

Relative to the factors a judge must consider when determining the seriousness of the offense, the factors do not include the vulnerability of the victim; whether multiple victims were impacted; prior offenses involving a victim or multiple victims; prior DUIs; and more. Ultimately, a judge would be required to make a pre-trial release decision within 48 hours, impacting victims' rights as previously noted under Proposition 9.

On the issue of fiscal impacts, SB 10 would result in significant costs that are not provided for within the measure. Given the short time frames to conduct risk assessments, review the associated reports and hold hearings/appearances, the framework under SB 10 will require significant staff increases to conduct the risk assessments and review the reports 24 hours a day. Additionally, the bill does not contain any funding or incentive to ensure offenders appear or for intervention when they do not.

According to the 2015 Board of State & Community Corrections (BSCC) Jail Profile Survey, the Average Daily Population (ADP) for all county jails in California is 75,965 with capacity of all facilities being capped at 75,987 (2012 PPIC Report). The Report also highlights that there is an average of 279,102 felony warrants in the system and an average of 1,431,846 misdemeanor warrants in the system – total warrants being at approximately 1,710,948.

Based on these numbers as reported by the BSCC and with a cost per FTA as compared with the Washington, DC Pretrial Program, the costs associated with the elimination of the money bail system and implementation of the SB 10 framework in every county in the state would be over \$3 billion. Recall, the Washington, DC Pretrial System costs \$65 million for a population of 660,000. Clearly California is a different animal on a number of fronts as compared with DC. And yet these numbers do not even take into account the roughly 300,000 offenders who are currently out on bail at any given time. How will California seek to manage that additional caseload and ensure victim and public safety is protected? Also of note, these costs do not take into account the likelihood based on current experience that many offenders will reoffend resulting in additional criminal justice costs – not to mention additional victim and public safety impacts.

CVUC appreciates your consideration of these concerns associated with the current version of SB 10. If you have any questions regarding CVUC's opposition to this bill, please contact CVUC's Legislative Advocate, Dawn Koepke with McHugh, Koepke & Associates, at (916) 930-1993. Thank you!

Sincerely,



Harriet Salarno  
Chair

Cc: The Honorable Bob Hertzberg, Author  
Members, Senate Appropriations Committee  
Sean Naidu, Consultant, Senate Appropriations Committee  
Eric Csizmar, Consultant, Senate Republican Office of Policy



## JUDICIAL COUNCIL OF CALIFORNIA

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TANI G. CANTIL-SAKAUYE  
*Chief Justice of California*  
*Chair of the Judicial Council*

MARTIN HOSHINO  
*Administrative Director*

CORY T. JASPERSON  
*Director, Governmental Affairs*

June 30, 2017

Hon. Reginald B. Jones-Sawyer, Sr., Chair  
Assembly Public Safety Committee  
State Capitol, Room 2117  
Sacramento, California 95814

Subject: Senate Bill 10 (Hertzberg), as amended March 27, 2017 – Letter of Concern  
Hearing: Assembly Public Safety Committee – July 11, 2017

Dear Assembly Member Jones-Sawyer:

The Judicial Council has a number of significant concerns about SB 10, as amended March 27, 2017. SB 10 would enact major bail/pretrial release reform. While there are some areas of conceptual agreement the Judicial Council continues to have substantial concerns about many elements of the bill including the impact on judicial discretion and independence; the creation of unrealistic or unspecified timelines; the imposition of unrealistic responsibilities and expectations on the pretrial services agencies that courts would rely on for information in making decisions, and the creation of an overly burdensome and complicated system. While expressing these concerns about SB 10, the Judicial Council acknowledges that SB 10 is a work in progress. We have been in communication with the author's office and the sponsors and we understand that the author is considering amendments.

### *Areas of Conceptual Agreement*

While the Judicial Council has a substantial number of very significant concerns about SB 10 in its current form, in concept, the council agrees with the following:

- Providing for pretrial release, with or without conditions as appropriate, for all eligible defendants, and providing for preventive detention for defendants who pose a high risk to public safety or of fleeing the jurisdiction.
- Exploring the implications of moving from a pretrial release and detention system that is implemented primarily through the setting of money bail to a system that focuses on evidence-based risk assessment that considers the risk to public safety and victims with the risk of fleeing the jurisdiction and failure to appear, and is implemented through setting conditions of release, and preventive detention for cases in which no combination of conditions of release will be sufficient to address the risk.
- Providing pretrial services in a manner that: 1) closely coordinates with the courts; 2) delivers risk assessment information, criminal history, and other data relevant to judges' determinations of conditions of release for defendants; 3) includes monitoring and supervision of defendants released pretrial, where appropriate; and 4) is funded at a level to adequately and properly address the costs of such services.
- Use of a validated risk assessment instrument that does not give undue weight to factors that correlate with race, ethnicity, and class to obtain a risk level or score.
- Respect for the constitutional principle of judicial discretion and responsibility for pretrial release and detention decisions, and with aiding judges in their decision-making responsibility by providing risk assessment and other relevant information gathered by pretrial services.
- Improving upon the current system of pretrial detention/release to enable judges to make appropriate decisions as quickly as possible when there is adequate information on which to base such a decision, and so long as there are new and sufficient resources for the system.

### *Areas of Concern*

#### *Judicial discretion and independence*

The Judicial Council is concerned that SB 10 would infringe on judicial discretion and independence for the following reasons:

- *Balance of system interests*: The council is concerned that SB 10 does not establish a reasonable or realistic balance between the interest in releasing all defendants who can be safely released pretrial, and a concern for public safety (including safety of victims) and the administration of justice (fleeing jurisdiction/failure to appear). Judges have

constitutional and statutory responsibility for implementing the law in ways that ensure appropriate consideration for protecting the rights of the accused, protecting the public and victim(s), and providing for the fair and efficient administration of justice. In that regard, the council is concerned that SB 10 would require the pre-arraignment release by the pretrial services agency of any person charged with a misdemeanor (unless the defendant is already on pretrial release), without providing an opportunity for a judge to determine whether the defendant (who may be charged with a serious misdemeanor, including domestic violence) is a risk to public safety or the safety of the victim(s), or is likely to flee. SB 10 also does not account for those defendants who fail to appear and are cited and released rather than booked.

- Matters appropriate for Rules of Court: The bill has a number of detailed requirements for judicial decision-making that are more appropriately addressed in Rules of Court rather than statutes, so they can be more easily revised and updated. For example, the council believes that it is more appropriate for Rules of Court to address certain factors courts must consider in making their determination, such as what the court must consider in making a release decision, what constitutes "substantial hardship" in determining ability to pay, and factors for determining whether the defendant's release would result in great bodily harm to others.
- Information provided to the court: The bill appears to significantly limit information provided to the judge at pre-arraignment as a basis for the release determination. As currently drafted the bill would only require information about the current offense, the law enforcement list of charges, and a risk assessment result. The bill, however, does not allow other important information to be provided to the judge such as criminal history, probable cause documentation or other background related to the risk assessment.
- Balance between judicial authority and pretrial services authority: Substantial burdens are imposed on judges to justify any departure from recommendations of the pretrial services agency, including requiring courts, if the release decision is inconsistent with the recommendations of the pretrial services agency, to include a statement of reasons. The bill also requires the court to annually report the rate of judicial concurrence with recommended conditions of release without requiring the provision of additional data regarding the decisions made, the conditions actually imposed initially and through the course of the case, etc. Reporting solely the rate of concurrence implies that judges are discouraged from exercising any discretion that departs from the pretrial services recommendations.
- Judicial determination of risk: SB 10 would allow the court to impose preventive detention only for those defendants who are charged with a violent or serious crime. The



council is concerned that this makes the bill ineffective and unfair because the determination is charge-based rather than risk-based and appears to not allow the judge to take criminal history or other factors into account. Further, the council believes that courts should have the option of imposing preventive detention for those defendants who, whatever their current charge, score in the highest risk levels and for whom no condition or combination of conditions can provide for safe pretrial release.

- *Release on bail:* The bill provides for release on bail in a manner that places judges in the untenable position of being required to release on bail defendants who are at high risk of failure to appear (FTA) or of danger to public safety. This structure undermines the legislation's goal of judicious use of preventive detention to protect public safety while releasing defendants who are appropriate for pretrial release. For example, the proposed bill would prohibit release on bail *except* when no condition or combination of conditions can assure safe pretrial release. It requires the court to set monetary bail at the least restrictive level necessary and to consider ability to pay without substantial hardship. This arrangement affords "high risk" defendants the opportunity to be released on bail *despite* their risk level, unless they have been charged with a violent or serious offense. Further, the bill appears to limit the court's ability to consider the appropriateness of preventive detention in cases where the defendant has a history of violent offenses but has a current offense for which preventive detention is not statutorily permitted.
- *Violations of release:* The proposed approach for addressing violations of pretrial release is unrealistic and impinges on judicial discretion because the sole option for addressing violations of pretrial release is through contempt of court proceedings, which is not an adequate solution. Contempt is a complex and extended process for courts to impose and implicates Penal Code section 1382 rights. Penal Code section 1382 requires the court, unless good cause is shown to the contrary, to order an action dismissed in specified cases.

### Timelines/Resources

The Judicial Council is concerned that the bill would impose unrealistic (and unspecified) timelines on courts. The bill would require informed decision-making on timelines that are unrealistic for courts and criminal justice partners. For example, the bill would: (a) require pretrial services agencies to gather and courts to process a significant amount of information regarding a defendant on very tight timelines; (b) require judges to issue findings of fact and a statement of the reasons for imposing each condition that are specific to the person in each case where conditions are imposed; and (c) require up to five pre-arraignment hearings on very tight timelines. Currently, many of the timelines in SB 10 are yet undefined, to be filled in through later amendments. The council is also concerned that the limitations on hearings are unclear, so it seems they could be as extensive (and time consuming) as a preliminary hearing with



presentation of witnesses, cross-examination, and submission of other evidence. Because the proposed system is so complex, it is unclear whether there is a need for these multiple hearings in order to accomplish the legislation's stated purposes.

**Pretrial Services agencies: unrealistic responsibilities and expectations**

The Judicial Council is concerned that the bill would impose unrealistic responsibilities and expectations on the pretrial services agencies that courts would rely on for information when making decisions, as follows:

- **Courts' interest in effective pretrial services agencies:** The proposed system requires pretrial services agencies to undertake a variety of tasks that are integral to efficient and effective decision-making by courts. Courts have a vested interest in the effectiveness of agencies with such significant responsibilities that are intertwined with those of the court. In many counties, such agencies either do not currently exist or are relatively small. For a pretrial release and detention system to function, courts must have confidence that pretrial services agencies—whether a separate agency or a unit of an existing agency—are right-sized and well-run so that courts can rely on the agencies' assessments, recommendations, and ability to monitor and supervise defendants granted pretrial release.
- **Risk assessment instrument:** Portions of the bill that define the use of a risk assessment tool by pretrial services raise questions regarding validity, reliability and access. More specifically, the bill would mandate certain criteria for the tool and prohibit other criteria. This approach would undermine the fundamental requirement that the factors in an evidence-based tool, and the algorithm used to weight the factors, have been validated to be predictive of risk for a particular population. Further, the council is concerned that *only* the PSA-Court instrument developed by the Laura & John Arnold Foundation currently appears to meet the requirements of SB 10.

**Burdensome and complicated system**

Finally, the Judicial Council is concerned that SB 10 would create a non-linear and highly complex system. More specifically, the council is concerned that the operational impact on courts would be profound and, without adequate funding, unachievable. The council is also concerned that SB 10 would attempt to graft at least four different release and detention elements onto the current statutory structure for the bail system: risk-based release; unsecured bonds; ability-to-pay determinations; and preventive detention. Further, in many counties, a significant portion of the pretrial population is ineligible for release due to probation or parole holds, immigration (ICE) holds, holds for multiple failures to appear, or other legal circumstances that prevent their release. The council believes that it would be inefficient to use resources to assess defendants, process paperwork, hold hearings, etc. for defendants who will not be eligible for

Hon. Reginald B. Jones-Sawyer, Sr.

June 30, 2017

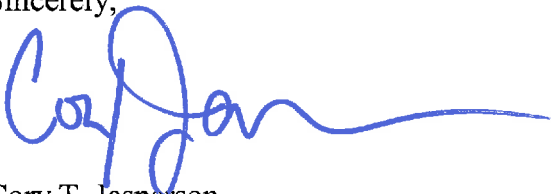
Page 6

release due to circumstances that arise from legal issues unrelated to the current charge. Finally, the council believes that any significant revision to the current pretrial detention and release system should be phased-in with at least a two year “sunrise” so that courts and justice system partners are able to put the necessary structures, processes and training into place, and help to ensure that the revised system will be functional and a genuine improvement.

In closing, the Judicial Council has several substantial concerns about SB 10 in its current form and looks forward to working with the author’s office and your committee to address these concerns.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,



Cory T. Jaspersen  
Director, Governmental Affairs

CTJ/SR/yc-s

cc: Members, Assembly Public Safety Committee  
Hon. Bob Hertzberg, Member of the Senate  
Hon. Travis Allen, Member of the Senate  
Hon. Joel Anderson, Member of the Senate  
Hon. Toni G. Atkins, Member of the Senate  
Hon. Jim Beall, Member of the Senate  
Hon. Steven Bradford, Member of the Senate  
Hon. Ricardo Lara, Member of the Senate  
Hon. Holly J. Mitchell, Member of the Senate  
Hon. William W. Monning, Member of the Senate  
Hon. Bob Wieckowski, Member of the Senate  
Hon. Scott D. Wiener, Member of the Senate  
Hon. Rob Bonta, Principal coauthor, Member of the Assembly  
Ms. Mica Doctoroff, Legislative Advocate, American Civil Liberties Union of California  
Ms. Sandy Uribe, Counsel, Assembly Public Safety Committee  
Mr. Gary Olson, Consultant, Assembly Republican Office of Policy  
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor  
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

# COMMUNITY ALLIANCE ON PRISONS

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

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



## **HCR 134 TASK FORCE TESTIMONY FRIDAY, OCTOBER 13, 2017 - 1-3 pm Ali`iolani Hale - Hawai`i Supreme Court 417 South King Street, Room 101**

Aloha Chair Trader and Members of the HCR 134 Pre-Trial Task Force,

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 two decades. We have been following and researching pre-trial issues since roughly one-third of Hawai`i's incarcerated population are pre-trial detainees.

Mahalo for this opportunity that you have provided to the task force so that they could learn hear community concerns about the pre-trial process, and especially about money bail that results in the imprisonment of some of our most vulnerable people who are struggling with a myriad of public health challenges. We understand that there is no silver bullet, however, there are many successful strategies that can be implemented to reduce the jail population, and direct people to appropriate services to address their pathways to lawbreaking.

This testimony is respectfully offered on behalf of the approximately 5,700 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 from their ancestral lands.

### **WHAT HAWAI`I NUMBERS TELL**

The End of Month Population Reports<sup>1</sup> from the Department of Public Safety reveal the number of pre-trial detainees imprisoned in state facilities. Some data follows next. At the end of the following periods the data show:

<sup>1</sup> Department of Public Safety End of Month Population Reports. [www.dps.hawaii.gov/corrections](http://www.dps.hawaii.gov/corrections)

- August, 2017 - approximately 31% of the total population of 3774 individuals
- July 2017 - approximately 30% of the total population of 3603 individuals
- June 2017 - approximately 29% of the total population of 3615 individuals
- December 2016 - approximately 26% of the total population of 4071 individuals
- December 2015 - approximately 26% of the total population of 4013 individuals
- December 2014 - approximately 28% of the total population of 3965 individuals

## WHAT THE RESEARCH AND DATA SHOW

The **research** on the impact of incarceration is clear that even a few days of imprisonment can have a lifelong impact on a person, their family, and the community.

In 2015, the Vera Institute of Justice released a report<sup>2</sup> on the misuse of jails. The key takeaway is that jails are one of the pipelines to mass incarceration and is neither economically sustainable nor beneficial to public safety, community well-being, and individual rehabilitation. Underlying the behavior that lands people in jail, there is often a history of substance abuse, mental illness, poverty, failure in school, and homelessness.

Community Alliance on Prisons asserts that imprisoning individuals suffering from a myriad of public health and social challenges that are treatable surely doesn't comport with our Aloha Spirit law<sup>3</sup> or Kānāwai Māmalahoe (Law of the Splintered Paddle)<sup>4</sup>.

<sup>2</sup> INCARCERATION'S FRONT DOOR: *THE MISUSE OF JAILS IN AMERICA* (2015)

<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>

<sup>3</sup> [§5-7.5] "Aloha Spirit". (a) "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the following unuhi laula loa may be used:

"Akahai", meaning kindness to be expressed with tenderness;

"Lokahi", meaning unity, to be expressed with harmony;

"Oluolu", meaning agreeable, to be expressed with pleasantness;

"Haahaa", meaning humility, to be expressed with modesty;

"Ahonui", meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

(b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit". [L 1986, c 202, §1]

<sup>4</sup> Kānāwai Māmalahoe, or Law of the Splintered Paddle is a precept in Hawaiian law, originating with King Kamehameha I in 1797. The law, "Let every elderly person, woman and child lie by the roadside in safety," is enshrined in the state constitution, Article 9, Section 10, and has become a model for modern human rights law regarding the treatment of civilians and other non-combatants during times of war. It was created when Kamehameha was on a military expedition in Puna. His party encountered a group of commoners on a beach. While chasing two fishermen who had stayed behind to cover the retreat of a man carrying a child, Kamehameha's leg was caught in the reef. One of the fisherman, Kaleleiki, hit him mightily on the head with a paddle in defense, which broke into pieces. Kamehameha could have been killed at that point but the fisherman spared him. Years

Another study from 1998<sup>5</sup> found that on a macro-level, relying on incarceration to reduce disorder can undermine the development of more informal means of social control, which are important to the long-term prevention of crime.

There is a module at O'ahu jail (OCCC) for the severely and persistently mentally ill. There are people imprisoned there who don't even know their names. Are we satisfied with our correctional system becoming our de facto mental health system? And the problems at OCCC's mental health module have been highlighted in news articles<sup>6</sup> as Hawai'i once again is out of compliance with federal standards.

In 2006, the Bureau of Justice Statistics released a study<sup>7</sup> that reported that more than half of all prison and jail inmates, including 56% of state prisoners, 45% of federal prisoners and 64% of local jail inmates, were found to have a mental health problem. The findings represent inmates' reporting symptoms rather than an official diagnosis of a mental illness. The study determined the presence of mental health problems among prison and jail inmates by asking them about a recent history or symptoms of mental disorders that occurred in the last year. Among the inmates who reported symptoms of a mental disorder, 54% of local jail inmates had symptoms of mania, 30% major depression and 24% psychotic disorder, such as delusions or hallucinations.

It's not simply that jails are ill-equipped to treat the mentally ill. Studies, including one by the Urban Institute, a public policy research organization, found that the mentally ill remain in jail longer than others, return to jail more frequently, and cost more to incarcerate. Jails are also chaotic, noisy and dangerous, attributes more likely to exacerbate symptoms than soothe them. Treatment, advocates say, would not only help individuals caught up in the cycle of arrest-jail-release-arrest but relieve pressure on jails and state hospitals.<sup>8</sup>

Below is an excerpt from the federal experts who investigated mental health services at OCCC. The plan was to implement community standard mental health services at all correctional facilities statewide. Now, after the feds left, the standard of care has diminished and no one seems to care that most of these folks are suffering and will return to the community.

later, the same fisherman was brought before Kamehameha. Instead of ordering for him to be killed, Kamehameha ruled that the fisherman had only been protecting his land and family, and so the Law of the Splintered Paddle was declared.

<sup>5</sup> INCARCERATION, SOCIAL CAPITAL, AND CRIME: IMPLICATIONS FOR SOCIAL DISORGANIZATION THEORY (1998) <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.1998.tb01255.x/abstract>

<sup>6</sup> Mentally ill prisoners receiving shoddy care - Prison probe hints politics at play, By Rob Perez Advertiser Staff Writer, January 14, 2007 <http://the.honoluluadvertiser.com/article/2007/Jan/14/ln/FP701140362.html>

Legislators question withheld OCCC data, By Rob Perez Advertiser Staff Writer, January 17, 2007 <http://the.honoluluadvertiser.com/article/2007/Jan/17/ln/FP701170383.html>

Better mental health services at prisons seen taking 3-5 years By Rob Perez Advertiser Staff Writer. February 2, 2007. <http://the.honoluluadvertiser.com/article/2007/Feb/02/ln/FP702020357.html>

<sup>7</sup> MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=789>

<sup>8</sup> Getting the Mentally Ill Out of Jails, By The Pew Charitable Trusts, APRIL 7, 2017. <http://www.routefifty.com/health-human-services/2017/04/getting-mentally-ill-out-jails/136831/>

These findings do not give any assurance, especially now when Hawai'i is again out of compliance with federal standards of care. The state knows what they need to do, however, they are satisfied with moving staff into positions for which they are not trained, at the expense of the providing the mandated community standard of care.

**“Prisons don’t disappear social problems, they disappear human beings.”**

Angela Davis

### *A HISTORY OF PROBLEMS*

1984: The American Civil Liberties Union files a class-action lawsuit on behalf of prisoners at O'ahu Community Correctional Center in Kalihi and the Women's Community Correctional Center in Kailua, alleging the two prisons were overcrowded, lacked medical care for inmates, were unsanitary and had a host of other problems. The ACLU's lead attorney described mental-health services at OCCC as grossly inadequate.

1985: The federal government notifies the state of the results of its one-year investigation of OCCC, alleging that unconstitutional conditions existed because of inadequate medical, dental and psychiatric care.

1985: On the eve of trial in the ACLU case, the state concedes that major problems exist at both prisons and signs a consent decree agreeing to fix them. The changes would be monitored by a panel of experts, who gave their findings to the court.

1998: Conditions at the women's prison improved to the point that it was removed from the lawsuit.

1999: The ACLU agreed to end the lawsuit after determining OCCC was in compliance with the consent decree. The court dismissed the case.

June 2005: The Justice Department notifies Gov. Linda Lingle that it is investigating OCCC's mental-health services to determine whether inmates' civil rights were being violated.

November 2005: Three medical experts who inspected the prison issue an internal report for the Justice Department detailing numerous deficiencies in the prison's mental-health care.

July 2006: Departing from its usual practice, the Justice Department gives a copy of the experts' report to the state without issuing its official findings letter.

January 2007: A Justice spokeswoman says the OCCC investigation is still pending.

