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## A BILL FOR AN ACT

RELATING TO BAIL.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that the presumption of  
2 innocence is the primary principle that must guide  
3 determinations of pretrial release and detention. A defendant  
4 may not be convicted of a crime unless and until the government  
5 proves guilt beyond a reasonable doubt, without any burden  
6 placed on the defendant to prove the defendant's innocence. The  
7 underlying principle that there is a presumption of innocence in  
8 favor of the defendant is firmly rooted in the most basic  
9 constitutional principles. In the United States of America,  
10 liberty is the norm and detention should be the very limited  
11 exception.

12           A defendant must be accorded due process before being  
13 subjected to preventative detention. In the criminal pretrial  
14 context, the United States Supreme Court has long recognized a  
15 distinction between punitive measures that may not  
16 constitutionally be imposed prior to a determination of guilt  
17 and regulatory restraints that may be imposed. The bail process



1 must be limited for use under a legitimate regulatory purpose  
2 and not as a pretrial punishment or to incapacitate an  
3 individual for an alleged crime. Bail cannot be used to  
4 circumvent due process protections required throughout the  
5 preventive detention process. Federal courts have held that:

6 (1) A defendant's financial circumstances and possible  
7 alternative release conditions must be considered  
8 prior to pretrial detention;

9 (2) The bail determination must be based on  
10 individualized, case-specific reasons;

11 (3) A meaningful bail hearing must take place promptly  
12 after arrest; and

13 (4) If a court concludes that an amount of bail the  
14 defendant is unable to pay is required to ensure the  
15 defendant's future court appearances, it may impose  
16 that amount only upon a determination by clear and  
17 convincing evidence that no less restrictive  
18 alternative will satisfy that purpose.

19 Pretrial release and detention practices also implicate  
20 equal protection principles. Since liberty is a fundamental  
21 right, traditional equal protection analysis requires the



1 government to ensure that pretrial release and detention laws do  
2 not treat similar persons dissimilarly and to show that these  
3 laws are necessary to achieve a compelling or overriding state  
4 interest. Recently, civil rights organizations have begun suing  
5 counties in federal court on the theory that local bail laws are  
6 treating similar persons dissimilarly based on their wealth, and  
7 correlatively their race. The analysis can be boiled down to  
8 the following illustration: two misdemeanor arrestees are  
9 identical in every way, except that one arrestee is wealthy and  
10 the other arrestee is indigent. Without an individualized  
11 assessment, both arrestees will probably receive identical  
12 secured bail amounts. The wealthy arrestee is able to post  
13 bond, while the indigent arrestee is not. This results in the  
14 wealthy arrestee being less likely to plead guilty, more likely  
15 to receive a shorter sentence or be acquitted, and less likely  
16 to bear the social costs of incarceration. The indigent  
17 arrestee, by contrast, must bear the brunt of all of these  
18 outcomes, simply because the arrestee has less money than the  
19 arrestee's wealthy counterpart. This system appears to violate  
20 the equal protection clause. Consequently, courts around the  
21 nation have increasingly mandated, on due process and equal



1 protection grounds, individualized considerations of a  
2 defendant's personal and financial circumstances prior to the  
3 setting of bail.

4 The purpose of this Act is to achieve a more efficient and  
5 just pretrial system that upholds Hawaii's laws while preserving  
6 our community principles and local values by adopting the  
7 recommendations of the criminal pretrial task force established  
8 by House Concurrent Resolution No. 134, 2017 Regular Session.

9 SECTION 2. Section 804, Hawaii Revised Statutes, is  
10 amended by adding two new sections to part I to be appropriately  
11 designated and to read as follows:

12 "§804- Right to prompt hearing. Upon formal charge and  
13 detention, the defendant shall have a right to a prompt hearing  
14 concerning release or detention and whether any condition or  
15 combination of conditions will reasonably assure the defendant's  
16 appearance as required and the safety of any other person and  
17 the community. At the hearing, the defendant shall have the  
18 right to be represented by counsel, and, if financially unable  
19 to obtain representation, to have counsel appointed. The  
20 defendant shall be afforded an opportunity to testify, present  
21 witnesses, cross-examine witnesses who appear at the hearing,



1 and present information by proffer or otherwise. The rules  
2 concerning admissibility of evidence in criminal trials shall  
3 not apply to the presentation and consideration of information  
4 at the hearing. The defendant may be detained pending  
5 completion of the hearing.

