



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Wednesday, February 20, 2019 10:30 a.m.
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by

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

Bill No. and Title: Senate Bill No. 1539, Relating to Bail Hearings.

Purpose: Adds provision that, upon formal charge and detention, defendants shall have the right to a prompt bail hearing concerning release or detention and whether any condition will reasonably assure the defendant's appearance. Permits defendants to be represented by counsel at the hearing, or have one appointed if they are financially unable to obtain representation. Permits defendants to present evidence and witnesses and to cross-examine witnesses who appear at the hearing.

Judiciary's Position:

The Judiciary respectfully supports Senate Bill No. 1539, which adopts the recommendation of the Criminal Pretrial Practices Task Force to entitle defendants in criminal cases to a prompt bail hearing.

Pursuant to House Concurrent Resolution No. 134, H. D. 1 Regular Session of 2017, Chief Justice Mark E. Recktenwald established the 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. It began with an in-depth study of the history of bail and the three major generations of American bail reform of the 1960s, 1980s, and the last decade. The Task Force members researched the legal framework underlying current practices, which are firmly rooted in our most basic constitutional principles of presumption of innocence,



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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 set forth in the 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 submitted twenty-five recommendations, to include amending Section 804 of the Hawai'i Revised Statutes to add a new provision requiring defendants who are formally charged with a criminal offense and detained be afforded a prompt hearing to address bail. The Judiciary respectfully supports Senate Bill No. 1539 in so far as it adopts the recommendation of the Criminal Pretrial Task Force.

Thank you for the opportunity to testify on this measure.



OFFICE OF HAWAIIAN AFFAIRS

Legislative Testimony

SB1539
RELATING TO BAIL HEARINGS
Ke Kōmike Ho'okolokolo

Pepeluali 20, 2019

10:30 a.m.

Lumi 016

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB1539, a measure which would effectuate one of the recommendations of the HCR134 Task Force on Pretrial Reform: clarifying that criminal defendants shall have a right to a prompt hearing concerning pretrial release and associated conditions. OHA, as a member of the Task Force, has endorsed each of its recommendations, and believes that this measure will facilitate improved judicial pretrial efficiency, reduce the harms arising from the State's overreliance on cash bail, and minimize the costs of unnecessary and prolonged pretrial detention.

Unfortunately, our current bail system is overwhelmed, inefficient, ineffective, and has resulted in harmful, unnecessary socioeconomic impacts¹ on low-income individuals and their families, a disproportionate number of whom may be Native Hawaiian. The intended purpose of bail is not to punish the accused, but rather to permit their pretrial release while ensuring their return to court. Presently, our bail system, overwhelmed by a historically increasing volume of arrests, is fraught with delays and frequently does not provide sufficient information to judges and attorneys seeking timely and appropriate pretrial release determinations. Moreover, mounting evidence demonstrates that overreliance on cash-secured bail punishes poor individuals and their families before any trial, much less conviction. In Hawai'i, indigent defendants must often decide between posting hefty cash bail or bond amounts that impose considerable financial hardship, or pretrial incarceration that threatens their employment and housing. Notably, detaining individuals for weeks or months before their trial simply because they are too poor to post bail also represents a substantial cost to taxpayers,² and further exacerbates the overcrowding in our detention facilities.³

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

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

³ All four of the state-operated jail facilities—where pretrial defendants are detained—are assigned populations between 166-250% of the capacities for which they were designed and hold populations amounting to 127-171% of their modified operational capacities. STATE OF HAWAII DEPARTMENT OF PUBLIC

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

Specifically, OHA emphasizes the Task Force recommendation addressed in SB1539, which would **reinforce the need for prompt bail hearings and bail determinations that are thoroughly informed, based on defendants' ability to pay, and made expeditiously**. OHA supports this and other efforts to improve judicial pretrial efficiency, reduce the harms arising from the State's overreliance on cash bail, and minimize the costs of unnecessary and prolonged pretrial detention.

For the reasons set forth above, OHA respectfully urges the Committee to **PASS** SB1539. Mahalo piha for the opportunity to testify on this important measure.