### *EXPERTS FIND OCCC CARE DEFICIENT*

Three medical experts who inspected treatment of mentally ill prisoners at O'ahu Community Correctional Center in late 2005 found numerous deficiencies. The inspection was part of an

ongoing federal investigation into the prison's mental-health services, but the Justice Department has not issued official findings yet. Here are some of the findings of the three psychiatrists and how the state has responded:

- No designated person was in charge of mental-health services, the organizational structure was confusing and inconsistent, policies and procedures were outdated and often not followed, and a quality improvement process essentially did not exist.
- Significant deficiencies existed in treatment programs for men and women. Mental-health care was primarily limited to medication. Treatment planning mostly wasn't done.
- Inmates were placed in therapeutic lockdowns that lasted days to weeks and were not allowed any privileges. No discernable treatment was provided except for psychotropic medications, and the inmates weren't monitored adequately. The lockdowns frequently exacerbated symptoms.
- Suicide watches resulted in significant isolation, deprivation and general discomfort, all of which likely worsened the psychotic symptoms. Clinical monitoring was inadequate.

"They are locked in with no reading materials, are only allowed to wear their undershorts and allowed a special suicide blanket. They are generally not allowed an eating utensil, may have no facility to wash during the day, have minimal exercise outside of the cell and uniformly report they were cold. Detainees also reported that cells were often not cleaned between detainee's cell moves."

- Individual counseling was an exception rather than the rule.
- There was inadequate access to or use of psychiatric hospitalization for those needing such care.
- Restraints were used for agitated women detainees without documentation showing range of motion, monitoring of vital signs or clear guidelines for release from restraints.
- With few exceptions, discharge services were not provided to those leaving the prison.
- The prison lacked sufficient numbers of trained mental-health professionals.
- Documentation problems were found throughout the programs.

#### ***THE DEPARTMENT OF PUBLIC SAFETY'S RESPONSE***

• "The department has taken significant steps to address the various concerns identified through the DOJ's investigative process, choosing not to wait for the DOJ to issue its findings and recommendations. All necessary changes cannot realistically take place instantaneously. The department, however, is confident that all changes that could be made immediately have been



made, that the appropriate review and planning for future changes are well under way and that it has in place the basic structure for a successful mental-health program."

- Hired five mental-health professionals, including a program administrator, and one medical records technician.
- Meeting weekly to develop master treatment plans for inmates with identified needs.
- Working toward providing each OCCC inmate in the therapeutic housing units with face-to-face treatment time and 20 hours of mental-health programming per week.
- Revising policies, including changing its therapeutic lockdown one, emphasizing intervention and rehabilitation. Since then, inmate behavior has improved.
- Doing discharge planning to link OCCC inmates with community mental-health programs.
- Training workers on a revised suicide prevention manual. The number and duration of suicide watches has since declined considerably.
- Using a more timely process for transferring inmates to the Hawai'i State Hospital.

*Sources:* Federal experts report, Department of Public Safety panel of experts, who gave their findings to the court.

### **JAIL IS EXPENSIVE WHEN MORE EFFECTIVE EVIDENCE-BASED ALTERNATIVES EXIST:**

Incarceration is the most expensive option, yet incarceration is not the most effective way of addressing the majority of Hawai'i's imprisoned population who are Class C felons, misdemeanants, technical violators, petty misdemeanants, and parole and probation violators.

The Price of Jails Report<sup>9</sup> was released in 2015 said that the only way localities can safely reduce the costs incurred by jail incarceration is to limit the number of people who enter and stay in jails. The report acknowledges that is no small task. How and why so many people cycle through jails is a result of decisions dispersed among largely autonomous system actors. This means that the power to downsize the jail is largely in the hands of stakeholders outside its walls. *So only by widening the lens—looking beyond the jail to the decisions made by police, prosecutors, judges, and community corrections officials—will jurisdictions be able to significantly reduce the size of their jails, save scarce county and municipal resources, and make the necessary community reinvestments to address the health and social service needs that have for too long landed at the doorstep of the jail.*

<sup>9</sup> THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (2015)  
<http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf>



There are several initiatives that are either on-going or being developed that can reduce the number of people sent to jail.

In 2015, the Vera Institute of Justice released a report, “Reducing the Use of Jails”. Conversations about mass incarceration tend to focus on prison, but local jails admit 20 times more people annually. (...) Today, jails log a staggering 12 million admissions a year – **mostly poor people arrested for minor offenses who can’t post bail, and for whom even a few days behind bars exact a high toll.** (...) **There’s no simple fix, so the work includes using alternatives to arrest and prosecution for minor offenses, recalibrating the use of bail, and addressing fines and fees that also trap people in jail.**<sup>10</sup>

Some local initiatives that are working in Honolulu include:

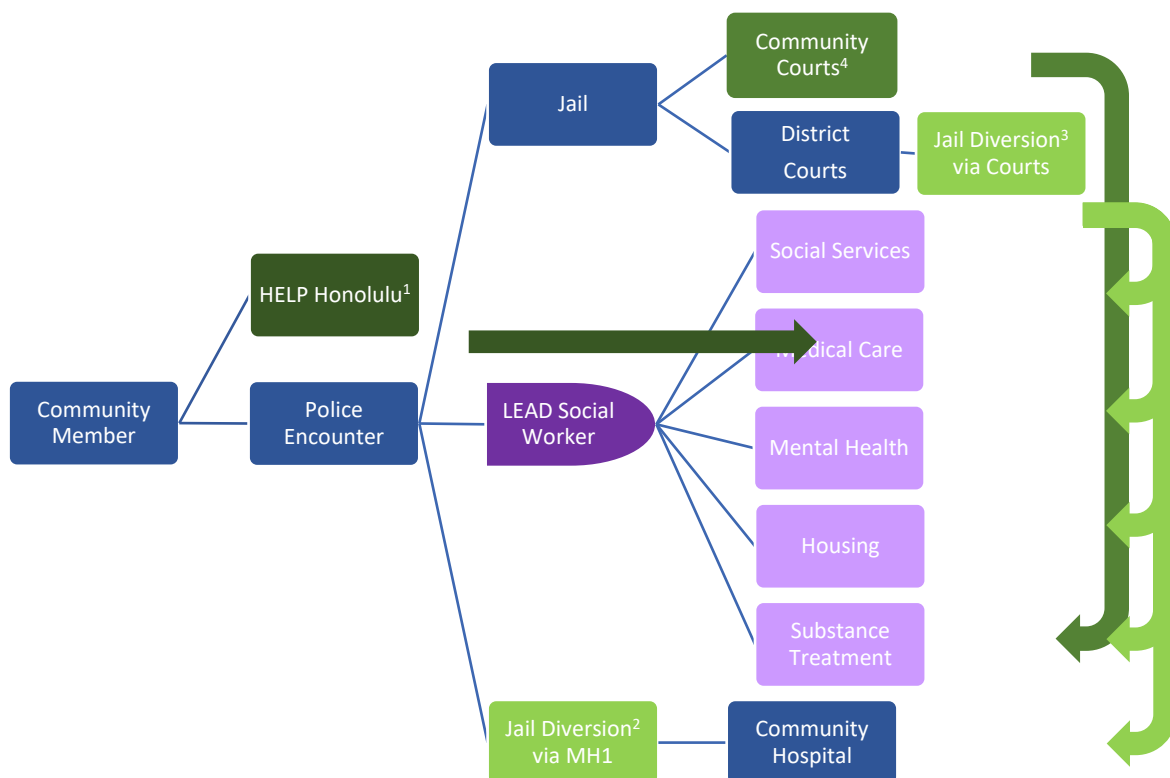
- Community Court Outreach: This program has been successful in clearing up warrants and other violations of some of Honolulu’s most vulnerable people.
- LEAD - Law Enforcement Assisted Diversion: Very successful program from Seattle that is being launched as a pilot program in Chinatown on O`ahu this Fall.
- HELP (Health, Efficiency, Long-term Partnerships) Honolulu: Honolulu Police Department (HPD) and outreach workers from social service agencies partner to provide services for individuals in the community setting.
- “Pre-booking Jail Diversion Program”: Funded by Department of Health’s Adult Mental Health Division (AMHD), pre-booking program that connects individuals to community hospitals based on mental health assessment by HPD psychologist (MH1).
- “AMHD Jail Diversion Program”: Supportive case management service provided for potential consumers in post-booking and pre/post arraignment situations with the goal of diverting from incarceration and reducing recidivism.
- Community Courts: Post-booking program that seeks to clear minor offenses, in collaboration with the Prosecutor’s office, to facilitate linkages to housing and other services.
- Ho`opono Mamo Youth Diversion Program: Diverting eligible youth in Kalihi District to supportive services in lieu of arrest.

<sup>10</sup> INCARCERATION TRENDS: REDUCING THE USE OF JAILS (2015)  
<https://www.vera.org/our-work/ending-mass-incarceration/reducing-the-use-of-jails>

## Law Enforcement Assisted Diversion Hawaii

A Key Component for an Integrated System of Public Health and Public Safety (Adults)

*Pilot Area: Chinatown in Honolulu (Oahu)*



1. **HELP (Health, Efficiency, Long-term Partnerships) Honolulu:** Honolulu Police Department (HPD) and outreach workers from social service agencies partner to provide services for individuals in the community setting.
2. **“Pre-booking Jail Diversion Program”:** Funded by Department of Health’s Adult Mental Health Division (AMHD), pre-booking program that connects individuals to community hospitals based on mental health assessment by HPD psychologist (MH1).
3. **“AMHD Jail Diversion Program”:** Supportive case management service provided for potential consumers in post-booking and pre/post arraignment situations with the goal of diverting from incarceration and reducing recidivism.
4. **Community Courts:** Post-booking program that seeks to clear minor offenses, in collaboration with the Prosecutor’s office, to facilitate linkages to housing and other services.
5. **Ho’opono Mamo Youth Diversion (not pictured):** Program to divert eligible youth in Kalihi District to supportive services in lieu of arrest.

Increasing funding for Hawai`i community-based substance treatment programs and re-building our community mental health system will go a long way to reducing the imprisonment of some of our most vulnerable community member.

In most Texas counties, ability to pay financial bail determines which defendants will be released until adjudication of criminal charges. Increasingly, however, policymakers, judges, and other stakeholders are asking whether release based on a defendant’s individualized risk might be a better way to ensure court appearance and prevent new criminal activity among people on bond.

In October 2016, the Texas Judicial Council's Criminal Justice Committee reviewed the evidence and produced a report advocating expansion of risk-informed release and personal bond. To inform their decision-making and test the potential impacts of this policy guidance, the Council asked the Public Policy Research Institute at Texas A&M University to conduct a two-part study gathering evidence from Texas jurisdictions.

The 2-part study concluded that:

Stakeholders in Texas and the nation are increasingly questioning the use of financial bail as a means of pretrial release. After reviewing the major concerns about the current bail system, the Texas Judicial Council's Criminal Justice Committee issued an October 2106 report<sup>11</sup> articulating an eight-point reform agenda. They then asked PPRI (Public Policy Research Institute at Texas A&M University) to gather new data from Texas jurisdictions to further inform their leadership on this issue. The two-part study combined a multiple case study analysis of two jurisdictions with a statewide survey of pretrial practitioners and judges.

There are initiatives being established and enacted in several jurisdictions such as Crisis Intervention Teams and Day Reporting Centers.

Mahalo for this opportunity to share some of our research into this important and exceedingly expensive issue. We are Hawai'i. We care for and about each other. We can do more to help our people struggling with a myriad of public health and social challenges.

*Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.*


*Lewis Powell, Jr.*

<sup>11</sup> LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS, March 2017.  
[http://www.txcourts.gov/media/1437499/170308\\_bond-study-report.pdf](http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf)

**From:** Sylvia Cabral <sylviacabralmaui@gmail.com>  
**To:** HCR134.Jud@courts.hawaii.gov

---

**Date:** Sunday, October 08, 2017 10:40AM  
**Subject:** Prison reform. Costs of broken families, foster care, loss of HUD & Food stamps . Support minimum pay for all.

History:  This message has been forwarded.

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Please stop making felons of poor who sleep in cars to get to work, can't afford fines, homeless. prison reform. SHENTA (amnesty) for fines, pot, young first time offenders. Costs more to keep in prison than fines. Go after white collar crime. not poor.

Syl Cabral  
808 879 9007

**Attachment B-6**

DAVID Y. IGE  
GOVERNOR



STATE OF HAWAII  
**CRIME VICTIM COMPENSATION  
COMMISSION**

1136 Union Mall, Suite 600  
Honolulu, Hawaii 96813  
Telephone: 808 587-1143  
FAX 808 587-1146

October 13, 2017

**MARI MCCAIG**  
Chair  
**MARTHA ROSS**  
Commissioner  
**SANDRA JOY EASTLACK**  
Commissioner  
**PAMELA FERGUSON-BREY**  
Executive Director

Criminal Pretrial Task Force  
First Circuit Court  
777 Punchbowl Street  
Honolulu, Hawaii 96813

via e-mail at: [HCR134.Jud@courts.hawaii.gov](mailto:HCR134.Jud@courts.hawaii.gov)

Dear Judge Trader and members of the Criminal Pretrial Task Force,

Thank you for your letter dated October 6, 2017, informing the Commission about the Pre-Trial Task Force public meeting to be held on October 13, 2017. In order for any proposed legislation regarding pre-trial release to truly promote public safety, the safety of victims must be of paramount concern. In order to address concerns for the safety of victims, representatives of the victim services organizations must not only be allowed to provide their input, they must be part of the process and help to shape the recommendations of the task force.

Please consider giving the victim groups an appropriate voice in the task force.

Sincerely,

Pamela Ferguson-Brey  
Executive Director

**From:** "E. Funakoshi" <maukalani78@hotmail.com>  
**To:** "HCR134.Jud@courts.hawaii.gov" <HCR134.Jud@courts.hawaii.gov>

---

**Date:** Thursday, October 12, 2017 08:19AM  
**Subject:** House Concurrent Resolution No. 134, HD1

History: [➔](#) This message has been forwarded.

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To the Criminal Pretrial Task Force:

I am elayne ileina funakoshi, resident of Pearl City, and very concerned about the overcrowding of OCCC, the cost, and the lives of those placed in OCCC.

I truly am sorry that I cannot attend this very important meeting. I have a prior commitment which I cannot break.

My concern is that there is no assessment of individuals prior to being placed in OCCC. To mix the mentally ill, homeless, hardened criminals with individuals unable to pay their bail, etc. into OCCC is a much higher cost to the state then to place them in appropriate treatment programs.

At \$152 a day, \$2.5 million a month is an atrocious amount to pay for 51% of pre-trial detainees in OCCC. Keeping nonviolent individuals in jail, even for a few days, can impact their lives permanently.

There are so many alternatives that are more effective and less costly that should be established or enhanced to directly address a person's pathway to imprisonment.

In summary, I thank the task force for examining the criminal pretrial practices and procedures which really is long overdue and affecting the lives of so many nonviolent individuals who need treatment, not incarceration.

Mahalo and Aloha,

e. ileina funakoshi

Judge Rom Trader, Chair  
Criminal Pretrial Task Force  
777 Punchbowl Street  
Ka'akumanu Hale  
Honolulu, Hawaii 96813

Dear Judge Trader and Committee,

We were quite delighted to receive your invitation for participation and comment for the deliberation before the Criminal Pretrial Procedures Task Force; we received the invitation so late, that we are unable to be present.

This submission is a substitute for your consideration.

It has never been our experience serving survivors of domestic violence that the pre-trial conditions set for alleged perpetrators of domestic violence take into account the real danger and the real violence experienced by victims of partner abuse.

We implore you to recognize that domestic violence is real violence. Danger to physical safety and property, not to mention stability and emotional resilience has its roots in the experiences of victims and their alleged abusers in court. From the outset, if a victim is not assured by the system that what she is suffering is a threat to her life, and intended to destabilize her, she will not continue to participate, and could very likely not be alive to participate in criminal proceedings.

A pre-trial assessment of every alleged perpetrator of partner abuse would be a welcome and long overdue response by the system. This means that the risks, the weapons, the options and the accountability is understood and clear at the beginning. Bail and conditions of release could be a reflection of real circumstances and not a conceptual approach, argued by opposing counsel.

This examination is crucial for our community's response to domestic violence crimes. The threats and circumstances terrorizing victims are not well understood and too little attention has been paid to understanding and protecting women (mostly) and families.

We are available for further discussion and input. We would, in fact, be happy to offer thoughtful perspectives to help guide in the Committee's work. We would need earlier notice, however. Busy over here!!

Thank you.  
In community and peace,

Nanci Kreidman, M.A.  
Chief Executive Officer



Meeting  
HCR 134 Criminal Pretrial Procedures Task Force

Judge Rom A. Trader, Chair  
Judge Shirley M. Kawamura, Reporter  
HCR134.Jud@Courts.Hawaii.Gov

Date: Friday, October 13, 2017  
Time: 1:00 p.p. To 3:00 p.m.  
Location: Ali`iolani Hale Multi-Purpose room 101 Hawaii Supreme Court  
417 S. King Street, Honolulu, Hawaii

Testimony of James Waldron Lindblad.  
550 Halekauwila Street # 303  
Honolulu, HI 96813  
[James.Lindblad@Gmail.com](mailto:James.Lindblad@Gmail.com)  
808-780-8887 Cell

My name is James Waldron Lindblad. I believe Hawaii has one of the best, most fair and high-functioning pretrial systems in America and our Hawaii pretrial system is working to ensure justice to our very unique and diverse population.

If there is one area to consider it is bail amounts as originally set. Most pretrial releases occur with defendants whose bail is initially set very high but then later once the intake interview is complete release without bail is either recommended or denied with the court being the final arbiter of release conditions as it should be. Setting bail in amounts defendants can reasonably afford depending on the nature of the crime, public safety and risk of flight should remain in the hands of our judges. I believe bail amounts are generally too high and the proof is the number of supervised releases later without any bail rather than reduced bail. Setting bail in lower amounts initially may allow more people to post bail and not wait for supervised release. Daily court would help too and especially afternoon court when more relatives might appear to support defendants. I believe tools for effective pretrial release are already legislated and

funded in Hawaii and that policy change as set by Administrative Judges would be a useful tool to further improve pretrial procedures in Hawaii.

I believe that in order to administer justice equally there should be oversight and results driven reports for all participants in the pretrial release process and that we should all report the successes and the failures of our appearance rates with data driven reports to help ensure justice and equity for all participants and stakeholders in our effort to reduce prison crowding.

The following ideas involve a) accountability, b) swift and sure, c) common sense, d) substance over form ideas I have experienced first hand and most importantly, e) balance and fairness.

1) I think there are too many people in jail and I favor reducing the prison population.

2) Bail agents and their surety insurers are the main instrumentalities through which pretrial release is secured in this state and the nation and as such should participate in the ongoing discussions on how to reduce crowded jail populations. Bail agents are underutilized in reducing the prison population.

3) No person should be held in jail simply for lack of funds and ISC and state funded pretrial programs that monitor defendants and that do more than simply ensure appearance should concentrate on the truly needy. I advocate here that we, the people of Hawaii, have the public defender and court-appointed lawyers and we have private lawyers. There is nothing fundamentally wrong with individuals paying their own lawyers or with paying for their own bail. There are extremes on each side of the release or detain decision that must remain in the hands of our judges to decide, based on facts and circumstance. There are defendants in jail that require added services such as drug testing, daily monitoring, and counseling that have no one to assist them other than the state. Some defendants have no third party co-signer. They have no family willing to help them and are on their own. These are the defendants our state-run pretrial service agencies must concentrate their effort on helping. See attachment 3 Prison Population Mgt 1992 Bail Bond Myths.

I envision a hybrid approach utilizing all forms of pretrial release as determined by the court but with a special effort on bail bond agents participating in the process with lowered bail amounts when determined by the court.

### **Examples.**

1) Washington DC processes about 16000 arrests per year, similar to HPD arrest figures and budgets \$65M, annually to process these 16000 arrests plus an additional 4000 from previous years. Total 20,000 annually. This report helped me to gauge the cost associated with Pretrial Release. This means the annual cost to release or detain a pretrial defendant in Washington DC., is at least \$3250.00 per defendant. We do not know the failure to appear rates or how many outstanding bench warrants exist in Washington DC., however, based on my experience in the public sector of pretrial release the failure rate is at least 15% and likely closer to 40%. This percentage compares to private bail in Hawaii which is less than 1% failure rate. See Attachment #4 Wash DC PSA Budget Sub-2015.

2) The Washington state, Barton case attached tells us the difference between cash bail and bail by sufficient surety. In Hawaii, bail is defined as the signing of a recognizance by the defendant and the defendant's surety or sureties. For individuals without a sufficient surety or who do not want to pay for a bail bond, the use of cash can be substituted for release as well as liens on real property. See Attachment #1 Barton. See also Attachment 14 on ways to secure bail in Hawaii.

3) My paper, Bail Bond Myths and Prison Population Management, written in 1992, mirrors many ideas presented in HCR 85. Bail is a, *we are us matter*, and bail agents are underutilized in prison population management. See Attachment #3 Prison Population Mgt.

4) My letter to Department of Public Safety in 1992 explains my views on how to reduce our prison population. Bail agents want to assist and cooperate with government and use bail bond sufficient surety to help reduce the prison population. Scarce state resources should be reserved for the truly needy. See Attachment #2 Shapiro Letter to DPS

5) My blog contains notes from a talk I gave at UH School of Law on May 20, 2015 explaining bail in Hawaii and the blog contains a compilation of articles regarding bail and prison population management. <http://808bail.com/honolulu/>. Archives contain links to the Arnold Foundation's work on bail and promoting unsecured two party release where the defendant promises the court to comply with conditions of release. <http://808bail.com/honolulu/2015/05/> ( cost, about \$6319.00 per defendant )

6) Bail in Hawaii, March 2, 2012, by James Lindblad. This is a 30-minute TV talk show format on bail and prison population management in Hawaii. <http://www.expertbail.com/resources/bail-industry-news/expertbail-agent-james-lindblad-talking-bail-bonds-hawaii-style> This link is also on the blog under March 2012 Archive #3.

7) The San Francisco case tells us what bailable means. Being classified, "Pretrial," does not always mean bailable. This is very important. How many of the 48% labeled Pretrial at OCCC are bailable? At least 200 Hope Probationer are at OCCC and classified as Pretrial but are actually not bailable. If HPD arrests 16000 people per year and there are 569 people classified as pretrial status but with actually only 369 left over as bailable pretrial defendants then how many others of these pretrial classified defendants are in fact bailable and why are these persons left over and still in jail? This must be explained if we are to argue these issues. What is the reason they are detained on bail? Could the bail be lowered to effect release? Could any combination of conditions as set by the court ensure public safety and appearance? What is the nature of the crime? Should a no-bail hold with detention be set by the court? Should they be simply released by the Director of Public Safety in spite of the court's bail ruling in setting a bail amount? Handing off judicial release decisions to prison administrators as been tried twice in Hawaii under Emergency Release Bills that never delivered the desired result due to 50% failure rates as documented by legislative rules. Presently emergency release has been reestablished as an overflow value to corrected potential overcrowding.