6 §804- Monetary bail; non-violent offenders. (a) Any  
7 defendant arrested and charged with a traffic offense,  
8 violation, nonviolent petty misdemeanor offense, or nonviolent  
9 misdemeanor offense shall be released on the defendant's own  
10 recognizance conditioned upon the defendant's appearance in  
11 court and any other least restrictive nonfinancial condition  
12 necessary to assure the defendant's appearance in court and  
13 protect the public; provided that this subsection shall not  
14 apply if:

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

21 (2) One or more of the following apply:



- 1            (A) The defendant has a history of non-appearance
- 2            within the last twenty-four months;
- 3            (B) The defendant has at least one prior conviction
- 4            for a misdemeanor or felony crime of violence;
- 5            (C) The defendant is pending trial or sentencing at
- 6            the time of arrest;
- 7            (D) The defendant is on probation, parole, or
- 8            conditional release at the time of arrest;
- 9            (E) The defendant is also concurrently charged with a
- 10           violent petty misdemeanor, violent misdemeanor,
- 11           or any felony offense arising from the same or
- 12           separate incident; or
- 13           (F) The defendant presents a risk of danger to any
- 14           other person or the community.

15           (b) If any of the exceptions in subsection (a) apply,  
 16           monetary bail may be set in a reasonable amount. If the  
 17           defendant is unable to post bail as ordered, the defendant shall  
 18           be entitled to a prompt bail hearing."

19           SECTION 3. Section 353-10, Hawaii Revised Statutes, is  
 20           amended by amending subsection (b) to read as follows:

21           "(b) The centers shall:



- 1 (1) Provide orientation, guidance, and technical services;
- 2 (2) Provide social-medical-psychiatric-psychological
- 3 diagnostic evaluation;
- 4 (3) Conduct internal pretrial risk assessments and prepare
- 5 and provide a bail report to the court on adult
- 6 offenders within [~~three~~] two working days of admission
- 7 to a community correctional center [~~which shall then~~
- 8 ~~be provided to the court for its consideration~~];
- 9 provided that this paragraph shall not apply to
- 10 persons subject to county or state detainers, holds,
- 11 or persons detained without bail, persons detained for
- 12 probation violation, persons facing revocation of bail
- 13 or supervised release, and persons who have had a
- 14 pretrial risk assessment completed prior to admission
- 15 to a community correctional center. For purposes of
- 16 this [+]paragraph[+], "pretrial risk assessment" means
- 17 an objective, research-based, validated assessment
- 18 tool that measures a defendant's risk of flight [~~and~~],
- 19 risk of criminal conduct, and risk of violence or harm
- 20 to any person or the general public while on pretrial
- 21 release pending adjudication[+]. The pretrial risk



1           assessment tool and procedures associated with its  
2           administration shall be periodically reviewed and  
3           subject to further validation at least every five  
4           years to evaluate the effectiveness of the tool and  
5           the procedures associated with its administration.

6           The findings of any review shall be publicly reported;

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

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

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

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

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





1       ~~(8)~~ (9) Provide pretrial bail reports within two working  
2       days to the courts on adult offenders that are  
3       consented to by the defendant or that are ordered by  
4       the court. A complete copy of the executed pretrial  
5       risk assessment delineating the scored items, the  
6       total score, any administrative scoring overrides  
7       applied, and written explanations for administrative  
8       scoring overrides shall be included in the report.

9       The pretrial bail reports shall be confidential and  
10      shall not be deemed to be public records. A copy of a  
11      pretrial bail report shall be provided only:

- 12      (A) To the defendant or defendant's counsel;  
13      (B) To the prosecuting attorney;  
14      (C) To the department of public safety;  
15      (D) To any psychiatrist, psychologist, or other  
16      treatment practitioner who is treating the  
17      defendant pursuant to a court order;  
18      (E) Upon request, to the adult client services  
19      branch; and  
20      (F) In accordance with applicable laws, persons, or  
21      entities doing research."



1 SECTION 4. Section 803-6, Hawaii Revised Statutes, is  
2 amended by amending subsection (b) to read as follows:

3 "(b) In any case in which it is lawful for a police  
4 officer to arrest a person without a warrant for a nonviolent  
5 class C felony, any misdemeanor, any petty misdemeanor, or  
6 violation, the police officer may [~~, but need not,~~] exercise  
7 discretion and issue a citation in lieu of the requirements of  
8 [{}subsection[{}]] (a), if the police officer finds and is  
9 reasonably satisfied that the person:

- 10 (1) Will appear in court at the time designated;
- 11 (2) Has no outstanding arrest warrants which would justify  
12 the person's detention or give indication that the  
13 person might fail to appear in court; [~~and~~]
- 14 (3) That the offense is of such nature that there will be  
15 no further police contact on or about the date in  
16 question, or in the immediate future [~~-~~]; and
- 17 (4) The offense does not involve domestic violence, sexual  
18 assault, robbery, or any other offense enumerated in  
19 chapter 707."