SAFETY, END OF MONTH POPULATION REPORT, NOVEMBER 30, 2018 available at <https://dps.hawaii.gov/wp-content/uploads/2018/12/Pop-Reports-EOM-2018-11-30.pdf>.

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COMMITTEE ON JUDICIARY

Sen. Karl Rhoads, Chair

Sen. Glenn Wakai, Vice Chair

Wednesday, February 20, 2019

10:30 am

Room 016

SUPPORT SB 1539 - PROMPT BAIL HEARING

Aloha Chair Rhoads, Vice Chair Wakai and Members of the Committee!

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

SB 1539 adds a provision that, upon formal charge and detention, defendants shall have the right to a prompt bail hearing concerning release or detention and whether any condition will reasonably assure the defendant's appearance. It permits defendants to be represented by counsel at the hearing or have one appointed if they are financially unable to obtain representation and permits defendants to present evidence and witnesses and to cross-examine witnesses who appear at the hearing.

Community Alliance on Prisons supports this measure and encourages the committee to pass it!

Mahalo for this opportunity to testify.

SB-1539

Submitted on: 2/19/2019 9:58:41 AM

Testimony for JDC on 2/20/2019 10:30:00 AM

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

Comments:

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Date: February 20, 2019

To: The Honorable Karl Rhoads, Chair
The Honorable Glenn Wakai, Vice Chair
Senate Committee on Judiciary

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

RE: Testimony in Opposition to S.B. 1539
Relating to Bail Hearings

Good morning Chair Rhoads, Vice Chair Wakai, and members of the Senate Committee on Judiciary:

The Sex Abuse Treatment Center (SATC) respectfully opposes S.B. 1539 and asks that the Committee please defer this measure, which implements some of the recommendations of the Criminal Pretrial Task Force.

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

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

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

- At this time, it is unclear what is meant by, on page 2 at line 12, "[t]he defendant shall be afforded an opportunity to . . . present witnesses [and] to cross-examine witnesses who appear at the hearing."

It would seem that in a hearing concerning bail, where the danger posed by the offender to a victim or witness to the crime is under consideration, this potentially could give the offender the right to subpoena or otherwise compel a complainant victim or a witness to the crime to court for an adversarial and contentious proceeding.

Placing oneself in the victim's or witness's shoes, this would mean that, before trial begins, they could be called to face the offender on the specific issue of whether the offender is a threat to their safety, with the potential outcome that the offender is released into the community immediately following the hearing.

We note that this creates a risk of further traumatizing or intimidating victims and witnesses, and may cause some to discontinue their willing participation in the court process and, as a result, distort public safety and criminal justice outcomes.

- For victims and witnesses that are able to continue participating in the criminal justice system, despite the concern stated above, the possibility of being called to court in the bail hearing would tend to compound their appearance burden in the case.

We note that the burden of appearing in court proceedings is already a challenge, especially in felony cases that are sometimes repeatedly continued at the trial stage and require the victims and witnesses be prepared and appear many times at personal cost, such as missed work or school, and at risk of additional trauma and re-victimization during each appearance.

It is also uncertain what impact the defendant's right to counsel for the bail hearings, provided on page 2 at line 10, may further have. If prompt bail hearings are conducted automatically, or, alternately, if they are granted upon motion as a matter of right and a large volume of offenders exercise that right, and a defense attorney is consequently not available at that time for the hearing to proceed, it is unclear if this would provide a reason to postpone and reschedule hearings, again causing victims and witnesses to prepare and appear on multiple occasions.

- On page 2 at line 15, the bill provides "[t]he rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing." We note that it is unclear which of the rules of penal procedure with respect to evidence are suspended by this statement, in the context of the bail hearing, and what standards will be applied in their place.

We appreciate this opportunity to testify on S.B. 1539. In the absence of clarity on the points of concern detailed above, we ask that the Committee please defer this measure in order to allow Hawai'i's victims of crime and agencies that serve victims, like SATC, the opportunity to meaningfully engage and collaborate with the Criminal Pretrial Task Force stakeholders on this important issue.