8) History of bail. See Attachment #5 Tom Parker on Bail in America. Why does bail work? When is bail fair and when is bail not fair? When a community member known to the court vouches for an accused person and furthermore stands surety by written bail bond contract for an individual the likelihood of appearance at court and likelihood of the defendant's good conduct while on release is better than when the court is stuck dealing with only the defendant's

promise own his/her own or the defendant substituting money, for instance, his own cash or credit card. There is no better form of pretrial release to ensure balance and fairness to all than to utilize an outside third party sufficient surety for release as recognized and explained in Barton. See PDF #1. Barton. Those persons lacking friends or relatives to vouch for them or to act as surety or to hire a bail bond agent require much greater effort, much greater monitoring and state run pretrial service agencies are able to provide added services and can many times assist but there will be greater failure rates and less public safety. Further, state pretrial agencies have traditionally never concentrated their efforts on the truly needy and prefer instead to recommend release for those persons who would otherwise pay bail. Judges are best suited to review these matters based on nature of the crime, flight risk, public safety and circumstance of the defendant. For instance, is it the first arrest, does the defendant have a job, does the defendant have a place to live, has the defendant missed any court dates before?

9) Mike Whitlock on bail agents participating in the ongoing jail Crowding issues. See Attachment #6 This is especially important due to Norway being homogeneous and Hawaii being so diverse. Health care and social services in Norway work there in part due to Norway's cultural base. Hawaii is a melting pot and more diverse thus requiring more effort and more tools though certainly education and training of prison staff and offering more services would help us here in Hawaii. Bail bonding in America originated in part due to travel in the west and much diversity and the need for treating everyone equally while preserving the rights of victims by attaining or assuring accountability of the accused.

10) Public-private partnership and Pretrial Free Bail offered by bail agents to limited numbers of defendants as referred by the court where an approved bail agency would take one client per month on a test basis. ( Brook Hart and Judge Perkins - discussion ) Bail agents recognize the public paid for pretrial release agencies have clients they cannot monitor successfully as demonstrated by the 200 drug court defendants sitting at OCCC classified as pretrial and who we know number at least 200 persons and even for the HCR 85 study were still designated pretrial out of the 569 pretrial defendants. Targeting these 200 pretrial persons should be a priority and not counting them as pretrial would allow better focus on those who are held who might otherwise be eligible for pretrial release.

Bail bonding by its nature is suretyship and is a three party contract where co-signers hire bail agents who represent a sufficient surety insurer qualified by statute to be a sufficient surety and it is this three-party contract with a sufficient surety that ensures success. Pretrial release without surety on SR or OR is a two-party contract between the court and the defendant where only the defendant is promising to appear. There is no consequence to a third party with SR or OR. However I believe certain pretrial defendants would benefit from private bail bond release rather than court sponsored state run ISC release. The court could decide this matter in the same way the court decides who should get a court appointed attorney rather than a public defender or should the defendant be required to hire their own private attorney.

11) I do not favor release or detain. I favor release of the least restrictive type, with citation release by police being preferred. I think judges must make the release decision on more serious crimes using guidelines set by our legislature. Judges should not be restricted to only a release or detain decision. There is a very large gray area in between release or detain. Judges are the best qualified to make the release decision and to set bail conditions. Our Hawaii statutes contain a guideline for the court in the bail setting criteria from own recognizance to securing bail with property, cash or credit cards or by bail bond agents representing sufficient corporate sureties. See #14 HRS 804-11.5.

12) The pretrial release decision cannot be binary or one-sided to release or detain. There are many ways to ensure appearance. Judges need choices. Pretrial release is not a grand jury where only one side is heard. Both sides must be heard by a judge. Every person in American who has ever been confronted by the legal system having received even a traffic ticket knows this.

13) As to being innocent until proven guilty, this is true but innocence begins at trial and not before. Certainly, society has an interest in securing the appearance of those accused of a crime and to ensure public safety. Making use of surety and three party bail bond contracts is an efficient and fair method for the vast majority of persons arrested and has proven to work efficiently and fairly.

14) And I believe as US District Court Judge **Yvonne Gonzalez Rogers** of Oakland, stated that:

“Without zealous advocates — on both sides — the court risks deciding an important constitutional question without two sets of well-crafted legal arguments and a fully vetted factual record.”

In other words, we must argue these issues fully. This is because of my belief there is much middle ground in the bail release decision. and to reduce pretrial bail release to a release or detain decision is unfair, not practical and makes no sense. Trading a working bail bond via sufficient surety release system for a binary release or detain system that will cost at least \$3250.00 to \$6319.00 per defendant release with certain failure rates as already proven at 15% to 25% for felony cases and more for misdemeanor cases works against victims of crime and is detrimental to the public interest. Legislative restriction by eliminating bail agents or limiting bail release choices for judges to chose from and how bail is used by the court to ensure public safety, fairness and appearance rates will not reduce prison populations as has already been proven and tested in Oregon, Kentucky, Wisconsin and Washington DC.

When the court feels bail is set to be reasonable after hearing both sides and then makes use of bail by sufficient surety as guaranteed in our constitution then I think this is a valid means to ensure fairness. To do otherwise and require binary release or detail decisions is a slippery slope that has not had the desired results anywhere in the US and will not reduce prison overcrowding and will not be fairer. Using money or property for bail to substitute for sufficient surety bail is a reasonable choice judges in Hawaii should be allowed to utilize. Judge Alm successfully utilized cash only bail settings in his drug court program.

15) Placing a binary restriction on our courts to release or detain is the worst idea I can imagine to reduce crowding in our prisons because this method has never been shown to provide the desired results of reducing prison overcrowding and does not ensure public safety. There are no set of validated questions and answers as set forth by the Arnold Foundation or anyone else that can replace mom and dad cosigning to bail out their child using private bail bond suretyship.

16) I believe that working together as described in HCR 85, we should be able to reduce the prison population but this reduction does not mean we should delay making improvements to

the infrastructure which I believe we must begin immediately and we must also begin immediately training people to work within the prison system.

17) The first thing the judiciary can do is to assist Department of Public Safety with night court, afternoon court and speeding up the entire process from arrest to conviction. The idea that courts begin at prime time traffic during school hours at 8:30 AM should be modified to allow for parking, taking time off work and traffic. Reduction of sentence times and probation time periods from 5 years to 3 years or better, 2 years or in many cases six months for less serious crimes and monitoring those persons on probation with probation bonds via the private sector. Defendants are allowed to hire private attorneys and should be able to monitor themselves by providing a probation bond when the court feels this is best.

18) Police and law enforcement should provide consistent and predictable policy procedures regarding arrest and surrender of those persons in violation of the bail release conditions and bring the person before a judge pursuant to statute as presently surrender of bail by a surety is time consuming and unpredictable even when a bench warrant is involved. I have personally been made to wait outside HPD in the sun with no bathroom and no bench to sit on for up to six hours with the defendant in hand before HPD CRD staff accepts the person while at other times the defendant is allowed to surrender within 30 minutes.

19) The fundamental and basic concept of two party release or SR or OR like insurance v the nature of bail and the three party release by sufficient surety with someone pledging something to lose and with skin in the game must be explained and understood. Judges need to know the difference between a promise to appear and a responsible third party to guarantee appearance by suretyship. This two party v three party concept cannot be replaced by a questionnaire.

### **Conclusions.**

Those persons in authority should be made to know their duties and responsibilities regarding bail bond surrender and law enforcement should know their duties regarding violation of condition of release. Family members involved in bailing out a loved one expect to be able to put the defendant back when needed and surrender the bail pursuant to statute and not risk the surrender being rejected or questioned and worse being made to wait and wait or argue with



CRD staff at HPD. We need predictable clear guidelines on bail surrender. The statutes are clear on what police duties are regarding bail surrender yet no guidelines in writing are available at HPD to tell bail agents or members of the public how HPD interprets these statutes so that when further discussion is required HPD will be able to provide guidance.

Courts must adhere to their duties and when a defendant misses court by accident or mistake and when *good cause exists* the defendant should be placed back on calendar by request and should not be required to file a motion and wait two weeks while the bench warrant is outstanding and risk arrest or rearrest just to obtain a court date to explain the error in missing court or being late for court. In other words, the present system is too harsh and has no balance. Attorneys routinely are able to get their misdemeanor clients back on calendar so why can't defendants do this themselves? A magistrate could easily handle this task.

I stand, as do many other bail agents, ready to assist and cooperate and share my experience to assist in reducing prison overcrowding.

Kindest personal regards,

James Waldron Lindblad

Attachment are all in DropBox

<https://www.dropbox.com/sh/2iwmcba90ya4kkm/AAACrGLUPcp1T8avwzDnM95Ha?dl=0>

There are presently 18 attachment in the DropBox folder.

- 1) Barton Ruling, Washington state on Cash v Sufficient Surety
- 2) Shapiro Letter to DPF
- 3) Prison Population Mgt 1992. Bail Bond Myths, by James Waldron Lindblad
- 4) Washington, DC \$65M Pretrial Budget
- 5) Tom Parker, History of Bail
- 6) Mike Whitlock, Bail Agents Participating in the Ongoing Jail Crowding Issues
- 7) Hawai'i Constitution See # 12 Bail Section
- 8) Chief Judge DeArmond on Review of Pretrial
- 9) Colorado Letter to Maryland on Pretrial
- 10) Bail Reform, Eric Granof

- 11) Bail Reform, Jerry Watson
- 12) San Francisco, and Cash Bail- See page 6 90% labeled Pretrial not Bailable.
- 13) Pretrial Detention in Federal Courts 1995-20010 at increase 59% to 76% Detention ( Federal Study)
- 14) HRS 804-11.5 How to Secure Bail in Hawaii
- 15) Nelson- Hawaii Supreme Court on Notice to Insurance Surety- and 15a) HCR 85 Task Force, Interim Report, 2017 Justice Michael D Wilson, Chair 2.16.2017
- 16) Hidden Siscrination in Criminal Risk Assessment Scores NPR 5.24.2016 -Looking at Outcomes.
- 17) Judges Replacing Conjecture with Formula. Arnold Foundation to Tell Judges how to Judge.
- 18) Henley - Hawaii Case on Cash Bail or Cash-Only Bail. No Sufficient Surety - See Page 24- Unfairness. SCWC-13-0005595.

Final: 10.13.2017 ( 10 ) pages

First Supplement #1 December 8, 2017  
HCR 134 Criminal Pretrial Procedures Task Force

Judge Rom A. Trader, Chair  
Judge Shirley M. Kawamura, Reporter  
HCR134.Jud@Courts.Hawaii.Gov

Meeting Date: Friday, October 13, 2017  
Time: 1:00 PM. To 3:00 PM  
Location: Ali`i olani Hale Multi-Purpose room 101 Hawaii Supreme Court  
417 S. King Street, Honolulu, Hawaii

Testimony of James Waldron Lindblad. First Supplement #1.  
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First Supplement #1 December 8, 2017  
[HCR134.Jud@courts.hawaii.gov](mailto:HCR134.Jud@courts.hawaii.gov)

Dear Judge Trader,

I am writing to supplement my written testimony for the October 13, 2017 meeting.

Included here are my personal views based on my experience in pretrial release and bail bond sales on how to improve the criminal pretrial process but also to tell what I think is working and to further address and try to answer the questions and points raised at the October 13, 2017 Task Force Meeting.

First, I believe we have a high functioning pretrial release process in Hawaii that is working well and I believe the Arnold Foundation and the ACLU, are promoting a negative pretrial agenda

that includes no regard for public safety or judicial authority and fails to keep our constitutional rights in balance. I have addressed what I think to be this negative agenda since at least 1977 and I can provide written correspondence since 1995 here in Honolulu when Mr. Alvin Bronstein, Chair of the National Prison Project wrote me a letter on his pretrial release opinions dismissing or not bothering to read my opinions. In other words, his mind was made up. Mr. Bronstein stated he does not approve of free enterprise and profit making in the criminal justice system. Those persons in attendance at the Hawaii Criminal Justice Commission meetings around 1995 know full well the results of Mr. Bronstein's National Prison Project consent order and how those persons at our Department of Public Safety in Hawaii needed to send inmates to the mainland to comply with the order. Many inmates are still up on the mainland due, I believe to Mr. Bronstein and the ACLU agenda. The Bronstein letter is in the DropBox folder under the name 6 Sandy Lebeguen Alvin Bronstein. My point is to suggest the task force question the ACLU, their sources, their track record and the resulting burdens on our Department of Public Safety due to a negative pretrial policy Mr. Bronstein and others at the ACLU promoted then in 1995 that is now still being promoted as evidenced from the ACLU testimony presented to the task force. I think what the courts need to function highly are more release options like I advocate here thus maintaining our high functioning Hawaii pretrial process and I think reducing release options and taking control of release out of the hands of our judges and to limit court pretrial release decisions to a single release or detain option with reduced and less judicial discretion based on a questionnaire promoted by the Arnold Foundations like the ACLU advocates is backwards and going in the wrong direction. Further, I believe neither the ACLU nor the Arnold Foundation can show positive and cost effective results anywhere in the US using their release or detain model.

I think the ACLU position falls short and has failed to help improve the pretrial process anywhere because their methods are based on VERA and Arnold Foundation models that fail to help the truly needy and instead focus on those defendants who would otherwise bail out via sufficient surety or bail bonds. This ACLU position advocates that we taxpayers hire at huge public costs state workers and staffers to implement a program like Washington DC has that has failed miserably in Washington DC and has provided no improvements to fairness or jail crowding. Washington DC's efforts are already tried and tested costing at least \$65M annually that at best provides less than 70% efficiency, is very costly at \$3200.00 per release and can never be more fair compared to present methods as used in Hawaii which are completely fair

and completely balanced and do in fact already address the needy as well as allowing judges to protect public safety.

Our Hawaii legislature has gone to great length in ensure pretrial justice in Hawaii and the judicial tools for pretrial release are already in place and our pretrial process is already backed up by the Hawaii Intake Service Center and these combined judicial tools including traditional bail by sufficient surety are what the ACLU and Arnold Foundation want to tear apart by requiring and calling for a binary release or detain decision making by our courts and in this process the ACLU is calling for the elimination of bail by sufficient suretyship including money bail and bail bond agents. This means judicial discretion will be curbed and limited rather than improved and expanded. The ACLU position is to rid Hawaii of bail agents in spite of the bail agent's proven worth and value as a high functioning method of obtaining release by sufficient surety. This ACLU has failed to provide any meaningful data or results from anywhere in America of a pretrial model that is working better than in Hawaii. The ACLU cannot provide or point to any model that is better in concept, in practice or in any theoretically perceived way that is better or that works more fairly that can replace bail by sufficient surety. This is because there is not anything close to working better than bail by sufficient surety anywhere else or that can provide better or more fair results at any cost. There is no pretrial release means that would better protect public safety than by using a judge to decide and by involving family members of defendants held pretrial by making use of bail by sufficient suretyship, or money and by utilizing family members with skin in the game. This ACLU excuse is money is not fair. Mr. Bronstein states this belief regarding profits in his letter. Contrarily, I believe those defendants who have established ties and have their family to support them should be allowed bail by sufficient surety and those leftover defendants who have no family, no ties to community and no assets can then appear before the court with an Intake Service Center report to assist the court to determine the best pretrial solution from Own Recognizance, to release to program, to release with supervision to deduced bail.

I think dangerousness is a key point in setting bail and Judges can decide dangerousness at a bail hearing. Unbelievably, the ACLU and others are now calling for taking dangerousness out of the pretrial release and bail decision making process and asserting that determining dangerousness is in and of itself discriminatory and should not be considered. See attachment #9.

Many pretrial choices are already available to our courts in Hawaii by statute and this explains why we have fewer than 500 pretrial inmates at OCCC out of 20,000 annual arrests by HPD. However, we still do not know how many pretrial defendants are actuallyailable persons at OCCC out of those 20,000 HPD annual arrests. HOPE and probation violators should be treated differently and housed separately, perhaps via a license to halfway houses or alternate forms of detention and not held at OCCC.

I believe there is no better bail or pretrial model anywhere in the United States of America than in Hawaii. This is because Hawaii incorporates combined sound judicial decision making based on our fair and balanced bail statutes that already include all forms of pretrial release from own recognizance to fully secured bail via property, cash, stocks or bail bonds and then is backed by the Intake Service Center bail reports that add clarity for all decision makers.

*I suggest the task force beware of exaggerated and false outside analysis of our Hawaii pretrial process as step one from the ACLU, and in my view, is to bamboozle us first with the implementation of the Arnold Foundation risk assessment tool asking defendants the same questions I asked in 1974 that adds nothing to improve matters as we already have the intake service center asking these questions and the ACLU then begins by suggesting that the current system we have here in Hawaii is somehow broken when it is not. The Hawaii system is not broken. Step two is the insinuation that the poor are "languishing" in jail only because they cannot afford bail and that being the basis of more bail reform. Step three is advancement of policies which remove judicial discretion in favor of requiring release which is the "least restrictive." This was all very well orchestrated by the nationally scripted ACLU testimony and has been similar if not exactly the same since at least 1974 when I was advocating the exact same message as a pretrial practitioner myself. Yes, I was a pretrial worker that at one time believed in the ACLU model, that is, until I worked within the system and saw the failures.*

*We early pretrial workers began by advocating more judicial choices to our courts founded on the Vera principle of releasing the poor with no money, safely. But, in practice we could only reduce reliance on sufficient surety bail if we competed with bail agents by offering free bail to those who would otherwise pay and worse we ignored the truly needy we were suppose to help.*

*This was wrong. I help far and away more people offering bail than I could ever help by asking ten questions we now call the validated risk assessment tool.*

*We pretrial workers did our best to get rid of bail agents. We thought paying 10% bail direct to court might help but reducing bail amounts would have been better because we never collected on the back end when there was a default or a missed court date. There was no infrastructure in place to collect and we never tried to find defendants that missed court either.*

*In my view, the practice of releasing those who would otherwise pay bail on their own via family, friends or a bail agent and then ignoring the needy was underhanded and a confusing way to say cash is unfair when bail reduction and own recognizance was available. We cannot confuse bail that is restricted to cash only, which may as well be a gazillion pengos. We must understand the nature of bail as stated in the Barton Case attached. However, the ACLU, does not approve of bail agents or compensated sureties. To prove this up, the new argument the ACLU is now promoting has evolved to the notion that dangerousness should no longer be considered by the court in the release or detain formula the Arnold Foundation is promoting because they say, dangerousness is discriminatory. See Gov. Cuomo letter attached in Dropbox. This limitation by the ACLU to release or detain by a series of questions is the most unfair thing I can imagine and attacks the 8th amendment.*

*For me, after two years of working within this pretrial system my experience with over 2000 clients changed my mind about how to achieve a high functioning and fair pretrial system. I believe American benefits from bail by sufficient surety, that includes bail agents and I now think the release or detain concept that evolved from and originated with the VERA Foundation that in effect was calling for only a two party release or detain model has proved unworkable. We cannot limit pretrial release that trusts only the defendant in every single case. Judges need many choices. Surety bail or bail agents has proven effective.*

*Limiting pretrial release choices from it's primary purpose of supplementing and adding to release methods is a step backwards. We need ISC and we need state supervision for those persons lacking community ties and financial support. But the VERA model should not advocate yet again to cancel and eliminate all other forms of bail involving sufficient suretyship like bail bonds. Why limit release to a binary release or detain model? This is at a time when*

*we need more release methods, not less. Judges need many choices because diversity requires choices. There are too many differing circumstances in the pretrial release process to reduce release choices or hamper judicial decisions. One size doesn't fit all. Further, dangerousness must remain in the decision making process for all pretrial release, on bail or on recognizance. Committing new crimes, types of crimes, and patterns of criminal behavior as reported in the ISC reports must remain a factor for judges to consider. Many times these JDC reports or criminal records reports are available at arraignment and this information can guide the court.*

*If anything, we just need to speed up the entire process which I think is now possible under HRS 804-10.5 as validated by Nelson and Vaimili and could allow administrative changes for speeding up release on bail to benefit all concerned. We could have daily arraignments at Honolulu District Court for felons every afternoon and examine bail status daily. Electronic filing of bail for weekend release at OCCC would help too. The police can look at E-Kokua and see when bail is filed.*

*A good example of where we are going bail wise in the United States is the federal court system where the conviction rate rose from **approximately 75%** to **approximately 85%** between 1972 and 1992. For 2012, the US Department of Justice reported a **93%** conviction rate. The conviction rate is also high in U.S. state courts. People are in jail first because they commit crimes and society has an interest in protecting itself. Innocence begins at trial and not before. The ACLU's illusion of the first time arrest for a college student on minor charges languishing in jail at taxpayer expense because their parents won't bail them out is not true, and certainly not true in Hawaii, thanks to our ISC. We also know the detention rates for Federal pretrial defendants is over 70% detained. What state court can afford to detain 70% of their pretrial defendants?*

*A basic model for criminal behavior by Criminologist Cesare Lombroso classifies the five types of criminal or crimes. 1) Born that way, 2) insane, 3) crime by passion 4) habitual criminal and 5) occasional criminal. In other words, judges know there is a wide range of defendant thus calling for a wide range of release solutions and pretrial choices. We should add to the choices and not take away judicial choices like the ACLU and Arnold Foundation advocate. Personality and character of defendants is complex and there is great debate regarding criminal behavior and asking if criminals are born that way or formed. One size doesn't fit all in the release equation and*



*families making release decisions for their loved ones is an essential component that bail bond suretyship serves and should be expanded and not eliminated. When we talk about suretyship we are talking about a concept and a process that Plato wrote about when Socrates required a surety and the word bail is incorporated into our 8th amendment. How can anything be more cruel and unusual than a release or detain model. How anyone, especially the ACLU cannot see how the taking away of the right to bail by sufficient surety cannot have profound impact on our rights to freedom from government oppression boggles my mind. In English times in 1627, the case of the Five Knights spotlights how Lord Chief Justice Hyde denied bail when the knights were imprisoned for refusing to contribute. Parliament responded to the King's action and the court's ruling with the Petition of Right of 1628. The Petition protested that contrary to the Magna Carta and other laws guaranteeing that no man be imprisoned without due process of law, the King had recently imprisoned people before trial "without any cause showed." The Petition concluded that "no freeman, in any manner as before mentioned, be imprisoned or detained..." The act guaranteed, therefore, that man could not be held before trial on the basis of an unspecific accusation. This did not, however, provide an absolute right to bail. The offenses enumerated in the Statute of Westminster remainedailable and non-ailable. Therefore, an individual charged with a non-ailable offense could not contend that he had a legal entitlement to bail.*

A summary of my thinking, talking points, and recommendations pursuant to the agenda is as follows:

1) I think and have long believed the current pretrial system in Hawaii is working and it is fair. I have had close contact with ISC in Hawaii over the years. The Hawaii Intake Service is one of the best in the nation in part because judges in Hawaii still remain the ultimate arbiters in setting bail or making the release or detain decision. I advise everyone to beware when policymakers consider taking away judicial authority from the bail release decision. In fact, I think adding a daily court calendar specific to bail hearings at district court every afternoon at 1:30 PM., would benefit all concerned to speed up the process and give attorneys a place to argue for release on bail or own recognizance and to address pretrial issues quickly regarding bail that would allow judicial control of the process. Judicial control of the pretrial procedure is essential in order for our Hawaii Pretrial system to remain high-functioning.

