



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

LATE

ON THE FOLLOWING MEASURE:

S.B. NO. 1244, RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND
MILITARY AFFAIRS

DATE: Tuesday, February 9, 2021 **TIME:** 1:20 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Landon M.M. Murata,
Deputy Attorney General, at 586-1049)

Chair Nishihara and Members of the Committee:

The Department of the Attorney General ("Department") opposes this bill.

The purposes of this bill are to (1) eliminate the use of monetary bail, with certain exceptions, for traffic offenses, violations, and non-violent petty misdemeanor and misdemeanor offenses; (2) create a rebuttable presumption for both release and detention for certain offenses and specify the circumstances in which the presumptions apply; and (3) require the judicial council to appoint a committee to review and recommend changes to the Hawaii Penal Code.

The Department opposes this bill because there has not been sufficient time since the legislature made changes to the state's criminal pretrial system in 2019 to fully assess what is needed to improve the process. At this point in time, we cannot assess the effects of the 2019 changes or even determine what metric to use to properly measure the success or failure of those changes. The bill's implication that a reduction in the state's prison population is the only metric by which the state's criminal pretrial system should be evaluated (page 2, lines 4-15) does not consider a number of important interests, including the need to secure the appearance of defendants and to protect the public. Should the committee choose to move forward with this bill, the

Department suggests amendments to the bill to avoid internal inconsistencies and unnecessary and possibly detrimental changes to the bail statutes.

In 2017, pursuant to a request from the House of Representatives contained in House Concurrent Resolution No. 134, House Draft 1 (2017), the Hawaii State Judiciary convened 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[.]

See House Concurrent Resolution No. 134, House Draft 1 (2017).

On December 14, 2018, the criminal pretrial task force submitted its report to the legislature and, based on its findings and recommendations, the legislature enacted Act 179, Session Laws of Hawaii 2019, to (1) support best practices for an effective correctional system; and (2) implement certain recommendations of the task force. See Conference Committee Report No. 149, Regular Session 2019. In addition to making changes to the bail statutes, Act 179 also established the Criminal Justice Research Institute, which is responsible for, among other things, establishing and maintaining a centralized statewide criminal pretrial justice data reporting and collection system, and developing and tracking indicators that accurately reflect the effectiveness of the State's criminal pretrial system.

The bill approaches the State's criminal pretrial system from the standpoint that there is a "practice of mass incarceration" in the State, page 1, lines 6-7, and that the only metric by which to measure the success or failure of Act 179 is whether or not the Act's reforms succeeded in substantially reducing the State's "pretrial detained population", page 2, lines 4-6. The State already has a robust and flexible criminal pretrial system that the legislature has only recently changed by Act 179. Given the brief amount of time that has passed since those changes were made and the extraordinary challenges to the criminal pretrial system brought on by the Covid-19

pandemic, the effects of Act 179's changes are unknown. Accordingly, the Department recommends this bill be deferred and that the Criminal Justice Research Institute established by Act 179 be given sufficient time to evaluate the effectiveness of the State's recently amended criminal pretrial system.

Should the committee choose to move forward with this bill, the Department requests the Committee to consider the following comments and recommendations:

Section 2 (page 6, line 8, through page 8, line 10), requires defendants charged with traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses be released. On page 6, line 18, through page 8, line 4, the bill sets forth a number of exceptions which would allow the court to set bail "in a reasonable amount." See page 8, line 6. The mandate to release certain defendants is inconsistent with the court's discretion to determine the amount of bail pursuant to section 804-9, HRS, and to set conditions of bail or release pursuant to section 804-7.1, HRS, both of which are designed to assist the court in ensuring the appearance of the defendant and the protection of the public. Accordingly, the Department recommends deleting section 2 of the bill in its entirety and allowing the courts to retain the discretion and flexibility to set bail and conditions of bail or release to ensure both the continued appearance of defendants and the protection of the public.

Section 3 (page 8, line 11, through page 11, line 3) seeks to amend section 804-3, HRS, to change the definition of "serious crime," add a definition of "bail," and create a rebuttable presumption for release or bail on the "least restrictive conditions" for defendants charged with any crimes that do not fall under the new definition of "serious crime." The Department has no concerns with respect to the bill's amendments to section 804-3(a), HRS, on page 8, line 15, through page 9, line 2. However, the Department recommends deleting the bill's proposed amendments to section 804-3(b), HRS, on page 9, line 3, through page 10, line 5, for the following reasons.

The current wording of section 804-3(b), HRS, already establishes that "[a]ny person charged with a criminal offense shall be bailable" unless the defendant is charged with a serious offense and the court finds:

- (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.