1 SECTION 5. Section 804-3, Hawaii Revised Statutes, is  
2 amended by amending subsections (a), (b), and (c) to read as  
3 follows:

4 "(a) For purposes of this section, "serious crime" means  
5 murder or attempted murder in the first degree, murder or  
6 attempted murder in the second degree, [~~or~~] a class A [~~or B~~]  
7 felony, [~~except forgery in the first degree and failing to~~  
8 ~~render aid under section 291C-12,~~] or a class B or C felony  
9 involving violence or threat of violence to any person; and  
10 "bail" includes release on one's own recognizance, supervised  
11 release, and conditional release.

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

21 (1) There is a serious risk that the person will flee;



1 (2) There is a serious risk that the person will obstruct  
2 or attempt to obstruct justice, or therefore, injure,  
3 or intimidate, or attempt to thereafter, injure, or  
4 intimidate, a prospective witness or juror;

5 (3) There is a serious risk that the person poses a danger  
6 to any person or the community; or

7 (4) There is a serious risk that the person will engage in  
8 illegal activity.

9 If the prosecution demonstrates by clear and convincing evidence  
10 one or more of the serious risks listed in paragraphs (1)  
11 through (4) exists, the defendant shall be detained if the court  
12 finds that no condition or combination of conditions is  
13 sufficient to reasonably eliminate, reduce, or mitigate the  
14 risks presented.

15 (c) Under subsection (b)(1) a rebuttable presumption  
16 arises that there is a serious risk that the person will flee or  
17 will not appear as directed by the court where the person is  
18 charged with a criminal offense punishable by imprisonment for  
19 life with or without possibility of parole. For purposes of  
20 subsection (b)(3) and (4) a rebuttable presumption arises that



1 the person poses a serious danger to any person or community or  
2 will engage in illegal activity where the court determines that:

3 (1) The defendant has been previously convicted of a  
4 serious crime involving violence or threat of violence  
5 against a person within the ten-year period preceding  
6 the date of the charge against the defendant;

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

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

13 SECTION 6. Section 804-4, Hawaii Revised Statutes, is  
14 amended to read as follows:

15 "**§804-4 When a matter of right.** (a) If the charge is for  
16 an offense for which bail is allowable under section 804-3, the  
17 defendant may be admitted to bail before conviction as a matter  
18 of right [÷] and under the least restrictive conditions required  
19 to ensure the defendant's appearance and to protect the public.

20 Except for section 712-1207(7), bail shall be allowed for any  
21 person charged under section 712-1207 only subject to the



1 mandatory condition that the person observe geographic  
2 restrictions that prohibit the defendant from entering or  
3 remaining on public property, in Waikiki and other areas in the  
4 State designated by county ordinance during the hours from 6  
5 p.m. to 6 a.m.; and provided further that nothing contained in  
6 this subsection shall be construed as prohibiting the imposition  
7 of stricter geographic restrictions under section 804-7.1. The  
8 right to bail shall continue after conviction of a misdemeanor,  
9 petty misdemeanor, or violation, and release on bail may  
10 continue, in the discretion of the court, after conviction of a  
11 felony until the final determination of any motion for a new  
12 trial, appeal, habeas corpus, or other proceedings that are  
13 made, taken, issued, or allowed for the purpose of securing a  
14 review of the rulings, verdict, judgment, sentence, or other  
15 proceedings of any court or jury in or by which the defendant  
16 has been arraigned, tried, convicted, or sentenced; provided  
17 that:

18 (1) No bail shall be allowed after conviction and prior to  
19 sentencing in cases where bail was not available under  
20 section 804-3, or where bail was denied or revoked  
21 before conviction;



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

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

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

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



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

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

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

17 SECTION 7. Section 804-5, Hawaii Revised Statutes, is  
18 amended to read as follows:

19 "§804-5 By whom allowed. In cases where the punishment  
20 for the offense charged may be imprisonment for life not subject  
21 to parole, or imprisonment for a term more than ten years with





1 or without fine, a judge or justice of a court of record,  
2 including a district judge, shall be competent to admit the  
3 accused to bail, in conformity with sections 804-3 to 804-6. In  
4 all other cases, the accused may be so admitted to bail by any  
5 judge or justice of a court of record, including a district  
6 judge, and in cases, except under section 712-1207, where the  
7 punishment for the offense charged may not exceed two years'  
8 imprisonment with or without fine, the sheriff, the sheriff's  
9 deputy, the chief of police or any person named by the chief of  
10 police, or the sheriff of Kalawao, regardless of the circuit  
11 within which the alleged offense was committed, may admit the  
12 accused person to bail. The court may impose conditions of  
13 release or bail which are the least restrictive conditions  
14 required to ensure the defendant's appearance and protect the  
15 public."