2) I do not see any problems or issues with the current pretrial process but suggest a) capping of bail amounts on misdemeanors and aggregating amounts for bail bond purposes, most especially on TRO and abuse matters where last week Beth Chapman needed to file 21 bonds to effect release at HPD when on any outer island only one bond would have been required. The time for HPD to process 21 pieces of paper v one piece is 21 times more than needed. Likewise, these 21 cases followed to the court, the reason being the cases were not aggregated even though it was the same person and the same set of circumstance. This matter on aggregation has not been addressed since Judge Melvin Soong, aggravated felony cases on bail bonds at Honolulu district court to avoid stacking of bail agent powers of attorney and to streamline the release process when felony cases originated at the district court. Maui and Big Island courts already were doing this long ago.

3) One aspect of the ISC procedure in Hawaii that functions well is that Hawaii intake workers are not bullied by anyone and make independent decisions. The ISC is thorough and complete and justifies their decisions. This helps judges to make better release decisions. To improve, I think our ISC could make or offer bail amount guidelines. For instance, when bail is initially set high I think the ISC should have authority to recommend a lower bail amount and not be limited to a release or detain decision or be required to maintain whatever the present bail amount is. In other words, add flexibility to ISC reports.

4) All high-functioning pretrial systems have judges making the bail decision on whether to release or to detain or set bail and in what amount. Presently, judges in Hawaii make all felony release decisions however the legislature in 2016 gave authority to the DPS to release certain defendants if a population cap is reached. Via HB 2391 Resulting in Act 217, of the 2016 Legislative session. ( see bail agent testimony PDF attached ) This idea mirrors the Act 305 emergency release act which sunsetted.

5) I have never seen any barriers, challenges or impropersness in the pretrial process in Hawaii and if I did I would say so by writing a letter to the Admin Judge which I have done before on routine matters with positive results.

6) I think the Task Force could consider administrative solutions as well as legislated recommendations. Adding weekend bail at OCCC utilizing electronic bail bond filing for those sureties deemed sufficient under HRS 804-10.5 would speed release for those persons already determined eligible for release on bail by the court.

a) Certainly, if bail agents are to be better utilized a magistrate to fix errors and help clients who fail to appear in court to get back on court calendar would assist.

b) Expanding good cause to set aside forfeited bail.

c) Allow bail filings during at least some time on weekends on Oahu for OCCC release.

d) Improved ex-officio bail filing procedures for interisland and or HPD at Main v Kapolei to assist in bail release like Maui PD does for Molokai and Lahaina to ensure promptness and avoid driving or flying. We have email, we have the fax, we have telephones to communicate and deliver and we have the court computer to verify filing of bonds yet bail agents are still required to physically deliver a piece of paper to effect release.

e) Why can't OCCC and HPD look at the court computer to see when bail is filed? Federal courts have done this for over twenty years. This step would speed release and improve safety and accuracy.

f) HPD should provide written guidelines for bail bond surrender pursuant their duties and responsibilities under the statute HRS 804-14. Further, when HPD officers know there is a obvious violation of a condition of release on bail all police officers should follow the statute pursuant to HRS 804-7.2 and take that defendant forthwith before the court of record. In other words hold and take into custody. HPD has never enforced HRS 804-7.2, and has never held or brought a person on bail back to court for a bail violation but limits bail enforcement to serving only a warrant issued by the court. Further bail bond surrender is always a hassle at HPD and never certain like family members expect unless there is also another warrant involve to hold the person needing surrender. Family members know before anyone when bail should be revoked for surrendered and families expect bail agents to assist them and to know how to accomplish the task of bail surrender. Written guidelines on bail surrender or discharge of

surety subject to periodic review by HPD, DPS and the sheriff should be formulated and distributed.

g) HPD could change their policy on citation release and classes of crime requiring booking. Desk sergeants at HPD have authority to release on bail or own recognizance, after booking and when bail is set by HPD but rarely if ever, utilize this power or authority to release defendants even for misdemeanors and instead wait for the court to send in a judge.

Until such time as we can come up with something better and that has proven positive results that is fairer and more equitable without unknown side effects or unintended consequence and that is affordable, I think cash, property and sufficient surety, as determined by the court for bail is a reasonable and efficient means to the end goal of, a) protecting public safety, b) providing fairness and justice, c) protecting victims and their rights and has worked well for America's diverse population pursuant to our 8th amendment rights and has worked especially well in Hawaii for many years serving to our diversity in Hawaii. This perceived to be new Arnold Foundation & ACLU, idea on release or detain and that money is somehow bad in our laissez-faire capitalist society has already proven out false for over forty years of trials and in experiments elsewhere as has been tested in such places as the 10% cash only in Oregon fiasco and our Federal Courts have a very high 70% plus detention rate, but worse, the bail experiments the ACLU and Arnold Foundation point to in Chicago, California, New Jersey, New Mexico and especially Washington, DC., all show the unintended consequence of more crime and less fairness while the jails remain packed. Packed jails and failed results, so, why should Hawaii follow suit just because the ACLU thinks money is bad? The 8th amendment does not say sufficient surety is bad and in Hawaii bail by definition includes, property, or cash, stocks, bonds, and real property. Sufficient surety bail provides a choice and in conjunction with OR., SR., and bail reduction or increase is far better and more fair than a release or detain model. I think surety bail should be preferred and remain within the list of choices our judges could utilize to ensure fairness. I was asking the same Validated Risk Assessment questions in 1974 the Arnold model now advocates and asserts to be new yet these same questions were insufficient then and these same questions are worse now due to technology as everyone knows how to answer them. Families know best and taking the family out of the pretrial process and forcing courts or administrators to deal *one on one* with only the defendant is not in the public interest.

We, in Hawaii, must work hard and work together to argue these issues fully which is what I believe we have done and are continuing to do. The proof is there are like less than 500 bailable pretrial defendants at OCCC out of 20,000 HPD annual arrests. This low number proves Hawaii has a very high functioning pretrial release process.

I ask to be included in any ongoing discussions and to be made aware of policy changes and will stand by ready to assist and cooperate.

Sincerely,

James Waldron Lindblad

DropBox Link 2 HC134

<https://www.dropbox.com/sh/i3bbqsaqirpzqo8/AAA9pXD8WW23XNiJGYCZqczqa?dl=0>

There are presently 9 files in the DropBox Folder.

1. HCR134 Criminal Procedures Task Force October 13, 2017 ( Original Testimony )
  - 1a. The Barton Ruling on Cash Bail v Bail by Sufficient Surety
2. Emergency Release 2016 Testimony HB2391
3. On the Board Beth Law HRS 431 9N-102- those not paying forfeitures should not post more bail
4. Aggregation of Felony cases at District Court. Judge Melvin Soong, 1999
5. Calvin Ching \$1.6 M due and Owing Testimony.
6. Sandy Labeguen- Alvin Bronstein National Prison Project 1995- 30 pages Note the Arrogance of ACLU Policy on Bail even when Hawaii was under Federal Consent Decree.
7. Nelson, Supreme Court Notice to Insurance Surety SCWC-12-0001040 June 21, 2017
8. History of Bail, Including Case of the Five Knights.
9. Delete Dangerousness Gov Andrew Cuomo 100 Groups ( beyond belief )

Sincerely,

James Waldron Lindblad

Cell: [808 780 8887](tel:8087808887).... Please call or text anytime.

Email: [James.Lindblad@gmail.com](mailto:James.Lindblad@gmail.com)

July 7, 2018

RE: HCR134 Further Testimony Supplement \*2 Bail

9 Pages.

Dear Judge Trader,

Bail agents do a very good job at getting defendants to court and in doing so rely on indemnitors to monitor and control defendant behavior, travel and whereabouts. Questions generated and scored by machines can assist decision making but the human element and judicial control of pretrial release is essential to maintain our high-functioning pretrial process in Hawaii.

I think bail is an essential element of the pretrial process that offers judges more pretrial release choices than the ACLU release or detain model and importantly it seems judicial use of bail results in fewer people detained pending trial as proven by comparing Hawaii pretrial numbers where money or surety bail is used with Washington, D.C., pretrial hold numbers where bail is not used and only release or detain are provided. Arrest numbers in both Honolulu and Washington, D.C., are similar and comparable at between 16,000 and 20,000 annual arrests and or pretrial persons being purportedly monitored. Honolulu has about 2.5% or 500 persons at OCCC of HPD's 20000 annual arrests that have not bailed out and Washington, D.C., has either 5.66% or 10% at 1132 or 2000 pretrial holds depending on sources for their 16000 to 20000 annual arrests. Published figures show 16000 arrested on Washington, D.C., and about 4000 hold overs still pending trial being monitored. Stand alone, these figures demonstrate the high functioning nature of our pretrial process in Hawaii when comparing how many pretrial defendants are in jail. These numbers are further validated by attorney Mitch Roth's research published in the Big Island newspaper the Tribune-Herald that reports on the high functioning pretrial process and numbers of persons held relevant to population on a nationwide basis. ( see link 16, DropBox)

I have never understood why the ACLU wants to restrict pretrial judicial decisions and limit the judicial choice to release or detain when no place in the county can demonstrate reduced

**Attachment B-12**

numbers of pretrial defendants, or reduced crime and not to mention the side effect of more crime such as demonstrated in Washington, D.C. Besides, Hawaii already has release or detain statutes to allow judges these two choices. It is the restriction to only the two choices of release or detain the ACLU model calls for that I do not understand and that I think is unfair and that I object to.

My pretrial release training in 1973 at Clark County Community Corrections taught me bail was about the constitution and it is better many go free rather than one guilty suffer. We were taught detention was reserved for treason and murder. We pretrial workers were allowed a 5% failure rate and we quickly figured out how to modify and correct a failure to ensure additional funds to expand. Today how failure is monitored or determined varies widely. For instance, if a defendant has ten court dates and appears at nine but misses the sentencing court date number ten then in some pretrial circles this equates to a 90% success when the last or tenth court date was really the most important court date. My pretrial program in Vancouver, WA., expanded quickly and our program bought several houses in the area of the jail and converted the houses to offices. We intake workers called ourselves recog officers- short for recognizance officers and our staff worked nights interviewing and releasing those persons arrested on misdemeanors and we then attended court daily with our results from felony interviews that we reported to the court. Most pretrial workers worked all night interviewing those arrested for both pretrial releases and for public defender services. We worked in the booking area at the jail but had access to both city police and county sheriff jails and records and NCIC reports.

Much of the pretrial argument today in Hawaii centers around a new prison and maybe prison size. Those who argue against bail agents and bail also argue against a new prison. Those who work in and around the jail/OCCC like me see the need for new infrastructure and better staff training. We most certainly need contact visits for new parents which is presently lacking. This means, I think we need a new jail and we must replace OCCC.

In my view, it seems no person lobbying either the HCR 134 Task Force on bail or the HCR 85 Task Force on the jail replacement matter want bail bonds or money or surety pretrial release and thus are opposing use of bail agents or money bail itself but to me, none of those persons opposing the new jail has ever worked in or around the jail or court. Most all persons opposing the new jail and lobbying for new rules on bail like release or detain do not like bail agents. I

think this is at least partly because those who oppose bail do not understand bail itself and have not read the Barton case, and in part also refuse to imagine themselves ever arrested and detained or before the court or even attend court to observe a pretrial hearing. I cannot get even one person from the ACLU of Hawaii to come to my office or attend a bail hearing so they may know first hand what our judges face daily. For me, it only takes once to be in jail or even work in the jail and attend court and listen before the court and visualize being there at arraignment with only the release or detain model and the limited two choices promoted by the Arnold and MacArthur foundations, and now promoted by the ACLU, to release or detain when maybe allowing judges to set bail for the inbetweeners is not so terrible compared to detention as the only alternative choice to wholesale release. Shifting release decisions to family members of those accused works very well for bail agents. I shared a recent bail case from my office with ACLU staffer, Matteo Caballero regarding my client, a Japanese national accused of a class C terroristic threat in Waikiki over a surfing matter whose father, a doctor from Japan flew in to assist with the bail out. I asked Mr. Caballero if he felt detention of my client due to citizenship, ties to community and nature of crime would be preferred over the setting of the \$50,000 bail that was later paid by the father of the defendant and the defendant released. Thus, in this instance, there was a shifting of some appearance responsibility to a family member of the accused via money bail and I think this is in the public interest. I had asked Alvin Bronstein the exact same question in 1995 and of course we both agreed bail over detention is preferred yet Mr Bronstein, and the ACLU still lobby against bail agents.

Those defendants with friends or family or jobs that live in a community will appear before the court and a decision by the court will be made regarding the release, and vacationers, may require one decision and local persons with ties to the community another. Judges know the difference. This spotlights how judicial choices can help our pretrial decision makers. Either way, standing before the court can have an eye-opening effect on any person's thinking about bail and the 8th and 14th amendments and pretrial release. In my view, the 8th amendment assumes bail and the 14th amendment requires equal protection. What judge in America today does not understand balance, fairness and equal protection? How can machines and a point scale understand individual circumstance?

Yet, the ACLU's new fangled pretrial ten question script or a machine generated tabulation is cast in stone and requires only release or detain. No middle ground is allowable in the ACLU



model. Apparently, the ACLU thinks no judge can understand these things and the ACLU wants to force a release or detain decision.

I think the idea of release or detain is very unfair and I think it is even absurd to think judges should not judge bail decisions. This release or detain position taken by those persons against any new jails is impacting the pretrial process and freedom in America today nationwide by arguing that we limit judges in making bail decisions. Judges in Hawaii can already release or detain anyway so why anyone would lobby to hamstring the court with a machine generated bail report restricting pretrial release to a limited release or detain model only baffles me. This is like saying our Hawaii Intake Service Center is wrongheaded and their many years of great effort is not valid when the proof is, we in Hawaii have a high-functioning pretrial process compared to any other place including Washington, D.C., where over \$65MM is spent annually, and no fugitive figures are kept so that we may know the success rate and still 10% of those arrested are held which is more than in Hawaii based on similar arrested numbers.

My point here is that bail is not the cause of prison overcrowding as some assert. The ACLU statements that 41% to 50% of those in Hawaii jails or prisons are there due to bail are false. The DPS figures demonstrate this in the charts supplied in their annual report. And even assuming arguendo the percentage numbers of those held in Hawaii compared to anywhere else in the US is less in Hawaii by a large margin due to our high functioning pretrial process. We have 1500 Hawaii people serving sentences on the mainland so of course we need a new jail if only to help transition those getting out.

My son Nick, made a video about this with attorney Victor Bakke. [https://youtu.be/F-OF3\\_ZkM5M](https://youtu.be/F-OF3_ZkM5M) ( Bakke calls the ACLU clueless ) The charts published online show theailable numbers. We think there are about 500ailable persons at OCCC out of 20,000 annual arrests in the first circuit. This is about 2.5% of the 20,000 arrests made by HPD annually. We also know thanks to attorney Mitch Roth that Hawaii has one of the lowest numbers of pretrial persons or persons who cannot make bail in the US based on population. By comparison, Washington, D.C., lists either 5.66% or 10% detention rate on their 20,000 annually arrests while still spending at least \$65MM annually for a pretrial release or detain program.

Attorney Mitch Roth is well aware of this and said so in the Hawaii Tribune.

<http://www.hawaiitribune-herald.com/2018/02/03/hawaii-news/the-battle-over-bail-reform-efforts-fail-despite-aclu-study-critical-of-states-courts-jails/>

I met the ACLU staff writer Ainsley Dowling and her supervisor Mateo Caballero on December 13, 2017, at the ACLU annual meeting and we spoke of the need to make use of accurate statistics and how statistics can be gathered and what statistics were available and we went over the words and terms of regarding pretrial versus bailable. We went over the Washington, D.C., comparison on cost and number of annual arrests at 20,000 which is similar to HPD annual arrests and we went over the \$65MM budget Washington, D.C., has for pretrial services. I told Ainsley and Mateo how our Hawaii judges go to HPD on the weekend to release persons and I sent them both the January 22, 2018, HPD arrest log showing forty of forty DUI arrests made bail of \$500 and none were taken to OCCC which was contrary to the New York numbers where Ainsley stated only 15% of the arrested persons made bail when bail was set at \$500 or lower in New York. Later, I verified the DUI arrest and release date for the weekend of 2.20.18 where 57 DUI arrests were made and all 57 or 100% made bail and none were transported to court or OCCC. The Memorial Day weekend HPD arrest log shows 60/60 drunk drivers booked and all 60 released along with another 35 booked on warrants released by the HPD weekend duty judge. I have explained to the ACLU staff that I have worked with the pretrial system for my entire career and that Hawaii has a very high functioning pretrial process and that we in Hawaii already allow judges to release or detain. At a legislative hearing on HB 1996 and HB 2221, I asked Chair Takayama to instruct the ACLU and others opposing bail to meet with those persons who favored traditional bail over the new release or detain models as we all want to improve the pretrial process so that others will look to Hawaii to copy rather than Hawaii looking at homogenous Scandinavian countries that fail to serve diverse populations and mainland places like Washington, D.C., and Chicago where crimes rates are high and the jails still packed. The worst examples of a place to look are Oregon or New York where jails are full, crime is high and the release or detain models are used in conjunction with the 10% option to the court with no cosigner or surety used.

I invited both Mateo and Ainsley to my office as well as to court hearings involving my clients who were both denied supervisory release but who had made bail thanks in part to their father's flying in to sign for them and ensure appearance at my bail office.

[www.phrases.org.uk](http://www.phrases.org.uk)

Don't **throw** the **baby out** with the **bathwater** is an idiomatic expression for an avoidable error in which something good is eliminated when trying to get rid of something bad, or in other words, rejecting the essential along with the inessential.

<https://www.phrases.org.uk/meanings/dont-throw-the-baby-out-with-the-bathwater.htm>

!

Don't discard something valuable along with something undesirable.

The baby in the bathwater here in this matter is cash bail or bail by sufficient surety pursuant to our statutes and explained in the Barton case and or use of bail bonds persons to further assist those persons without the entire bail amount set. Judges set bail not bail agents and bail agent can only serve those defendants whose bail has been set by the court. This fact has been explained and re-explained to those persons at the ACLU including Alvin Bronstein, and the ACLU's National Prison Project who I had the opportunity to work with.

The bathwater here for us in managing our prisons is the crowding, the staffing, the warehousing, the lack of opportunity and the need that some people must stay in prison regardless. How we as a society deal with crime and punishment requires community support, taxation and oversight. I believe reviews by this taskforce and the legislature is an essential part of our duties as citizens and of the process as a whole.

I have met with and talked to Robert Merce and several other members of the HCR 85 Task Force where several members there do not favor a new jail I think because they went to New York and Norway and as a result, they do not want a new jail no matter what. This is understandable and I agree in theory with some things but I still think we need a new jail facility. Thinking on the new jail contrasts sharply with those persons like me that work in the Hawaii pretrial system and in or around OCCC., MCCC- KCCC and HCCC, because we who work in the pretrial system all know we need new and updated jail and prison facilities and have needed them for many years and at least since 1995 when Hawaii began sending our inmates to

Arizona thanks to Alvin Bronstein and the horribly expensive consent degree brought about in part due to ACLU thinking and lawsuit. We still have over 1500 Hawaii prisoners serving time on the mainland.

We all want fewer persons in prison and no person should be held simply for lack of funds but bail and prisons serve a purpose we all need and we all benefit from. Our Judges need choices to administer justice equally and bail should be one of the choices. The ACLU sees no relation to crime and prisons and stated this at the legislature. They say low crime means we should not have a prison and they see no correlation at all that perhaps crime is reduced as the right people are in prison. The ACLU also does not want dangerousness considered in the judges release criteria because the ACLU sees dangerousness questions as discriminatory and the ACLU even wants Hawaii to modify and change the Hawaii Intake Service Center questions because the ACLU thinks the ISC questions sometimes do not allow release due to dangerousness and past record, again, the ACLU finding this logic discriminates.

I believe judges, not machines should make release decisions and I think judges should have as many choices as we can think of to ensure the Hawaii pretrial process remains high functioning and I think we in Hawaii can set an example to the world on how to serve a diverse population.

The fly in the ointment here is the ACLU does not want a new jail and in my view, is grasping at straws here attacking bail like they have done since at least 1995 almost as though bail bondsman set bail when judges actually set the bail all the while never realizing the high functioning nature of our Hawaii pretrial system as it is and then going so far as to skew or misrepresent the facts by quoting erroneous and outright false numbers of pretrial persons at OCCC who are listed as pretrial but that cannot actually bail out via suretyship like HOPE - cash only and other probationers who are held and ignoring the fact that Hawaii judges can already release or detain.

### **Solutions:**

On the flip side, I want to further improve the Hawaii pretrial process by working within the already high functioning Hawaii pretrial process to make it even better by offering solutions learned from my experience. Statewide one-stop-drop for bail in coordination with court

computers to effect release and improved Ex-Officio Filings for same day entry so that statewide release including Kapolei police can effect release once the bond is filed at the court in a manner similar to Hilo and Kona courts, aggregation of TRO type bonds with a cap amount and consider capping the dollar amounts on other types of cases where many police report numbers can make law enforcement require a separate bond transaction, ( Judge Soong fixed this for district court felony cases in 1995 ) speeding up the entire process would help, expanding good cause to set aside bail forfeiture, allowing persons that miss court to get back on the court calendar by perhaps using a magistrate, \*daily bail hearings in the afternoon when families can appear, access to those persons needing bail, police cooperation under our bail surrender and discharge of surety statutes for those persons on bail that violate conditions of release, time limits on cases of not over two years, annual meetings with administrative judges to suggest procedural changes to benefit the courts regarding costs and costs to law enforcement, improved use of NCIC warrants, quicker notice on failure to appear and limitations on bail forfeitures when notice occurs after 30 days. Sureties require certainty to enhance their performance. The biggest fix would be for HPD to make improved use of citation release. Desk sergeants have it within their authority to release persons only when HPD sets the bail so this could be modified to allow HPD to release on its own without using court staff and weekend judges and this would allow faster release. If any person in authority is dissatisfied with bail agent performance I believe our statutes and recent supreme court cases can restrict who and how sufficient suretyship is determined by the court regarding most especially the character, place of residence, reliability, and finances of the surety. This means sureties that charge fees are under court control at all times and can be further regulated when required. The Nelson case proves this up clearly as do the HRS 804-10.5 requirements.

Those persons not wanting a new jail seem to find every argument against bail agents or money bail appealing, however, for me, the argument must be proven and not be a false or only a perceived argument. So far there is no place in America today with a better pretrial process than right here in Honolulu and further, there should always be a middle ground. When should a lifelong Hawaii property owner, working the same job for twenty years who votes be denied bail by sufficient surety or be denied the right to bail out their child? To me, this is not justice and is reverse discrimination that calls for sound judicial discretion. Machines cannot do this. Hawaii is diverse and we require many bail choices including bail by sufficient surety and not just two choices such as release or detain.

We cannot lump all bail decisions together into a machine generated directive. That is why we have judges. A judge should be allowed to judge.