Given that the definition of "bail" in section 804-3, HRS, includes release on one's own recognizance, the current wording of section 804-3(b), already fulfills the intent of the Legislature with respect to the bill's amendments to section 804-3(b), HRS, on page 9, line 3, through page 10, line 5, thus making many of the amendments in Section 3 unnecessary.

The Department recommends section 3 of the bill be replaced with the following:

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

"(a) For purposes of this section[, "~~serious crime~~"]:

"Serious 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, and "bail"] or a class B or C felony involving violence or threat of violence to any person.

"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[:] the court determines that:

- (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.

(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:

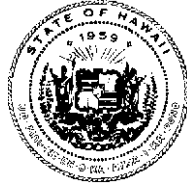
(1) The defendant has been previously convicted of a serious crime ~~[involving violence against a person]~~ within the ten-year period preceding the date of the charge against the defendant;

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

(3) The defendant is on probation or parole for a ~~[serious crime involving violence or a threat of violence to a person.]~~ felony charge."

These changes to Section 3 will ensure that (1) the current wording of the statute that "[a]ny person charged with a criminal offense shall be bailable" will remain the same; (2) the amendments to section 804-3(a), HRS, on page 8, line 15, through page 9, line 2, are consistent with the rest of the section; and (3) it is clear that the courts retain the ability to determine whether circumstances exist to deny bail only for those defendants charged with serious crimes.

For the foregoing reasons, the Department respectfully requests the bill either be deferred or, in the alternative, be amended as set forth above. Thank you for the opportunity to testify.



LATE

MARK PATTERSON
CHAIR
COMMISSIONERS
JUDGE MICHAEL A. TOWN
(ret.)
JUDGE RONALD IBARRA
(ret.)
TED SAKAI
MARTHA TORNEY

**STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

February 9, 2021

TO: Honorable Senator Clarence K. Nishihara
Committee on Public Safety, Intergovernmental, and Military Affairs.

FROM: Ronald Ibarra, Commissioner Hawaii Correctional System Oversight Commission.

SUBJECT: SB 1244 RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE SYSTEM

POSITION: The Hawaii Correctional System Oversight Commission Supports intent of this measure.

PUPOSE: The purpose of this bill is to eliminate the use of monetary bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanors offenses, and non-violent misdemeanor offenses. Creates a rebuttable presumption regarding both release and detention for certain offenses and specifics circumstances in which these presumptions apply. Resources the judicial council to appoint a committee to review and recommend changes to the Hawaii penal code.

The Oversight Commission urges the legislature to revisit pretrial reform efforts and help realize the important goals of the HCR 134 Task Force to reduce unnecessary, costly, and dangerous pretrial incarceration. HCR 134 Task Force key recommendations 20 and 21 should be reconsidered along with two amendments previously proposed and considered by the House during the 2019 session—for immediate passage in the 2021 session. The Commission bill incorporates the language suggested by the Task Force, as well as two amendments described below:

- The new HRS Section proposed in Section 2 of the bill, Subsection (b)(2) includes a list of exclusions from eligibility for application of the proposed process favoring release on recognizance. As indicated in Part (B) of this Subsection, (page 4, line 19), the Commission elected to impose a 10-year time limit upon the exclusion for defendants with prior convictions for crimes of violence. Although the House Judiciary Committee originally proposed a 20-year time limit for this exclusion,³ the Commission hopes that a 10-year time restriction will limit this exclusion to the most recent and relevant violent

crimes, while expanding the pool of defendants eligible for release on recognizance under the proposed new section.

- Also, in the new HRS Section proposed in Section 2 of this bill, in Subsection (c) (page 5, lines 10-13), the Commission added language to authorize the Director of Public Safety to release any defendant detained for the inability to post a bail amount of less than \$99. This language was originally added to this subsection by the House Committee on Public Safety, Military, and Intergovernmental Affairs,⁴ including a requirement that electronic monitoring equipment be used. The Commission agrees that the Director of Public Safety should maintain and nimbly exercise authority to help reduce overcrowding and unnecessary pretrial incarceration. However, the Commission declined to include the electronic monitoring requirement due to concerns about the availability and affordability of electronic monitoring devices for defendants who could not afford even very low bail amounts. Such a requirement would likely obstruct the use of the proposed administrative release authority.