16 SECTION 8. Section 804-7, Hawaii Revised Statutes, is  
17 amended to read as follows:

18 "~~§804-7 Release after bail. [When bail is offered and~~  
19 ~~taken the prisoner shall be discharged from custody or~~  
20 ~~imprisonment.]~~ Any defendant for whom a monetary amount of bail  
21 has been set by the police, other law enforcement agency, or the



1 court shall be permitted to post said bail amount at the police  
2 department, law enforcement agency, or county correctional  
3 center where the defendant is detained. Said monetary bail  
4 shall be payable seven days a week on a twenty-four-hour basis.  
5 Upon posting or payment of bail, the defendant or the  
6 defendant's representative or agent shall be provided a bail  
7 receipt and the defendant shall be released from custody  
8 forthwith."

9 SECTION 9. Section 804-7.1, Hawaii Revised Statutes, is  
10 amended to read as follows:

11 "**§804-7.1 Conditions of release on bail, recognizance, or**  
12 **supervised release.** Upon a showing that there exists a danger  
13 that the defendant will commit a serious crime or will seek to  
14 intimidate witnesses, or will otherwise unlawfully interfere  
15 with the orderly administration of justice, the judicial officer  
16 named in section 804-5 may deny the defendant's release on bail,  
17 recognizance, or supervised release.

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

20 (1) Prohibiting the defendant from approaching or  
21 communicating with particular persons or classes of



- 1 persons, except that no such order should be deemed to  
2 prohibit any lawful and ethical activity of  
3 defendant's counsel;
- 4 (2) Prohibiting the defendant from going to certain  
5 described geographical areas or premises;
- 6 (3) Prohibiting the defendant from possessing any  
7 dangerous weapon, engaging in certain described  
8 activities, or indulging in intoxicating liquors or  
9 certain drugs;
- 10 (4) Requiring the defendant to report regularly to and  
11 remain under the supervision of an officer of the  
12 court;
- 13 (5) Requiring the defendant to maintain employment, or, if  
14 unemployed, to actively seek employment, or attend an  
15 educational or vocational institution;
- 16 (6) Requiring the defendant to comply with a specified  
17 curfew;
- 18 (7) Requiring the defendant to seek and maintain mental  
19 health treatment or testing, including treatment for  
20 drug or alcohol dependency, or to remain in a  
21 specified institution for that purpose;



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

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

10          (10)   Imposing any combination of conditions listed above [~~-~~]  
 11                   or any other least restrictive nonfinancial conditions  
 12                   required to assure the defendant's appearance and  
 13                   protect the public.

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

17           SECTION 10.   Section 804-9, Hawaii Revised Statutes, is  
 18 amended to read as follows:

19           "**§804-9   Amount.**   The amount of bail rests in the  
 20 discretion of the justice or judge or the officers named in  
 21 section 804-5 [~~-but~~] and shall be set in reasonable amounts






1 based upon all available information, including the offense  
 2 alleged, possible punishment upon conviction, and the offender's  
 3 financial ability to afford bail. Bail amounts should be so  
 4 determined as not to suffer the wealthy to escape by the payment  
 5 of a pecuniary penalty, nor to render the privilege useless to  
 6 the poor. [~~In all cases, the officer letting to bail should~~  
 7 ~~consider the punishment to be inflicted on conviction, and the~~  
 8 ~~pecuniary circumstances of the party accused.] "~~

9 SECTION 11. This Act does not affect rights and duties  
 10 that matured, penalties that were incurred, and proceedings that  
 11 were begun before its effective date.

12 SECTION 12. Statutory material to be repealed is bracketed  
 13 and stricken. New statutory material is underscored.

14 SECTION 13. This Act shall take effect upon its approval.  
 15

INTRODUCED BY:

S. Ail    
  
Richard [unclear]  
John M. [unclear]  
 JAN 24 2019



# H.B. NO. 1542

**Report Title:**

Bail; Criminal Pretrial Task Force

**Description:**

Incorporates the statutory revisions suggested by the Criminal Pretrial Task Force established by House Concurrent Resolution No. 134, 2017 Regular Session.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