I stand by ready to assist and cooperate and share my pretrial and bail experience in the hope of further improvements to our already outstanding and high functioning pretrial process in Hawaii.

DropBox Link 3 20B Combo HCR85 and HCR134

<https://www.dropbox.com/sh/oqbwn0a6x9qx0rn/AADn9r2YRBNdFujp2gzX-zlza?dl=0>

Sincerely,

James Waldron Lindblad

808-780-8887

James.Lindblad@Gmail.com

**APPENDIX C**  
**SUBCOMMITTEE ROSTERS AND SUMMARIES**

**1. Arrest / Booking Subcommittee**

<b>Susan Ballard (Chair)</b>	Chief of Police, HPD – O‘ahu
Mitch Roth	Prosecutor – Hawai‘i County
Milton Kotsubo	Member of the Public
Tivoli Faaumu	Chief of Police, MPD - Maui
Craig DeCosta	Hawai‘i Association of Criminal Defense Lawyers (HACDL) – Kaua‘i

**Dates of Subcommittee Meetings**

Exchanged information via email

**Individuals and Organizations Consulted**

Hawai‘i Police Department, Hawai‘i County  
Honolulu Police Department, City & County of Honolulu  
Kaua‘i Police Department, County of Kaua‘i  
Maui Police Department, Maui County

**Authorities and Reference Materials**

General Orders pertaining to arrest and booking - all county police departments  
Developed questionnaire and summarized responses.

**2. Jail Screening / Intake Assessment Subcommittee**

<b>Rhonda Loo (Chair)</b>	Circuit Judge, Second Circuit
Michael Champion, M.D.	Department of Health
Kamaile Maldonado	Office of Hawaiian Affairs
Scott Nishimoto	State Representative
Kari Yamashiro	Deputy Chief Court Administrator, Fifth Circuit

**Dates of Subcommittee Meetings**

January 19, 2018  
February 9, 2018  
February 20, 2018  
March 9, 2018  
March 15, 2018  
March 21, 2018  
Various: information exchange via email

### **Individuals and Organizations Consulted**

Shelley (Nobriga) Harrington, O'ahu Intake Service Center  
Frank Young, O'ahu Intake Service Center  
Lisa Apana, Maui Intake Service Center  
Liane Endo, Maui Intake Service Center  
Kelcie Makaike, Hawai'i Intake Service Center  
Ronnie Lemn, Kaua'i Intake Service Center  
Lt. Gail Mirkovich, Maui Community Correctional Center  
ACO Dennis Mateo, Maui Community Correctional Center  
Warden Neal Wagatsuma, Kaua'i Community Correctional Center  
Jerry Jonah, Kaua'i Community Correctional Center  
Ainsley Dowling, ACLU  
Gavin Takenaka, PSD Mental Health Branch Administrator

### **Authorities and Reference Materials**

Form Doc. 0498 Medical/Dental/Mental Health Intake Screening form  
Hawai'i Revised Statutes (HRS) § 353  
HRS § 709-906  
HRS § 804-1, *et seq.* probation / parole  
Ohio Risk Assessment System – Pretrial Assessment Tool (ORAS-PAT)  
Janet T. Davidson, Haw. Dep't. Pub. Safety, *Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) on a Hawaii Pretrial Population (2014)*  
E.J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System*  
ORAS, 74 Fed. Probation 16, 16-22 (2009)  
Champion, Michael D., MD, Department of Health, State of Hawai'i, *Statewide Jail Diversion Program Summary* (May 2, 2018) - *see Attachment C-1*

### **3. Prosecutorial Decision-Making Subcommittee**

<b>Justin Kollar (Chair)</b>	Prosecutor – Kaua'i
J.D. Kim	Prosecutor – Maui
Mike Zola	HACDL – Hawai'i
Colette Garibaldi	Circuit Judge, First Circuit
Clarence Nishihara	State Senator

### **Dates of Subcommittee Meetings**

Various – members conferred via email  
January 31, 2018  
April 26, 2018

### **Individuals and Organizations Consulted**

Mitch Roth, Hawai'i County Prosecuting Attorney  
Mark Yuen, Chief of Screening, C&C of Honolulu Prosecuting Attorney  
Kevin Takata, Supervising DAG, Department of the Attorney General



## **Authorities / Reference Materials**

Bail determination documents used by each of the four county prosecutors and the Department of the Attorney General  
Diversion programs in each county  
Statutes and related reports – Delaware, Maryland, New Jersey  
Judicial Branch of California, Pretrial Detention Reform Workgroup, *Recommendations to the Chief Justice* (Oct. 2017)  
New Jersey Judiciary, *Annual Report 2017*

## **4. Initial Appearance / Defense Counsel Subcommittee**

<b>William Bagasol (Chair)</b>	Deputy Public Defender
Mike Soong	District Court Judge, Fifth Circuit
Paul Ferreira	Chief of Police, HPD – Hawai'i County
Michelle Puu	Deputy Attorney General
Marsha Yamada	Deputy Chief Court Administrator, Second Circuit

## **Dates of Subcommittee Meetings**

January 9, 2018  
January 31, 2018  
February 9, 2018  
March 9, 2018  
March 23, 2018  
April 2, 2018  
April 4, 2018  
April 6, 2018  
April 11, 2018  
April 20, 2018  
May 1, 2018  
May 4, 2018  
May 8, 2018  
May 17, 2018  
May 30, 2018

## **Individuals and Organizations Consulted**

Judge Colette Garibaldi, Chief Administrative Judge, Criminal Division, First Circuit  
Judge Rom Trader, First Circuit  
Judge Rhonda Loo, Second Circuit  
Judge Edmund Acoba, Fifth Circuit  
Office of the Public Defender, various branches, divisions and individuals including:  
John Tonaki, Public Defender, State of Hawai'i  
Susan Arnett, Deputy Public Defender, First Circuit  
Stephanie Sato Char, Deputy Public Defender, Fifth Circuit  
Michael Ebesugawa, Deputy Public Defender, Third Circuit

Wendy DeWeese, Deputy Public Defender, Fifth Circuit  
William McGrath (Maui), Deputy Public Defender, Second Circuit  
Jenalyn Camagong, Community Outreach Court Intake/Case Coordinator  
Justice Charles Daniels, New Mexico Supreme Court  
Magistrate Judge EJ Fouratt, Chaves County, Division 2, New Mexico  
Magistrate Judge Donna Bevacqu-Young, Santa Fe County, Division 3, New Mexico  
Wendy Hudson (Maui), former Deputy Public Defender, Second Circuit  
John D. Kim, Prosecuting Attorney, Maui County  
Shelley (Nobriga) Harrington, Intake Service Center, Litigation/PREA CoordinatorSgt.  
James Medeiros, Maui Sheriff Division  
Paul Petro, Fiscal Officer, Second Circuit  
James Rouse, Esq., former Public Defender, Maui  
Denise Villanova, District Court Administrator, Second Circuit  
Lisa Apana and Lianne Endo, Maui Intake Service Center  
Susan Gushiken, Judicial Assistant for Judge Peter Cahill, Second Circuit  
Kaua'i Intake Service Center  
Dale Ross, First Deputy Prosecutor, Third Circuit  
Hawai'i County Police Department  
Barry Porter, Esq. New Mexico Defense Attorney  
Mark Davies, Chief of Quantitative Research Unit, State of New Jersey  
Alison Thom, Federal Pretrial Services  
David Lam, Chief Court Administrator, Fifth Circuit  
Shari Kimoto, Acting Administrator, Institutions Division  
Constance Van Winkle, Chief of Security, OCCC  
Melinda Yamaga, Assistant Federal Public Defender  
Ainsley Dowling, ACLU of Hawai'i, Legal Fellow  
Ronnie Lemn, Supervisor for Kauai Intake Service Center  
Department of the Attorney General, State of Hawai'i

### **Authorities and Reference Materials**

HRS Chapter 804

HRS Chapter 353

Federal statute – 18 USC 3142

New Mexico Statutes and Rules: 7-401 NMRA

New Jersey Statutes and Rules: N.J. Court Rules, R. 7:4-1, N.J. Court Rules, R. 3:26-1,  
N.J. Stat. § 2A:162-17

Colorado Statute: Colorado Revised Statute § 16-1-104

Hawai'i Court Electronic Filing Rules 4.1 Eligibility; registration required.

American Bar Association Standards, Pretrial Release

[https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/p\\_retrial\\_release.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/p_retrial_release.authcheckdam.pdf)

Office of the Chief Justice (Hawai'i), *Report to the Twenty-Eighth Legislature, 2016 Regular Session on Senate Concurrent Resolution No. 98, Draft1*, December 2015.

Link:

[http://www.courts.state.hi.us/docs/news\\_and\\_reports\\_docs/SCR98SD1\\_FINAL\\_REPO\\_RT.pdf](http://www.courts.state.hi.us/docs/news_and_reports_docs/SCR98SD1_FINAL_REPO_RT.pdf)

Collins, S. E., Lonczak, H.S., Clifasefi, S. L. (2015). LEAD program evaluation. *Recidivism Report*. Retrieved from <http://leadkingcounty.org/lead-evaluation/>

Collins, S. E., Lonczak, H.S., Clifasefi, S. L. (2015). LEAD program evaluation. *Criminal Justice and Legal System Utilization and Associated Costs*. Retrieved from <http://leadkingcounty.org/lead-evaluation/>

Collins, S. E., Lonczak, H.S., Clifasefi, S. L. (2016). LEAD program evaluation. *The Impact of LEAD on Housing, Employment and Income/Benefits*. Retrieved from <http://leadkingcounty.org/lead-evaluation/>

Office of the Inspector General, U.S. Department of Justice, *Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as to Alternatives to Incarceration*, July 2016. <https://oig.justice.gov/reports/2016/a1619.pdf>

U.S. Department of Justice, *Jail Capacity Planning Guide, A Systems Approach* (2009) <https://nicic.gov/jail-capacity-planning-guide-systems-approach>

2017 Report to the Governor and Legislature, New Jersey, One-year, Criminal Justice Reform (2017) <https://www.judiciary.state.nj.us/courts/assets/criminal/2017cjannual.pdf>

New Jersey data showing reductions in crime, including violent crime, in 2017, the first full year of bail reforms:

[http://www.njsp.org/ucr/pdf/current/20180329\\_crimetrend\\_2017.pdf](http://www.njsp.org/ucr/pdf/current/20180329_crimetrend_2017.pdf)

<http://www.njspointlight.com/stories/18/01/23/equal-detention-under-the-law-questions-about-who-gets-held-without-bail/>

Testimony presented to the Task Force—Representatives from the Bail Bond Companies, Various members of the Public, see Appendix B

Testimony presented to House Public Safety Committee hearing on February 1, 2018 on House Bills relating to pretrial release.

ACLU of Hawai'i, *As Much Justice as You Can Afford: Hawaii's Accused Face /an Unequal Bail System* (January 2018)

Justice Charles W. Daniels, New Mexico Supreme Court, *Pretrial Justice Reform in New Mexico*, (April 2018)

UCLA Luskin School of Public Affairs, *Bail Reform in California* (May 2017)

Criminal Justice Police Program, Harvard Law School, *Moving Beyond Money Bail: A Primer on Bail Reform* (October 2016)

Other articles and information:

<https://mailchi.mp/pretrial/prosecutors-turn-away-from-money-bail?e=944dcefd04>

<http://bit.ly/2fMZzLF> (Albuquerque Journal)

[http://www.theiacp.org/portals/0/pdfs/Pretrial\\_Booklet\\_Web.pdf](http://www.theiacp.org/portals/0/pdfs/Pretrial_Booklet_Web.pdf) (Intl. Assn. of Chiefs of Police)

<http://www.sheriffs.org/sites/default/files/uploads/documents/2012resolutions/2012-6%20Pretrial%20Services.pdf> (National Sheriffs Association)

<http://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/20170809-supporting-federal-efforts-promote-pretrial-risk-assessment.ashx> (National Conference of Chief Justices)

<https://1newsnet.com/aba-house-supports-bail-reform-other-criminal-justice-measures/> (American Bar Association)

<http://lawenforcementleaders.org/wp-content/uploads/2017/09/Press-Release-for-Pretrial-Integrity-and-Safety-Act.pdf>

United States District Court for the Southern District of Texas, *O'Donnell v. Harris County*, 2017 U.S. Dist. LEXIS 65444, 2017 WL 1542457

Other relevant case law and statutes relating to bail

## **5. Judicial Decision-Making Subcommittee**

<b>Rom Trader (Chair)</b>	Circuit Court Judge – O'ahu
Lester Oshiro	Court Administrator – Hawai'i
Jan Futa	Prosecutor - Oahu
Wendy Hudson	HACDL - Maui
Darryl Perry	Chief of Police, KPD – Kaua'i

## **Dates of Subcommittee Meetings**

January 10, 2018

January 22, 2018

February 9, 2018

March 1, 2018

March 9, 2018

April 23, 2018 (telephone)

May 4, 2018

## Individuals and Organizations Consulted

Each member was tasked to speak to those individuals/agencies in each circuit to understand the current practices and procedures in use. This included judges, ISC workers, prosecutors, public defenders, private defense counsel, court administrators and agency staff. Most of this was accomplished by phone and email, with some in-person discussions. We sought to understand the current process and identify any significant differences between circuits. Each member was asked to share information at our subcommittee meetings.

## Authorities and Reference Materials

Hawai'i Revised Statutes (HRS) Chapter 804

HRS § 803-6

HRS § 353-10

HRPP, Rule 5 & Rule 10

Federal statute - 18-3142, U.S. Code, release or detention of a defendant pending trial  
Statutes – other jurisdictions including Alaska, Arizona, Connecticut, Colorado, Kentucky, New Jersey, Rhode Island, Utah and Washington D.C (re use of risk-assessment tools as part of their pretrial process)

The Washington Post: “When it comes to pretrial release, few other jurisdictions do it D.C.’s way,” [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.64985a6efb6f](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.64985a6efb6f);

New York Times: “New Jersey Alters its Bail System and Opens Legal Landscape,” <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>;

Colorado Public Radio “Local Judges Are Driving Bail Reforms Across Colorado,” <http://www.cpr.org/news/story/local-judges-are-driving-bail-reforms-across-colorado>; d  
“What Bail Reform Could Look Like in New York,” <https://www.wnyc.org/story/what-bail-reform-could-look-like-new-york>.

## 6. Pretrial Services Subcommittee

<b>Greg Nakamura (Chair)</b>	Circuit Judge – Third Circuit
Shelly Nobriga	Department of Public Safety, Intake Service Center
Brook Mamizuka	Adult Client Services Branch – O’ahu
Myles Breiner	HACDL – O’ahu

## Dates of Subcommittee Meetings

January 4, 2018

January 30, 2018

February 23, 2018

March 6, 2018

March 21, 2018

April 18, 2018

May 1 & 2, 2018

### **Individuals and Organizations Consulted**

Michael Champion, M.D., Department of Health, State of Hawai'i

C & J Telecommunications (reminder calls vendor)

Intake Service Centers – all circuits

Interagency Council on Intermediate Sanctions (“ICIS”)

Jennifer Lux, Ph.D., University of Cincinnati (OH) Corrections Institute Research Associate

### **Authorities and Reference Materials**

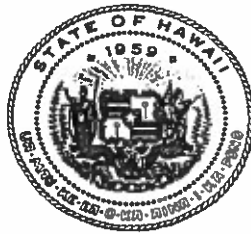
Champion, Michael D., MD, Department of Health, State of Hawai'i, *Statewide Jail Diversion Program Summary* (May 2, 2018) - see Attachment C-1

*Validation of Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) On a Hawaii Pretrial Population* by Janet Davidson, August 2014.

Hawai'i Revised Statutes § 353-10, Intake Service Center, risk assessments done within three days to measure flight risk and risk of conduct.

Administrative Policies governing the Intake Service Center Division of the Department of Public Safety, State of Hawai'i.

STATE OF HAWAII  
DEPARTMENT OF HEALTH



STATEWIDE JAIL DIVERSION PROGRAM SUMMARY

May 2, 2018

**Attachment C-1**

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## Overview

The Department of Health's (DOH) Pre-trial Jail Diversion Program is a DOH Behavioral Health Administration, Adult Mental Health Division program. It started in 2002 as a pilot program on the Island of Hawaii through funding from the Substance Abuse and Mental Health Services Administration (SAMHSA). As unique as the landscape and peoples of each county are, so was the development of each county's Jail Diversion Program and Manuals. Each program relies on collaborative efforts between the Judiciary, Department of Public Safety, and the Department of Health. Specifically, the referral process begins with the interactions of the Intake Service Center (from each County) making a mental health referral to the Department of Health Jail Diversion Staff (from same County). After screening for eligibility and appropriateness, the Jail Diversion Staff will engage with Judicial and Court staff (of the same County) to begin the negotiations that lead to the Jail Diversion admission process. From its grass-roots start, that pilot program was used as the model to expand this service through all the Hawaiian Counties as a DOH program.

The mission of the Post-Booking Jail Diversion Program in each county is to provide time-limited mental health and substance abuse treatment services for persons with SPMI (serious and persistent mental illness) who may have a concurrent substance use disorder. The intent of the service is to reduce criminal recidivism by diverting eligible, non-dangerous mentally ill arrestees from incarceration and into the appropriate level of community mental health services. The program endeavors to balance the individual service needs of the arrestee, the legal requirements of the courts, and the safety needs of the community.

The success of the Jail Diversion Program depends of the voluntary participation of a defendant, the collaboration of the all invested parties, and the availability of resources.

## Procedures

### Honolulu, Maui, and Hawaii Counties

Following arrest and booking, the defendant is detained at the county police department. Intake Services Center (ISC) staff then interviews the detainee and if appropriate, refers the detainee to the jail diversion program JDP. JDP staff will conduct an assessment of SPMI and functional impairment. ISC provides the JDP Coordinator with defendant's criminal history. If defendant's instant offense is a non-violent misdemeanor or petty misdemeanor and prior offenses over the past 5 years are non-violent, the defendant may qualify for the JDP. The defendant is informed of the JDP requirements to including mental health treatment, ISC supervision for at least six months, monthly JDP compliance appearances at Court, and the defendant is informed that JDP participation is completely voluntary.

If defendant elects to participate, s/he provides written consent for information sharing among mental health, law enforcement, and judicial agencies. If the defendant is not interested or is ineligible, the defendant proceeds with normal judicial processing. If the defendant has interest in participating in the JDP, the case is presented to the Intake Service Center, Prosecutor and Defense Counsel and Presiding Judge for approval. Jail Diversion is a special condition of the Terms and Conditions of Supervised Release.

For defendants who are enrolled, the JDP provides intensive case management services, psychiatric treatment, and assistance with housing, public assistance/entitlements and monitoring of legal encumbrances. Upon successful completion, underlying charges are dismissed. Participation is a minimum of six (6) months and a maximum of one (1) year.

Failure to engage in treatment or non-adherence with the requirements of JDP will lead to termination of JDP and revocation of Supervised Release. Defendant will continue through the normal course of legal proceedings.

If the defendant successfully completes the JDP, the goal is then met for a safe re-integration into the Community that helps the defendant advance toward mental health recovery within community-based support. The JDP offers a pathway toward breaking the cycle of criminal recidivism, reducing the criminalization of mental illness, and engaging state and community resources more economically while simultaneously reducing the criminalization of mental illness.

Success of the Jail Diversion Program depends of the voluntary participation of a defendant, the collaboration of the all invested parties, and the availability of resources.

Kauai County:

Following arrest, the defendant is processed by the Intake Services Center (ISC) staff at the Kauai Community Correctional Center and is screened for a history of mental health treatments and current symptoms of an SPMI. If SPMI is possibly present, the JDP Specialist provides a more detailed assessment of SMI and functional impairment. ISC provides the JDP Specialist with defendant's criminal history. If defendant's instant offense is a non-violent misdemeanor or petty misdemeanor and prior offenses over the past 5 years are non-violent, the defendant may qualify for the JDP. The defendant is informed of the JDP requirements including mental health treatment, ISC supervision for at least six months, monthly JDP compliance appearances at Court, and the defendant is informed that JDP participation is completely voluntary.

If defendant elects to participate, s/he provides written consent for information sharing among mental health, law enforcement, and judicial agencies. If the defendant is not interested or is ineligible, the defendant proceeds with normal judicial processing. If the defendant has interest in participating in the JDP, the case is presented to the Judge, Prosecutor and Defender for approval.

Next, the JDP Specialist and defendant develop a six-month treatment/recovery plan and present the plan's components to ISC, the Prosecuting Attorney and the Defender. The JDP-proffered Recovery Plan is then presented for the Judge's final determination. The JDP officially begins at a subsequent court hearing when the Defendant is formally inducted into the program. The JDP provides intensive case management services, psychiatric treatment, and assistance with housing, public assistance and entitlements. JDP also mandates program participant's attendance at bi-monthly group meetings which focus on teaching illness self-management and self-directed recovery skills.

The defendant next signs speedy trial and other waiver contracts with Judge and Prosecuting and Public Defenders. These contracts stipulate that failure to fulfill JDP requirements will result in a return to normal criminal justice proceedings. Alternatively, full compliance with JDP requirements for at least six months will result in the dismissal of defendant's pending charges following JDP graduation.

If the defendant successfully completes the JDP, the goal is then met for a safe re-integration into the Community that helps the defendant advance toward mental health recovery within community-based support. The JDP offers a pathway toward breaking the cycle of criminal recidivism while engaging state and community resources more economically while simultaneously reducing the criminalization of mental illness.

Summary of Jail Diversion Program Statewide

	3rd Circuit	5th Circuit	2nd Circuit	1st Circuit
	BIG ISLAND	KAUAI	MAUI	OAHU
<b>Active JD Program</b>	<b>Y</b>	<b>N</b>	<b>N</b>	<b>Y</b>

<b>Personnel</b>	# JD Specialist (ALLOCATED/FILLED)	3/3	1/1	1/0	3/2
	# JD Coordinator (ALLOCATED/FILLED)	1/1	0	0	1/1

<b>Length of time</b>	<b>Duration of Program:</b>				
	Minimum	6 months	6 months	6 months	6 months
	Maximum	12 months	12 months	18 months	12 months

<b>Eligible Offenses</b>	Petty Misdemeanors	Y	Y	Y	Y
	Non-Violent Misdemeanors	Y	Y	Y	Y
	Prior convictions in past 5 years	Y	Varies	Y	N
	Misdemeanor - Assault Third Degree	Y	Varies	Y	N
	Misdemeanor - Terroristic Threatening Second Degree	Y	Varies	Y	N
	Misdemeanor - Violation of Protection Order	Y	Varies	Y	N

## Oahu Jail Diversion Program

### Staffing

The Oahu Post-Booking Jail Diversion Program (OJDP) is currently staffed with two Jail Diversion Specialists and one Jail Diversion Coordinator; interviews are currently scheduled to hire a third Jail Diversion Specialist.

The Jail diversion program is located in each county's Community Mental Health Center (Branch) Forensic Treatment Services Section. The Oahu JDP is supervised by a Jail Diversion Coordinator, and overseen by the county Forensic Section Supervisor. The JDP team primarily operates from cell block and District Court of the First Circuit.

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Jail Diversion Coordinator (supervisor)	FTE: 1	Position filled
Jail Diversion Specialist IV	FTE: 1	Position filled
Jail Diversion Specialist IV	FTE: 1	Position filled
Jail Diversion Specialist IV	FTE: 1	Vacant

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### *Oahu Forensic Services Section*

### Strengths

1. Ability to identify known and previously unknown individuals with SPMI involved with the Judicial system and link to appropriate services
2. Ability to reduce number of individuals with SPMI who may be otherwise incarcerated
3. Provide a diversion pathway for individuals with SPMI that potentially lessens the risk of hospitalization in the community or Hawaii State Hospital
4. Ability to reduce recidivism of individuals with SPMI
5. Cross collaboration with other State and City Departments including: Fitness Restoration (AMHD), Mental Health Court, Adult Client Services, Community Outreach Court (Judiciary), Help Honolulu (HPD)

### Challenges

1. Enrollment into OJDP is heavily dependent on buy-in from Prosecutor's and Public Defender's offices including narrow legal criteria for only non-violent misdemeanors and petty misdemeanors. There is inconsistency across counties regarding following these criteria Some counties admit misdemeanors involving another person such as:
  - Assault in the Third Degree

- Terroristic threatening in the Second Degree
- Violation of Protection Order.

District Court First Circuit does not allow for this type of admission thereby limiting the potential number of admissions and diversions. Furthermore, a candidate with disqualifying offenses that occurred beyond five years past could be granted admission by the presiding judge but prosecutors are inclined to argue against admission into the program. This is not the case in other counties.

2. Time challenges with placement of new offenders involving bed availability for Substance Abuse and Mental Health Housing
3. Recruitment, hiring and retention of program staff
4. Availability of treatment providers: long waits for appointments, or not taking new patients

## Maui County Jail Diversion Program

### Staffing

Maui County (Maui Community Mental Health Center Branch, MCMHC of AMHD) currently has no Jail Diversion Program staff. Interviews are being scheduled for a Jail Diversion Coordinator and a Forensic Services Section Supervisor.

The Jail diversion program is located in each county's Forensic Treatment Services Section. The Maui JDP is supervised by the Maui Forensic Section Supervisor. The JDP team primarily operates from cell block and District Court of the Second Circuit.

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Jail Diversion Specialist	FTE: 1.0	Vacant
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### *Maui Forensic Services Section*

### Strengths (when active)

1. Ability to identify known and previously unknown individuals with SPMI involved with the Judicial system and link to appropriate services
2. Ability to reduce number of individuals with SPMI who may be otherwise incarcerated
3. Provide a diversion pathway for individuals with SPMI that potentially lessens the risk of hospitalization in the community or Hawaii State Hospital
4. Ability to reduce recidivism of individuals with SPMI
5. Cross collaboration with other State and City Departments including: Fitness Restoration, Maui County Missing Link Program, CIT (MPD)

### Challenges (when active)

1. Time challenges with placement of new offenders involving bed availability for Substance Abuse and Mental Health Housing
2. Recruitment, hiring and retention of program staff
3. Availability of treatment providers: long waits for appointments, or not taking new patients

## Hawaii County Diversion Program

### Staffing

The Hawaii County (Hawaii Community Mental Health Center Branch, HCMHC of AMHD) Jail diversion program is located in the Forensic Treatment Services Section. The Hawaii JDP is supervised by the Jail Diversion Coordinator, and overseen by the county Forensic Section Supervisor. The JPD team primarily operates from the cell block and the District Court of the Third Circuit.

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Jail Diversion Coordinator (supervisor)	FTE: 1	Position filled	Hilo
Jail Diversion Specialist	FTE: 1	Position filled	Hilo
Jail Diversion Specialist	FTE: 1	Position filled	Hilo
Jail Diversion Specialist	FTE: 1	Not allocated, so CM position is utilized instead	Kona

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### *Hawaii Forensic Services Section*

### Strengths

1. District Court of the Third Circuit allows for flexibility in the HJDP admission criteria. Similar to that of District Court of the Second Circuit—Maui, Hawaii JDP will admit Misdemeanors involving another person such as:
  - Assault in the Third Degree
  - Terroristic threatening in the Second Degree
  - Violation of Protection OrderThis is seen as an advantage in increasing the number of potential diversions. Furthermore, a candidate with “prior convictions” for the past five years will allow the presiding judge to consider the admission.
2. Divert forensic SPMI individuals from undergoing exams for fitness and penal responsibility that could result in eventual hospitalization at HSH
3. Ability to accept referrals from Defense Counsel and service providers (i.e., Purchase of Service providers, CMHC case managers)
4. Hawaii County Jail Diversion Program was implemented in 2002 under a Substance Mental Health Administration grant. JDP has been running continuously since its inception. Strong collaboration among Judiciary, Prosecuting Attorney, Public Defender, Hawaii Police Department, Department of Public Safety and Hawaii County Community Mental Health Branch has kept the program running.



## Challenges

1. The case manager position for JDP in West Hawaii was abolished in a previous re-organization. A case manager from West Hawaii CMHC has been temporarily assigned to the program even though AMHD has not allocated a position for the Kona Clinic. The Jail Diversion Program in West Hawaii is scheduled to start on April 23, 2018.
2. There are inconsistencies following the JDP eligibility criteria across counties as some counties admit Misdemeanors involving another person while other counties have exclusionary criteria (e.g. Oahu JDP).
3. Admission into the Jail Diversion Program has been low.

## Kauai Jail Diversion Program

### Staffing

The Kauai County (Kauai Community Mental Health Center Branch, KCMHC of AMHD) Jail diversion program is located in the Forensic Treatment Services Section. JDP is not yet fully operationalized but is gearing up with half the staff originally planned. It could be operational in May 2018 in routine and frequent coordination with Intake Services Center, Kauai Community Correctional Center, the Courts, Offices of Public Prosecutor and Defender, existing housing facilities, and community services.

The Kauai JDP is supervised by the Kauai Forensic Section Supervisor. The JDP personnel primarily operates from cell block and District Court of the Fifth Circuit.

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Jail Diversion Specialist	FTE: 1	Filled
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*Kauai Forensic Services Section*

### Strengths

1. Based on prior progress with JDP, there is still good buy-in into the program by elements of the criminal justice system. They generally are willing to work with the program, both for the fundamental rationale – treating an individual who is mentally ill and forensically encumbered with mental health measures while safeguarding the community and significantly lowering both immediate costs of treatment and the likelihood of recidivism – and because a successful JDP is likely to lessen workload elsewhere in the system.

### Challenges

1. Housing at all levels of care is inadequate, which too often results in leading to referrals to Hawaii State Hospital, and in less urgent cases to long delays in housing with resultant homelessness exacerbating underlying mental illness and thus making recovery and re-integration less likely. This is the major programmatic challenge.

**APPENDIX D**

**Validation of the Ohio Risk Assessment  
System (ORAS) Pretrial Assessment Tool (PAT)  
On a Hawaii Pretrial Population**



**Janet T. Davidson, Ph.D.  
August 2014**

## Summary of Findings

Risk assessment instruments in the field of corrections have been designed and crafted to maximize resources but, more importantly, to predict outcome so that offenders can be managed more effectively. The Ohio Risk Assessment System (ORAS) represents a series of such instruments. The ORAS system of instruments has been designed to "...efficiently allocate supervision resources and structure decision-making in a manner that reduces the likelihood of recidivism.<sup>1</sup>" While the ORAS has multiple risk and needs assessment instruments that vary by population served, the current validation focusses on the Pretrial Assessment Tool (PAT).

This initial validation effort on a Hawaii pretrial population thus endeavors to determine if the instrument is able to predict unwanted or wanted behavior of defendants released pending adjudication of their cases. The validation of the PAT for Hawaii included a pretrial population from the City & County of Honolulu, Hawaii County, and Maui County<sup>2</sup>. The sample of defendants used for this validation were all assessed between February 1, 2013 and March 28, 2013 and subsequently released to some form of community supervision (i.e., bail/bond, supervised release, and release on own recognizance).

Four outcome measures were analyzed, including revocation of supervised release, failure to appear, new arrest, or a global measure of failure that included all three of the aforementioned measures.

Figure 1 demonstrates differences in revocation of supervised release based upon the PAT risk level. While the lower risk releases do have lower revocation rates than moderate or high, high risk defendants are less likely to have a revocation than are moderate releases. The differences are not statistically significant. Thus, we can say that the PAT does not do a good job in predicting revocation of supervised release.

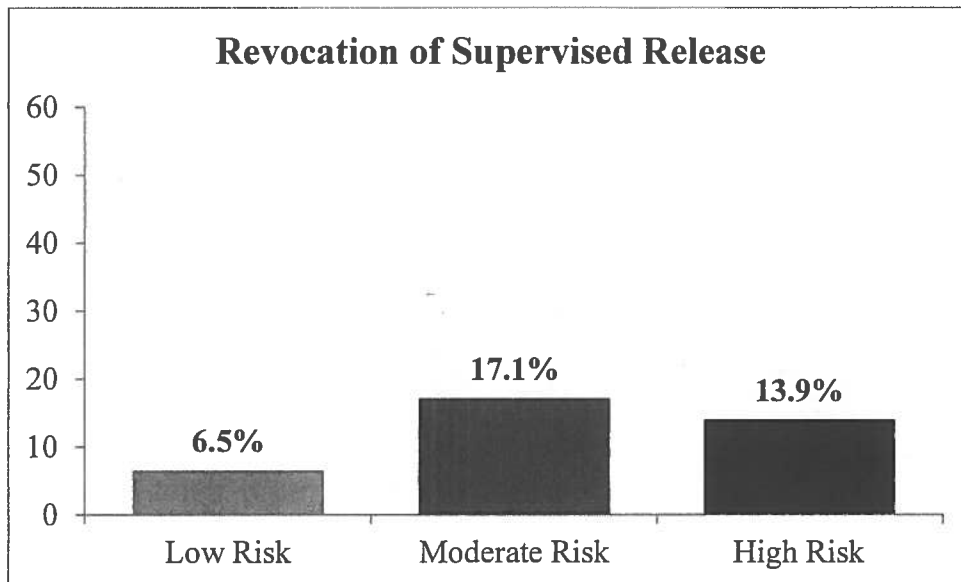
However, the PAT does appear to predict failure to appear. Differences in failure to appear rates do differ significantly by risk levels ( $\chi^2=38.459$ ,  $p < .001$ ) and are in the expected direction. There is a very clear pattern here, rates of failure to appear increase incrementally along with risk level.

---

<sup>1</sup> Latessa, E. J.; Lemke, R.; Makarios, M.; Smith, P.; and C. T. Lowenkamp. 2009. "The Creation and Validation of the Ohio Risk Assessment System (ORAS)." *Federal Probation* 74(1): 16-22.

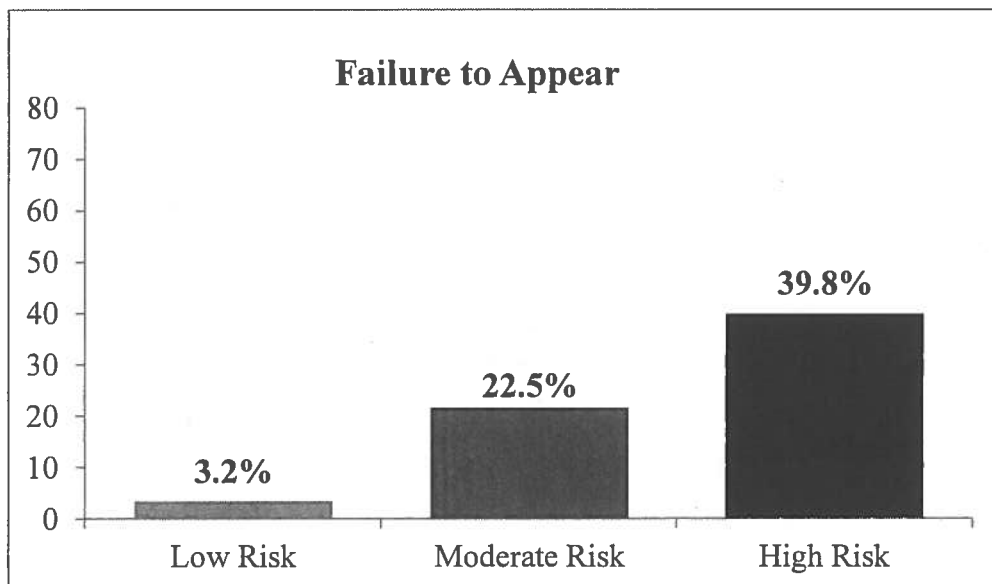
<sup>2</sup> Kauai cases were not included because of difficulties with data collection.

**Figure 1: Revocation of Supervised Release by Level of PAT Risk**



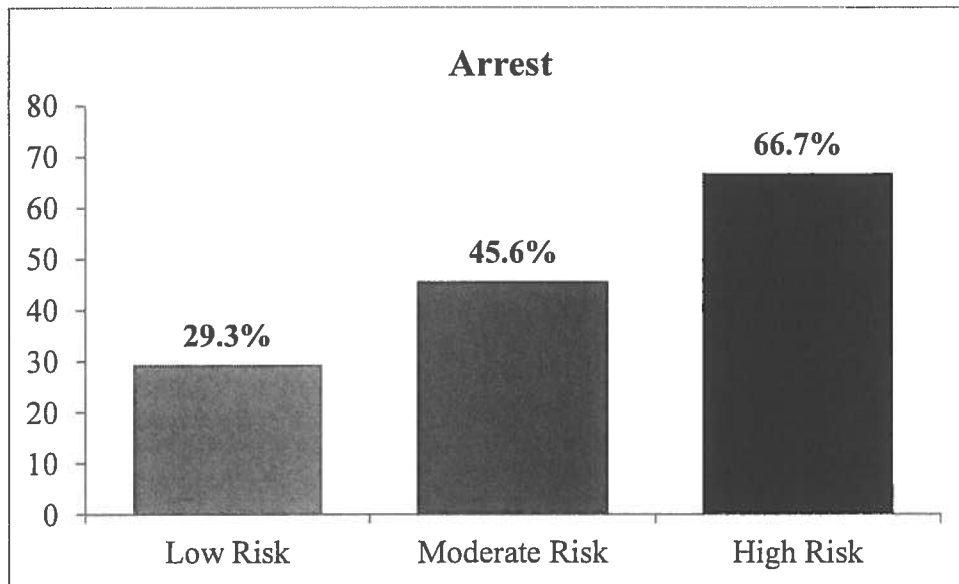
Note: Differences between risk levels are not statistically significant. This analysis only includes pretrial defendants out on supervised release.

**Figure 2: Failure to Appear by PAT Risk Levels**



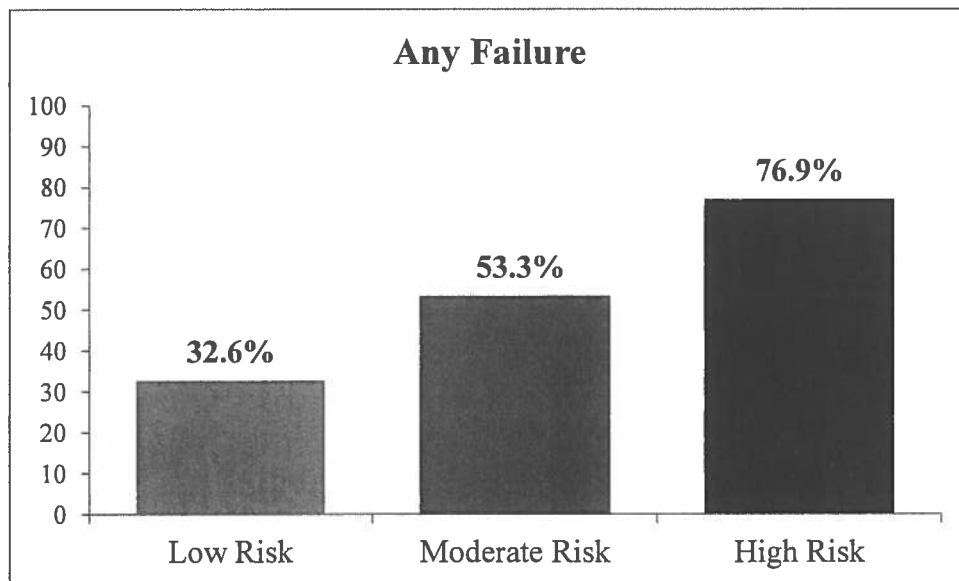
Note: Differences between risk levels are statistically significant at  $p < .001$ .

**Figure 3: New Arrest by PAT Risk Levels**



Note: Differences between risk levels are statistically significant at  $p < .001$ .

**Figure 4: Any Failure by PAT Risk Levels**



Note: Differences between risk levels are statistically significant at  $p < .001$ .

Figure 3 demonstrates new arrests for pretrial releases by PAT level of risk. The pattern is in the right direction and the differences are statistically significant ( $\chi^2=28.329$ ,  $p < .001$ ). Finally, Figure 4 demonstrates the same pattern with any failure (revocation of supervised release, failure to appear, or new arrest). The PAT does a good job at distinguishing between low, moderate, and high risk pretrial releases whereby lower risk defendants are less likely to fail than are higher risk ones ( $\chi^2=39.681$ ,  $p < .001$ ).

In sum, the ORAS PAT works as it should in terms of predicting failure to appear, new arrests, or any failure of pretrial release for this sample of assessed offenders in Hawaii. It does not adequately predict revocation of supervised release<sup>3</sup>. Future research should be conducted to reaffirm these initial findings, however. While a longer follow-up is not needed, a study that is randomly selected and includes all islands should be conducted. Nonetheless, the current validation provides evidence that the PAT can be used in Hawaii to safely and predictably allocate detention and pretrial resources based on assessed level of risk.

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<sup>3</sup> The original validation of the PAT did not include revocation of supervised release as an outcome measure.

## Validation Study

### Data and Sample

The sample for this initial ORAS PAT validation is based upon 395 pretrial cases that were assessed with the PAT between February 1, 2013 and March 28, 2013 in the City & County of Honolulu, Hawaii County, and Maui County. These defendants were released between January 21, 2013 and August 27, 2013. Cases that were released in 2012 were removed from the analysis, as were those that had less than a 6 month follow-up at the time of data analysis. Cases with invalid SID numbers were also removed as criminal history checks from the Hawaii Department of the Attorney General's Criminal Justice Information Center could not be pulled (these data are necessary to determine new arrests upon pretrial release within our study window).

Data on the assessed cases were received from the City & County of Honolulu, Hawaii County, and Maui County Intake Service Centers. Data included information on the type of offense for which the defendant was jailed, date and type of release to the community, and information on failure to appear and revocation of supervised release. Data on PAT assessments were received from the Council of State Governments Justice Center (CSG). CSG has been collecting and maintaining data related to Hawaii's criminal justice system as part of the Justice Reinvestment Initiative in Hawaii. Data from all sources were merged into a statistical software package for analyses that are represented in this validation study. Arrest data were retrieved electronically from the Department of the Attorney General's Criminal Justice Information Center (CJIS).

Each pretrial defendant was tracked for a minimum of 6 months post-jail release while pending case adjudication. The average tracking time was 11.7 months, and tracking ranged from 6.3 to 13.5 months in total. The total possible score on the PAT is between a 0 and 9. The average risk score for this sample was 4.13. Per the ORAS classification definitions, defendants are low risk if the score is between 0-2, moderate if the score is between 3-5, and high risk if the score is 6 or greater. The same cutoffs were utilized for this validation. Re-arrest was calculated using the data received from CJIS. Many defendants had more than one arrest. The first arrest after release from jail was counted. If there were multiple arrests on the same day then the most serious offense was counted (using offense severity and offense type, such as violent versus property). Failure to appear and revocation of supervised release outcomes were provided by the Intake Service Centers for each county. Four outcome measures were used for this validation. The first was revocation of supervised release. This measure was not included in the original creation and validation of the ORAS PAT but was included as an outcome of interest in this validation. The second outcome of interest was failure to appear, and these data were also supplied by the Intake Service Centers for each county. Arrest was measured as mentioned earlier. Finally, a fourth global measure included all three measures (revocation of supervised release, failure to appear, and/or re-arrest).



## Pretrial Assessment Tool Risk Levels by Offense Severity

Table 1 demonstrates the PAT risk levels by offense severity. There are significant differences between offense levels and PAT risk levels ( $\chi^2=10.532$ ,  $p < .05$ ). As would be expected, more felony defendants are assessed at high risk yet misdemeanor defendants are most likely to be assessed at low risk. Overall, though, the largest category of assessed defendants are moderate risk, representing 49.4% of the sample overall, with close to a quarter falling into either low or high risk.

**Table 1: Overall PAT Risk Level by Offense Severity**

PAT Risk Level	Total Sample (n=395)	PV, VL,PM (n=53)	Misdemeanant (n=100)	Felony (n=242)
Low Risk	23.3	35.8	16.0	23.6
Moderate Risk	49.4	41.5	60.0	46.7
High Risk	27.3	22.6	24.0	29.8

Note: Differences significant at  $p < .05$ .

## Pretrial Assessment Tool Risk Levels by County

**Table 2: Overall PAT Risk Level by County**

PAT Risk Level	Oahu (n=150)	Hawaii (n=137)	Maui (n=108)
Low Risk	15.3	32.1	23.1
Moderate Risk	45.3	51.8	51.9
High Risk	39.3	16.1	25.0

Note: Differences significant at  $p < .001$ .

Table 2 represents PAT risk levels by county. There are significant differences in PAT risk levels by county ( $\chi^2=23.943$ ,  $p < .001$ ). Oahu is more likely to have defendants assessed as low risk (15.3%) yet also have the most offenders assessed at high risk (39.3%). All three counties, however, demonstrate that the largest category of assessed offenders is at the moderate level of risk.

## Pretrial Assessment Tool Risk Levels by Outcome Measures

Table 3: Outcome Measures by County

Outcome Measures	Total Sample	Oahu	Hawaii	Maui
Revocation of Supervised Release	13.9	10.6	12.5	20.5
Failure to Appear (FTA)	22.3	28.0	16.8	22.3
Arrest	47.6	50.0	43.1	50.0
Any Failure (revocation, FTA, or arrest)	54.9	57.3	54.0	52.8

Note: Revocation of supervised release is based only on the supervised release population.

Table 3 demonstrates the various outcome measures for the sample overall as well as by county. Table 4, however, demonstrates outcome measures by PAT risk levels. In general, the PAT instrument demonstrates predictive validity. Low risk defendants are the least likely to demonstrate failure and high risk defendants are the most likely. For failure to appear, low risk defendants are significantly less likely to fail (3.3%) than are the moderate (21.5%) or high risk (39.8%) defendants ( $\chi^2=38.459$ ,  $p < .001$ ). Arrest demonstrates a similar pattern but is more pronounced. Low risk defendants are significantly less likely to have an arrest while on pretrial status (29.3%), followed by moderate risk (45.6%) and then high risk (66.7%) ( $\chi^2=28.329$ ,  $p < .001$ ). Any failure (including revocation of supervised release, failure to appear and/or arrest) was also well predicted by the PAT. Low risk defendants were significantly less likely to experience any failure (32.6%), followed by moderate risk (53.3%) and high risk (76.9%) ( $\chi^2=39.681$ ,  $p < .001$ ). The PAT did not significantly distinguish differences in revocation of supervised release by risk level.

**Table 4: Outcome Measures by PAT Risk Levels - Total Sample**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear***	Arrest***	Any Failure***
Low Risk	6.5	3.3	29.3	32.6
Moderate Risk	17.1	21.5	45.6	53.3
High Risk	13.9	39.8	66.7	76.9

Note: \*\*\* Differences significant at  $p < .001$ . Revocation of supervised release is based only on the supervised release population ( $n=187$ ).

The patterns witnessed in Table 4 hold for each county as well. On Oahu (Table 5), for failure to appear, low risk defendants are significantly less likely to fail (8.7%) than are the moderate (19.1%) or high risk (45.8%) defendants ( $\chi^2=16.147$ ,  $p < .001$ ). Low risk defendants are significantly less likely to have an arrest while on pretrial status (26.1%), followed by moderate risk (45.6%) and then high risk (64.4%) ( $\chi^2=10.689$ ,  $p < .01$ ). Any failure (including revocation of supervised release, failure to appear and/or arrest) was also well predicted by the PAT. Low risk defendants were significantly less likely to experience any failure (30.4%), followed by moderate (50.0%) and high risk (76.3%) ( $\chi^2=16.948$ ,  $p < .001$ ). The PAT did not significantly distinguish differences in revocation of supervised release by risk level.

**Table 5: Outcome Measures by PAT Risk Levels – Oahu**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear***	Arrest**	Any Failure***
Low Risk	0.0	8.7	26.1	30.4
Moderate Risk	8.7	19.1	45.6	50.0
High Risk	15.8	45.8	64.4	76.3

Note: \*\*\* Differences significant at  $p < .001$ ; \*\* Differences significant at  $p < .01$ . Revocation of supervised release is based only on the supervised release population ( $n=47$ ).

Hawaii County defendants continue to follow the same pattern (Table 6). For failure to appear, low risk defendants are significantly less likely to fail (0.0%) than are the moderate (19.7%) or high risk (40.9%) defendants ( $\chi^2=18.476$ ,  $p < .001$ ). There is little difference in arrest rates for low and moderate risk on Hawaii County, yet the differences between risk levels are statistically significant ( $\chi^2=6.847$ ,  $p < .05$ ). Low risk defendants are significantly less likely to have an arrest while on pretrial status (36.4%), followed by moderate risk (39.4%) and then high risk (68.2%). Any failure (including revocation of supervised release, failure to appear and/or arrest) was also well predicted by the PAT. Low risk defendants were significantly less likely to experience any failure (40.9%), followed by moderate risk (54.9%) and high risk (81.8%) ( $\chi^2=9.909$ ,  $p < .01$ ). The PAT did not significantly distinguish differences in revocation of supervised release by risk level.

**Table 6: Outcome Measures by PAT Risk Levels – Hawaii County**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear***	Arrest*	Any Failure**
Low Risk	8.8	0.0	36.4	40.9
Moderate Risk	14.5	19.7	39.4	53.5
High Risk	14.3	40.9	68.2	81.8

Note: Differences significant at \*\*\*  $p < .001$ ; \*\*  $p < .01$ ; \* $p < .05$ . Revocation of supervised release is based only on the supervised release population ( $n=96$ ).

The PAT assessments for pretrial defendants in Maui County (Table 7) also demonstrate significant differences by risk level for failure to appear, arrests, or any failure. For failure to appear, low risk defendants are significantly less likely to fail (4.0%) than are the moderate (26.8%) or high risk (25.9%) defendants ( $\chi^2=5.814$ ,  $p < .05$ ). The moderate risk defendants did experience slightly higher rates of failure to appear than high risk defendants. Low risk defendants are significantly less likely to have an arrest while on pretrial status (20.0%), followed by moderate risk (53.6%) and then high risk (70.4%) ( $\chi^2=13.767$ ,  $p < .001$ ). Any failure (including revocation of supervised release, failure to appear and/or arrest) was also well predicted by the PAT. Low risk defendants were significantly less likely to experience any failure (20.0%), followed by moderate risk (57.1%) and high risk (74.1%) ( $\chi^2=16.119$ ,  $p < .001$ ). The PAT did not significantly distinguish differences in revocation of supervised release by risk level.

**Table 7: Outcome Measures by PAT Risk Levels – Maui County**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear*	Arrest***	Any Failure***
Low Risk	0.0	4.0	20.0	20.0
Moderate Risk	29.6	26.8	53.6	57.1
High Risk	10.0	25.9	70.4	74.1

Note: Differences significant at \*\*\* p<.001; \*p<.05. Revocation of supervised release is based only on the supervised release population (n=44).

**Pretrial Assessment Tool Risk Levels by Outcome Measures and Arrest Severity**

Tables 8, 9, and 10 demonstrate PAT assessment risk levels by arrest severity. Arrest severity was collapsed into violations, petty misdemeanors and probation violators for the first group. The second and third groups are assessments for misdemeanor and felony cases, respectively. The PAT is able to significantly predict differences in failure to appear and any failure for all three levels, and is able to significantly predict differences in new arrests for misdemeanor and felony defendants.

**Table: 8 Outcome Measures by PAT Risk Levels – Criminal Violation, Petty Misdemeanor, or Probation Violation (n=53)**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear**	Arrest <sup>+</sup>	Any Failure**
Low Risk	20.0	10.5	15.8	21.1
Moderate Risk	13.3	27.3	40.9	50.0
High Risk	0.0	66.7	50.0	83.3

Note: Differences significant at \*\* p<.01; <sup>+</sup> p<.10. Revocation of supervised release is based only on the supervised release population (n=21).

**Table 9: Outcome Measures by PAT Risk Levels – Misdemeanant Offense (n=100)**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear***	Arrest**	Any Failure*
Low Risk	11.1	0.0	50.0	50.0
Moderate Risk	15.6	23.3	43.3	60.0
High Risk	0.0	54.2	79.2	87.5

Note: Differences significant at \*\*\* p<.001; \*p<.01; p<.05. Revocation of supervised release is based only on the supervised release population (n=45).

**Table 10: Outcome Measures by PAT Risk Levels – Felony Offense (n=242)**

PAT Risk Levels	Revocation of Supervised Release	Failure to Appear***	Arrest***	Any Failure***
Low Risk	3.1	1.8	28.1	31.6
Moderate Risk	19.0	19.5	47.8	50.4
High Risk	16.1	30.6	65.3	72.2

Note: Differences significant at \*\*\* p<.001. Revocation of supervised release is based only on the supervised release population (n=121).

### **Pretrial Assessment Tool Risk Levels by Type of Pretrial Release**

The current sample is comprised of individual defendants who were released on bail or bond (43.3%, n=171), on supervised release (47.3%, n=187), or released on their own recognizance (ROR, 9.4%, n=37). It is instructive to determine whether outcomes by PAT risk levels differ by type of release. Table 11 demonstrates that there are significant differences in overall risk levels by type of release ( $\chi^2=13.799$ ,  $p < .01$ ). Defendants released on bail/bond had the lowest PAT risk levels (20.5%) and those assessed at the highest risk were ROR releases (35.1%), although the percentage is very close to those released on bail/bond (34.5%).

**Table 11: PAT Risk Levels by Type of Pretrial Release**

PAT Risk Levels	Bail/Bond	Supervised Release	ROR
Low Risk	20.5	24.6	29.7
Moderate Risk	45.0	56.1	35.1
High Risk	34.5	19.3	35.1

Note: Differences significant at \*\*\* p<.01

Table 12 displays outcome measures by PAT risk levels for those pretrial defendants who were released on bail/bond. The PAT was able to adequately distinguish low, moderate, and high risk defendants for failure to appear, arrest, and for any failure. The differences in risk levels for failure to appear are significantly different and in the expected direction ( $\chi^2=14.100$ ,  $p < .001$ ) with only 5.7% of low risk defendants experiencing a failure to appear compared to 35.6% of the high risk defendants. Low risk bail/bond defendants were significantly less likely to experience an arrest (25.7%) compared to high risk ones (69.5%) ( $\chi^2=17.105$ ,  $p < .001$ ). Finally, bail/bond defendants assessed at low risk were the least likely to experience any failure (28.6%), followed by moderate (54.5%) and high risk (74.6%) ( $\chi^2=19.027$ ,  $p < .001$ ).

**Table 12: Outcome Measures by PAT Risk Levels – Defendants Released on Bail/Bond (n=171)**

PAT Risk Levels	Failure to Appear***	Arrest***	Any Failure***
Low Risk	5.7	25.7	28.6
Moderate Risk	15.6	49.4	54.5
High Risk	35.6	69.5	74.6

Note: Differences significant at \*\*\* p<.001

**Table 13: Outcome Measures by PAT Risk Levels – Defendants Released on Supervised Release (n=187)**

<b>PAT Risk Levels</b>	<b>Revocation of Supervised Release</b>	<b>Failure to Appear***</b>	<b>Arrest**</b>	<b>Any Failure***</b>
<b>Low Risk</b>	6.5	0.0	32.6	34.8
<b>Moderate Risk</b>	17.1	25.7	42.9	51.4
<b>High Risk</b>	13.9	41.7	69.4	80.6

Note: Differences significant at \*\*\* p<.001; \*\*p<.01

Table 13 displays outcome measures by PAT risk levels for those pretrial defendants who were released on supervised release. The PAT was able to adequately distinguish low, moderate, and high risk defendants for failure to appear, arrest, and for any failure, but not for revocation of supervised release. The differences in risk levels for failure to appear are significantly different and in the expected direction ( $\chi^2=21.588$ ,  $p < .001$ ) with none of the low risk defendants experiencing a failure to appear compared to 41.7% of the high risk defendants. Low risk supervised release defendants were significantly less likely to experience an arrest (32.6%) compared to high risk ones (69.4%) ( $\chi^2=11.704$ ,  $p < .01$ ). Finally, supervised release defendants assessed at low risk were the least likely to experience any failure (34.8%), followed by moderate risk (51.4%) and high risk (80.6%) ( $\chi^2=17.203$ ,  $p < .001$ ).

**Table 14: Outcome Measures by PAT Risk Levels – Defendants Released on ROR (n=37)**

<b>PAT Risk Levels</b>	<b>Failure to Appear*</b>	<b>Arrest</b>	<b>Any Failure</b>
<b>Low Risk</b>	9.1	27.3	36.4
<b>Moderate Risk</b>	23.1	46.2	61.5
<b>High Risk</b>	53.8	46.2	76.9

Note: Differences significant at \*\*\* p<.001



Finally, Table 14 displays outcome measures by PAT risk levels for those pretrial defendants who were released on their own recognizance (ROR). The PAT was only able to adequately distinguish low, moderate, and high risk defendants for failure to appear for this group. However, the sample size for ROR defendants is low (n=37) and thus makes it more difficult to determine statistically significant differences. However, the differences in risk levels for failure to appear are significantly different and in the expected direction ( $\chi^2=6.137$ ,  $p < .05$ ) with 9.1% of the low risk defendants experiencing a failure to appear compared to 53.8% of the high risk defendants. Low risk ROR defendants are less likely to experience an arrest or any failure than are high risk ones, but the differences are not significant.

## Conclusion & Recommendations

This validation study confirms that the PAT demonstrates good predictive validity for this sample of pretrial defendants, ones subsequently released to the community pending adjudication. The instrument does a respectable job at distinguishing defendants who are at low, moderate, and high risk for failure to appear, arrest while in the community, or any failure. The instrument does not significantly predict differences in risk for revocation of supervised release, however. It should be noted that the original creation and validation of the ORAS PAT did not include this measure in their validation. While a longer follow-up is not needed, a study that is randomly selected and includes all islands should be conducted. Nonetheless, the current validation provides evidence that the PAT can be used in Hawaii to safely and predictably allocate pretrial resources based on assessed level of risk. Specific recommendations that flow from this study follow.

**Recommendation One:** Use the findings from this initial validation study to guide policy and practice regarding pretrial release and supervision. This is true for the practices at Intake Service Centers, but also for the Judiciary. The Judicial decisions about release and type of release greatly impact the functioning of the Intake Service Centers. But, validation efforts should continue yearly for the next few years to reconfirm these initial findings.

**Recommendation Two:** Intake Service Center staff should continue to be diligent in the collection and maintenance of data surrounding assessments, revocation of supervised release, and failure to appear. These data will be necessary for timely and accurate future validation efforts.

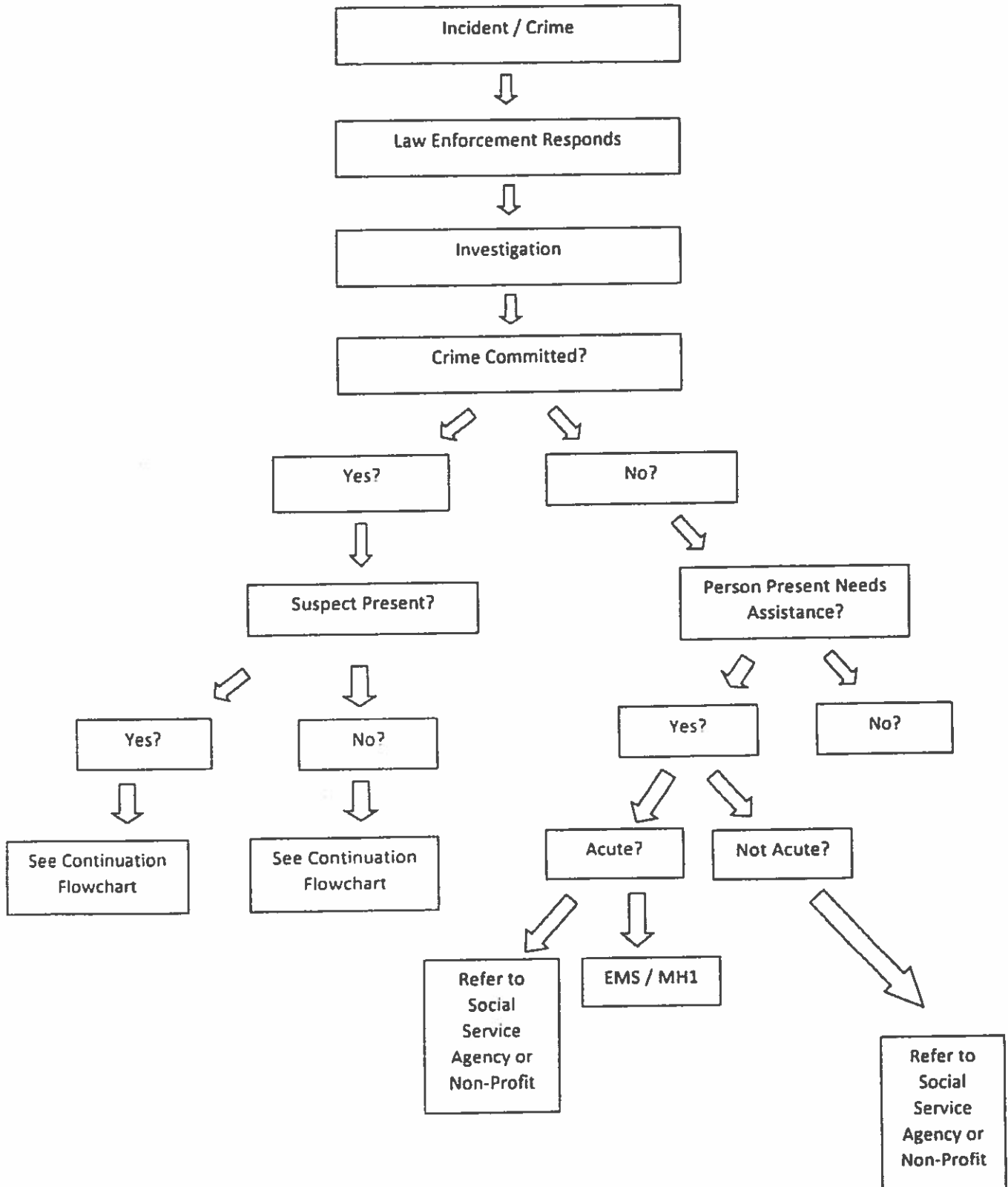
**Recommendation Three:** A future study should be directed at determining how Judges utilize the PAT assessment information. One of the important recommendations from the CSG included the need for Hawaii to reduce delays in the pre-trial process<sup>4</sup>. Specifically, the CSG noted, "Require bail report and supervision assessments be available to court within three working days after booking in a PSC CCC facility based on objective assessment of risk for re-offense, failure to appear, and suitability for supervision in the community. ISC has been conducting assessments, but there is evidence in this report that the Judiciary might not be utilizing these objective data. For example, this analysis demonstrates (see Table 11) that the percentages of defendants by risk level does not follow a pattern that might be expected based on risk level. Ideally, the largest percentage of released defendants should be low risk, followed by moderate, and then high. However, only 20.5% of this sample of bail/bond releases was low risk while 34.5% were high risk. There is similar pattern with ROR defendants: 29.7% low risk versus 35.1% high. While there were more low risk defendants than high on supervised release, the difference is not great. Relief in the CCC populations needs to include not only the administration of these risk assessments, but the use of them in judicial release decisions as well. It may be that factors not related to these

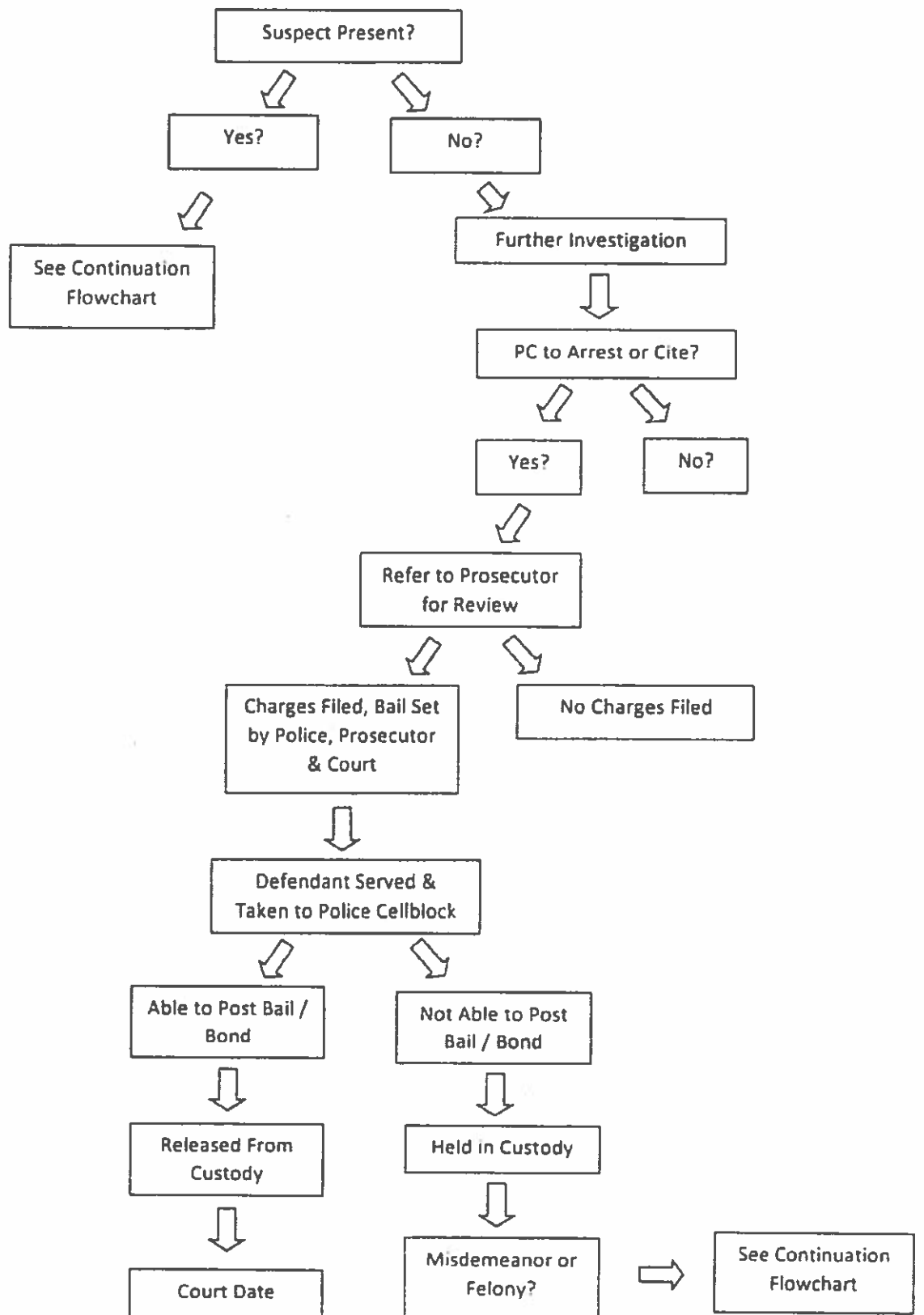
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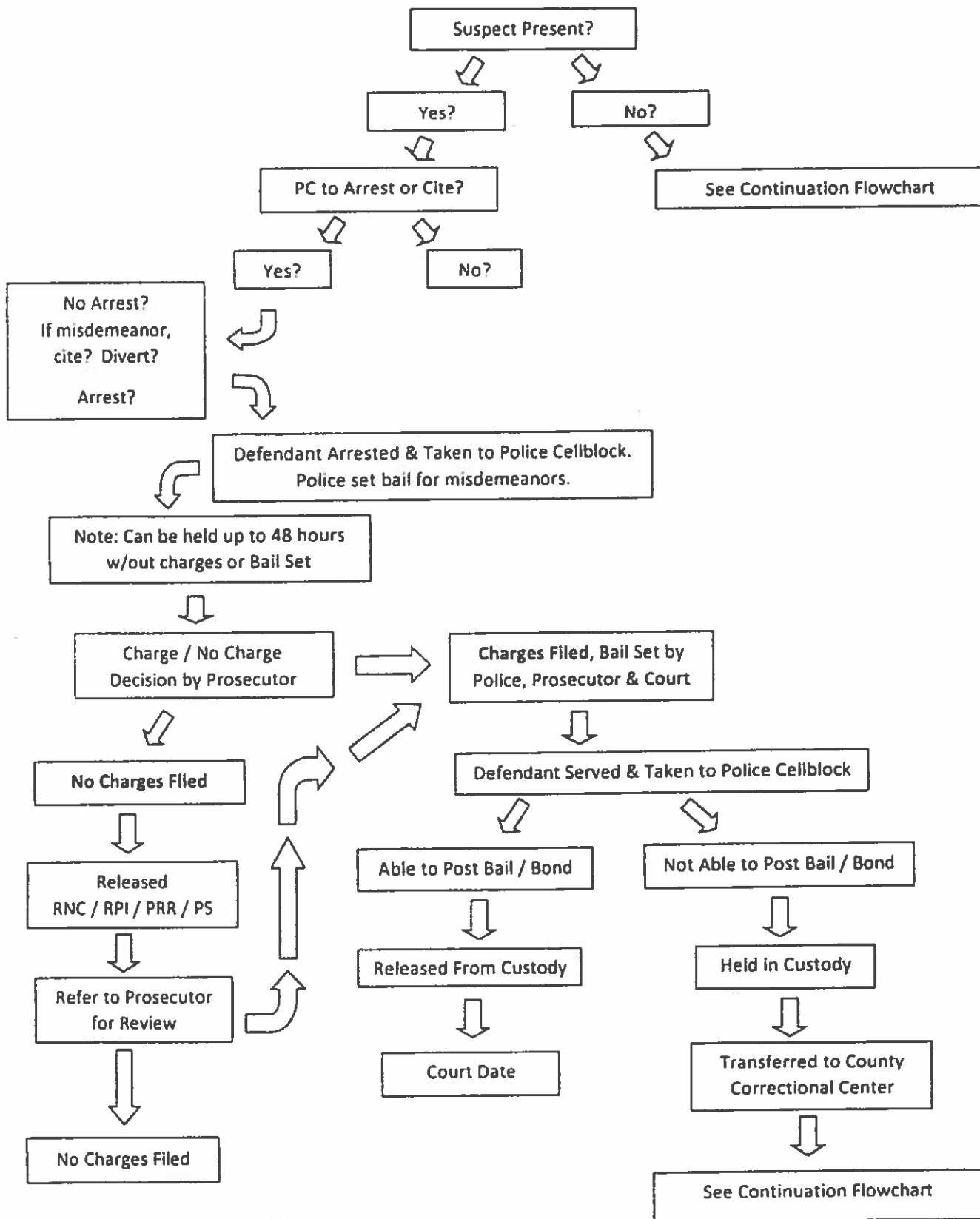
<sup>4</sup> Justice Reinvestment in Hawaii. 2012. Analyses and Policy Framework. Council of State Governments Justice Center. Marshall Clement, Andy Barbee, and Robert Coombs.

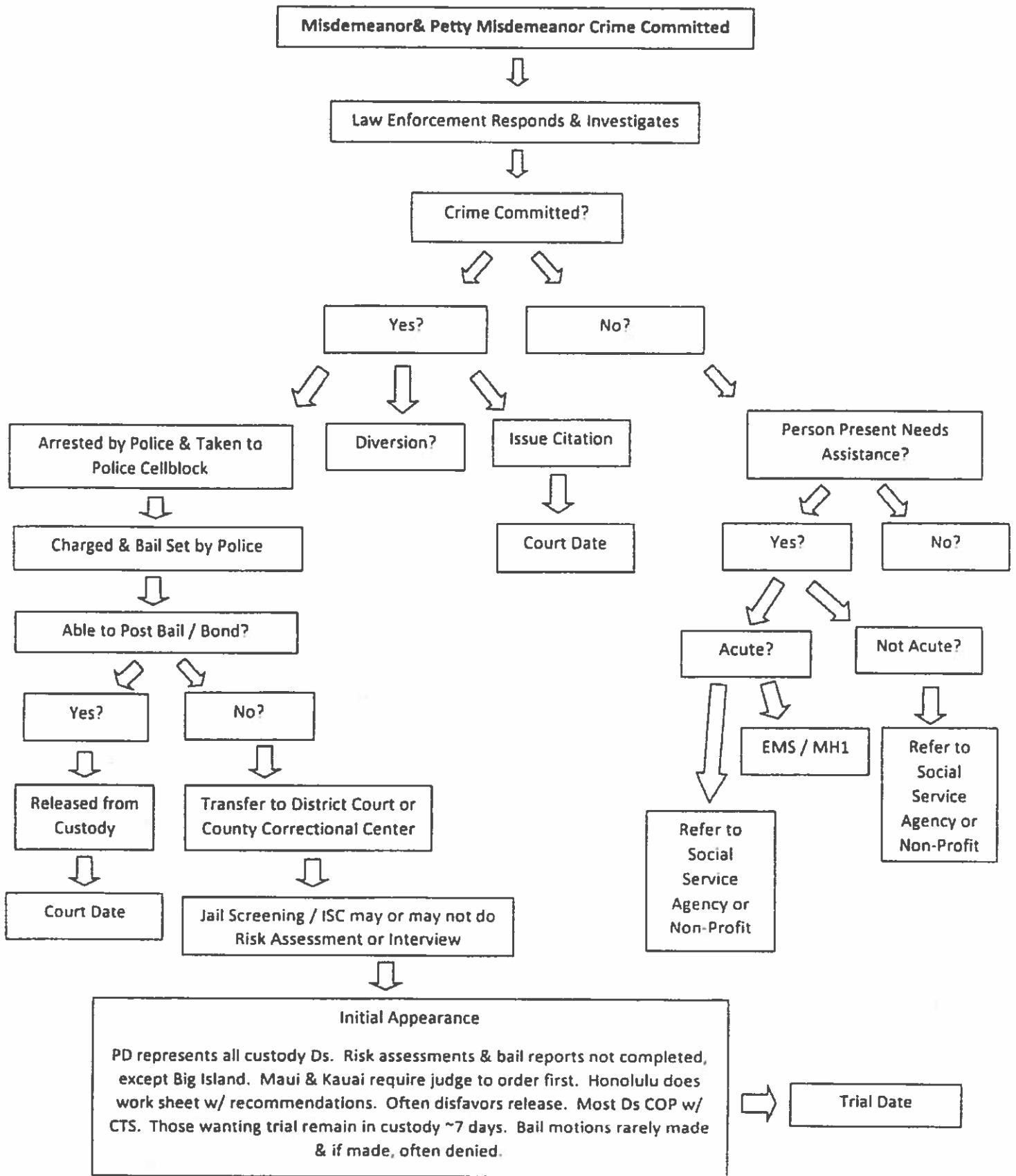
assessments are being considered in the Judicial decision-making process, but these factors need to be explored to determine if there is a need for services that would allow a greater percentage of lower and moderate risk defendants to be released into the community pending adjudication.

# APPENDIX E









Misdemeanor & Petty Misdemeanor  
Crime Committed



Defendant unable to post bail/bond. Remains in custody at police cellblock or County Correctional Center. Later transported to District Court for Initial Appearance. On weekends & holidays, District Judge goes to police cellblock to review all misdemeanor custody cases & orders release of low risk offenders.



ISC Actions

1. ISC often doesn't conduct risk assessments or interviews. (Both Honolulu & Big Island do. Maui & Kauai do not.)
2. 353-10, only requires ISC to do risk assessments in 3 working days of admission to county correctional center for Defendants without other holds, i.e., MRPs.
3. ORAS-PAT administered & scored, w/ overrides approved by supervisor. Override results in higher risk level.
4. ORAS-PAT assesses risk of non-appearance & risk of reoffending, but does not assess for risk of violence.
5. ISC does not obtain financial information.
6. ISC recommendations include ROR, SR to person/program or No Release. Recommendations typically disfavor release.
7. Bail reports not available for initial appearance, except for Big Island. In Honolulu, ISC does worksheet w/ recommendations provided to Court & counsel.
8. No administrative release options prior to Court.



Initial Appearance in District Court.

1. Next business day after arrest.
2. PD represents all custody Defendants.
3. PD discusses potential plea agreements with DPA.
4. PD discusses case w/ Defendant, including possible plea agreements and ISC recommendations, if available.
5. D appears in Court.
6. Most Defendants COP in exchange for jail with credit for time served (~ 2 days). Defendants who want trial, will remain in custody pending trial in ~ 1 week.
7. Bail motion rarely made & if made, generally are denied due to lack of information/bail report, judge being reluctant to hear it due to heavy calendar and/or deference to prior or subsequent judge.



COP w/ Credit for Time Served



Released from Custody



No plea, D wants trial,



PD makes bail motion requesting release. Often denied.



Held in Custody



No systematic re-review of jail population for appropriate release absent bail motion or court order.

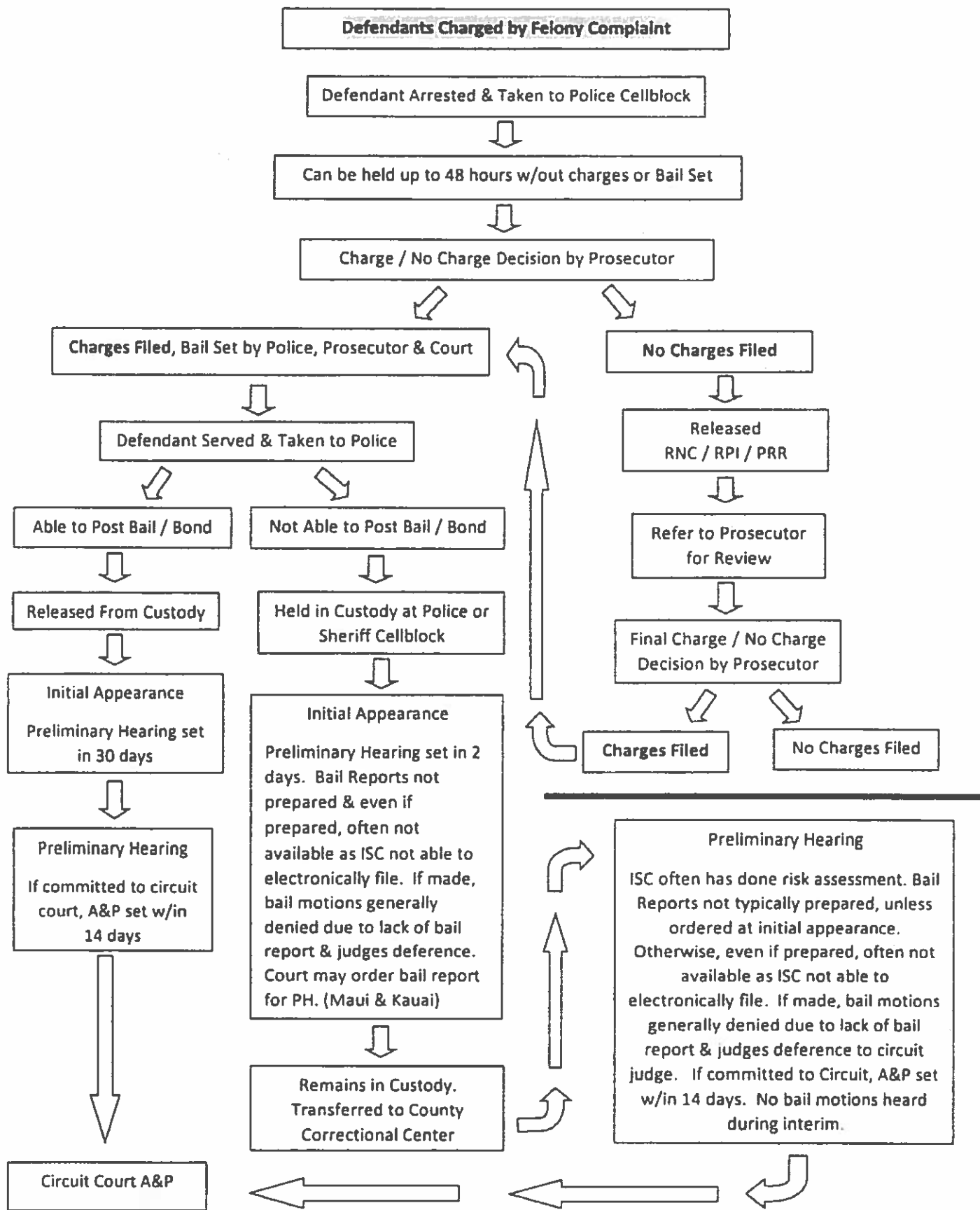


Defendant not eligible for release regardless of COP or wants trial. Other holds on Defendant, i.e., MRP or other pending matters.



Held in Custody





**Defendants Charged by Felony Information or Grand Jury Indictment**

Prosecutor obtains Felony Information or Grand Jury Indictment.  
 Felony Information - Prosecutor sets bail which must be approved by District Court Judge.  
 Indictment - Prosecutor sets bail which must be approved by Circuit Court Judge at GJ returns..

Defendant Served, Arrested & Taken to Police or Sherriff Cellblock

Able to Post Bail / Bond

Not Able to Post Bail / Bond

Released From Custody

Held in Custody at Police or Sherriff Cellblock

Circuit Court A&P  
 (w/in 7 days of arrest)  
 Assign Trial Week & Judge

Transported to County Correctional Center  
 ISC required to do risk assessments w/in 3 working days. ISC does not always do risk assessment or bail report unless bail motion filed prior to Circuit Court A&P.

Pretrial Conference,  
 Pretrial Motions, Trial  
 Call / COP

Circuit Court A&P  
 Held w/in 7 days of arrest on Information BW or GJ BW, per Rule 10, HRPP. Assign Trial Week & Judge.  
 Bail reports often not prepared & even if prepared, may not be readily available as ISC not able to electronically file. Court or counsel often do not get reports by A&P. Opportunities missed to address release. Bail motions often not made & if made, typically denied unless recommendation is for ROR or SR. Defer to trial judge.

Trial

Sentencing after COP

Verdict

Remains in custody

Not Guilty

Guilty

Pretrial Conference, Pretrial Motions, Bail Motions, Trial Call / COP. Service of bail motion on ISC triggers preparation of updated bail report. Most recommend against release. Reports often filed & provided before hearing.

Released From Custody

Sentencing after verdict

Guilty

Verdict

Trial

Sentencing after COP

Released from Custody

Not Guilty

**ISC Response**

Defendant enters police cellblock or community correctional center & not able to post bail / bond.

Misdemeanor or Felony?

Misdemeanor

ISC inconsistent across circuits. On Big Island worker goes to police cellblock & interviews in person. Run CJIS & pull prior bail reports. ORAS-PAT administered for risk of non-appearance & re-offending. Does not include risk of violence or financial information. Score reflects risk level - low, moderate or high risk. Reported to court & counsel via bail report at first appearance. Overrides available w/ supervisor approval. Overrides result in higher risk level which translates to ISC recommendations against release. In Honolulu, ISC worker assesses & interviews Defendants at District Court Cellblock & provides information & recommendations via worksheet provided at first appearance. On Maui & Kauai, ISC does not provide any information at initial appearance.

Initial Appearance

Next business day. ISC provides worksheet (Honolulu), bail report (Big Island) and nothing in Maui & Kauai. Most recommendations disfavor release. Most Defendant COP in exchange for jail with credit for time served (~ 2 days). Defendants wanting trial, remain in custody pending trial in ~ 1 week. Bail motions rarely made & if made, generally are denied due to lack of information/bail report, judge being reluctant to hear it due to heavy calendar and/or deference to prior or subsequent judge. On Maui, the Court will order a bail report. Trial date set.

Trial

No systematic re-review of jail population by ISC for release. Held until trial.

Felony

Felony Complaint case?

Yes

District Court Initial Appearance next work day.

Initial Appearance

ISC generally does not provide bail report, except Big Island. In Maui, judge will order bail report for PH set in 2 days. Bail motions, if made, are typically denied due to lack of information and defer to PH judge.

Preliminary Hearing

ISC generally does not provide bail report, except Big Island. In Maui, judge will order bail report for PH. Bail motions, if made, are typically denied due to lack of information and defer to Circuit A&P judge. A&P in 14 days.

Circuit Court A&P

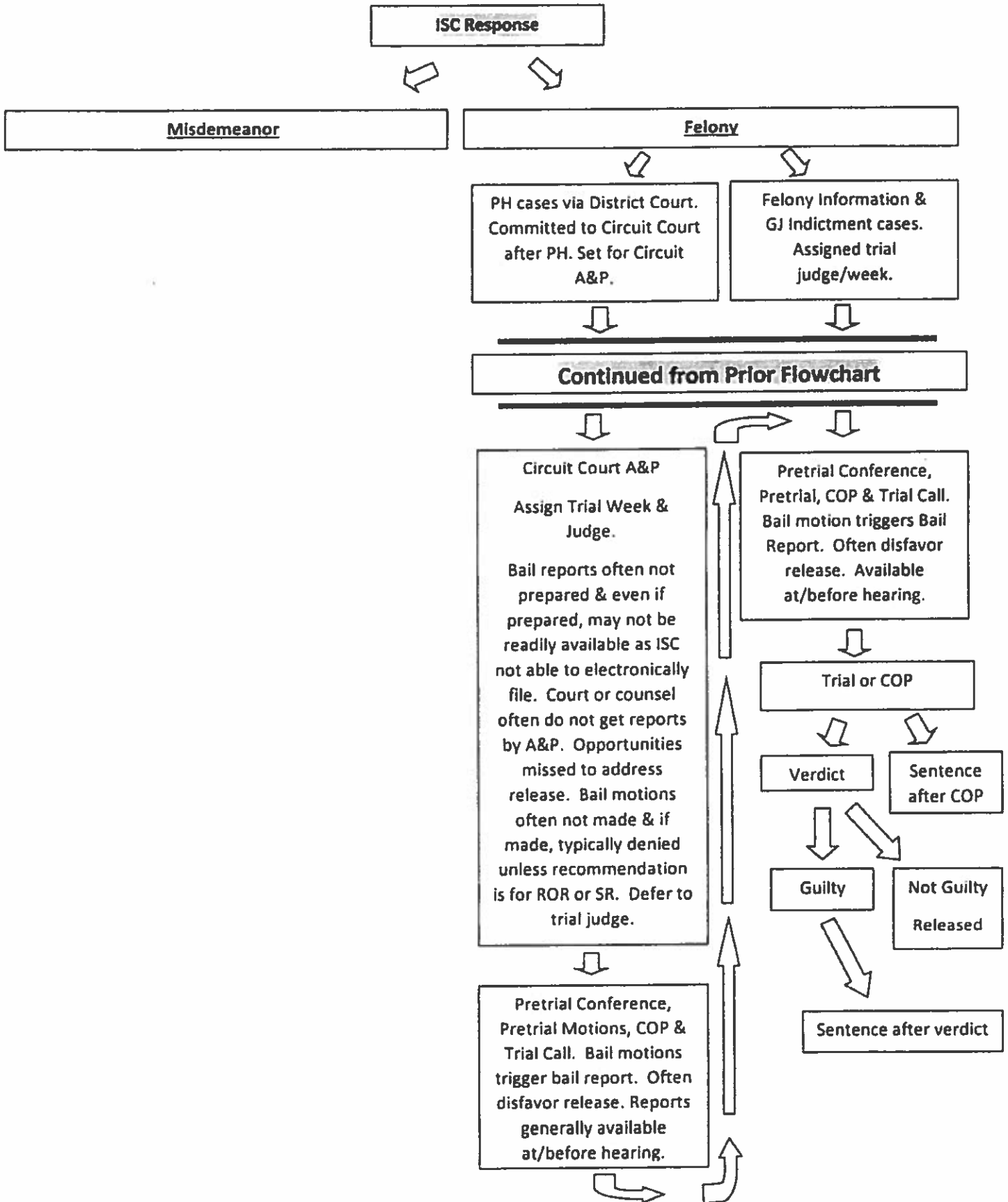
No

Circuit Court A&P set w/in 7 days of arrest

Circuit Court A&P

Assign Trial Week & Judge.

Bail reports often not prepared & even if prepared, may not be readily available as ISC not able to electronically file. Court or counsel often do not get reports by A&P. Opportunities missed to address release. Bail motions often not made & if made, typically denied unless recommendation is for ROR or SR. Defer to trial judge.



## APPENDIX F

### No-Cash-Bail Alternative Proposal\*

*\*As noted, the Task Force did not reach consensus on this proposal, but it is included for information.*

These amendments were proposed by an independent group of Task Force members seeking to offer a “no cash bail” alternative to the pretrial system reforms recommended by the relevant subcommittees. The proposal sought to improve the efficiency and accessibility of the pretrial release process, while also addressing concerns about specific defendants’ risk levels, to maximize the unconditioned release of defendants awaiting trial and minimize the burden pretrial detention places on the state and affected families and communities.

The proposed amendments to HRS § 804-3 would essentially create a ladder for release determinations starting at the lowest level with presumed unconditioned release, graduating to add conditions upon a demonstration by the prosecution that something greater than release on own recognizance (ROR) would be necessary to ensure appearance and public safety. The proposal would direct non-release only where a defendant is charged with a “serious” crime; the prosecution demonstrates there is a serious risk of flight, danger to the community, or reoffense; and the court finds that no combination of conditions will eliminate, reduce, or mitigate the risks presented.

Notably, this proposal provides for financial bail as an option of last resort where the court deems it necessary to impose a financial incentive for defendants to appear. However, it proposes that such bail be offered in the form of unsecured bond: instead of having to pay a large sum up-front—which many defendants do not have—release is presumed and bond is collected only if defendants actually fail to appear. Other jurisdictions, including the Federal District of Hawai‘i have implemented similar structures with great success.

Although this proposal would replace monetary bail provisions, it would preserve the current practice of setting bail in a nominal amount when requested by the defendant should they seek to receive credit for time served.

#### **804-3 Bailable offenses.**

(b) Any person charged with a criminal offense shall be bailable by sufficient sureties; provided that bail may be denied where the charge is for a serious crime, and: arrested and charged with a felony offense or if any of the exceptions in §804-1.3(1)(a)-(b) apply, the court shall presume release on recognizance with no conditions other than court notifications, unless the prosecution demonstrates by clear and convincing evidence that release on recognizance and court notifications will not ensure court appearance nor protect public safety. If the prosecution meets this burden, the court may impose any combination of conditions listed §804-7.1 or §804-3(c) so long as any applied condition is the least restrictive condition available to ensure the defendant’s appearance and to protect the public safety.

(1) If the charged offense is “serious” as defined by § 804-3(a), the court may deny release if:

i) The prosecution demonstrates:

- a) There is a serious risk that the person will flee;
- b) There is a serious risk that the person will obstruct or attempt to obstruct justice, or therefore, injure, or intimidate, or attempt to thereafter, injury, or intimidate, a prospective witness or juror;
- c) There is a serious risk that the person poses a danger to any person or the community; or
- d) There is a serious risk that the person will engage in illegal activity;  
and

ii) the court finds that no condition or combination of conditions is sufficient to reasonably eliminate, reduce or mitigate the risks presented.

(c) If the court finds no condition or combination of conditions in §804-7.1 will ensure the defendant’s appearance, the court may order the defendant to be released on the execution of an unsecured financial bond in a reasonable amount that reflects the defendant’s pecuniary circumstances. The court shall not set the unsecured bond at an amount that the defendant cannot afford.

(d) Nothing in this section shall prevent the court, the police, law enforcement agency, or prosecutor from setting a nominal bail amount for any defendant, including those who fall under 804-1.3(1), who wish to receive credit for time served pending trial.