Sincerely,

Judge Ronald Ibarra (retired), Commissioner
Correctional System Oversight Commission

Charlotte A. Carter-Yamauchi
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LEGISLATIVE REFERENCE BUREAU
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Written Comments

SB1244

RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the Senate Committee on Public Safety, Intergovernmental, and Military Affairs

Tuesday, February 9, 2021, 1:20 p.m.
Via Video Conference

Chair Nishihara and Members of the Committee:

I am Charlotte Carter-Yamauchi, Director of the Legislative Reference Bureau (LRB). Thank you for this opportunity to provide written **comments** on S.B. No. 1244, Relating to the Modernization of Criminal Justice.

The purpose of this measure is to:

- (1) Eliminate the use of monetary bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses;
- (2) Create a rebuttable presumption regarding both release and detention for certain offenses and specifies circumstances in which these presumptions apply;
- (3) Require the Judicial Council to appoint a committee to review and recommend changes to the Hawaii Penal Code;
- (4) Authorizes the appointed committee to, among other things, request assistance from the Legislative Reference Bureau in drafting proposed legislation, as may be needed to carry out the purposes of the measure.

The Bureau takes no position on this measure but submits the following comments for your consideration.

With regard to authorizing the Judicial Council - appointed committee to request assistance from the Legislative Reference Bureau to draft proposed legislation, as may be needed to carry out the purposes of the measure, we note that the Bureau is able to draft proposed legislation for the committee; provided that doing so does not adversely impact the Bureau's ability to provide services to the Legislature.

If the Committee decides to recommend passage of this measure and desires to keep the Bureau involved, we respectfully request that the measure be amended to specify that the request to draft proposed legislation be submitted to the Bureau no later than September 1, 2021, so that work on the proposed legislation would not adversely impact our ability to provide our core services to the Legislature for the upcoming Regular Session.

If the measure is amended to address the concerns noted above to have the Bureau assist with proposed legislation, and a specific deadline is inserted for submission of proposed legislation, the Bureau believes that the services requested under the measure would be manageable and that the Bureau will be able to provide the services in the time allotted; provided that the Bureau's interim workload is not adversely impacted by too many other studies or additional responsibilities, such as conducting studies, writing or finalizing other reports, drafting legislation, or any combination of these for the Legislature or for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for the opportunity to submit written comments.

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THE HONORABLE CLARANCE K. NISHIHARA, CHAIR
SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND
MILITARY AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

February 9, 2021

RE: S.B. 1244; RELATING TO MODERNIZATION OF CRIMINAL JUSTICE.

Chair Nishihara, Vice Chair English, and members of the Senate Committee on Public Safety, Intergovernmental, and Military Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to S.B. 1244.

The purpose of S.B.1244, is to re-examine the current criminal pretrial procedures following the passage of Act 179 (2019) and to implement the remaining recommendations based on the findings of the House Concurrent Resolution 134 Task Force report. While the Department appreciates the Committee's good intentions of improving upon current procedures, we agree with the various committees which reviewed and received testimony during the passage of Act 179 during the 2019 Legislative Session which prompted the removal of these problematic sections. Additionally, the Department would note that currently as addressed in the preamble of this bill, the Judiciary has the ability to implement some of the changes as it relates to the release of pretrial detainees proposed in S.B. 1244 without statutory amendments.

With regards to the specific contents of S.B. 1244, we would also like to note the following issues:

Section 2 (pg. 6-8, ln. 8-21, 1-10)

By creating a broad range of eligible offenses (traffic offenses, violations, and non-violent misdemeanor or petty misdemeanor offenses) while creating a static list of excludable offenses (domestic violence, sexual assault, robbery, assault, terroristic threatening, violations of TROs and VOPs, OVUII, negligent homicide and any other crimes of violence) this section fails to take into account that there are a plethora of charges classified as non-violent misdemeanor and petty misdemeanor offenses that are not excluded. This includes but is not limited to Promoting Pornography for Minors (§712-1215, H.R.S.), and Solicitation of a Minor for Prostitution (§712-

1209.1, H.R.S.), Harassment by Stalking (§711-1106.1, H.R.S.), and Violation of an Injunction Against Harassment (§604-10.5, H.R.S.). While the Department understands the Legislature's desire to lower the number of pretrial detainees, we urge the committee to maintain the current safeguards that are used to assess a pretrial detainee, beyond whether they will appear for court hearings. In particular, the Department believes it is extremely important for the court to consider any potential dangerousness, obstruction of justice, witness tampering and illegal activity, when determining if and how to release an individual back into the community, pending trial.

In addition, the Department would raise concerns over the amendments made in S.B. 1244, pertaining to the release of defendants who are unable to post bail that is set at an amount of \$99 or less. The Department would note that bail is routinely set at a nominal amount for defendants who may have additional felony offenses that preclude their release. By removing bail for the defendant's lower level offense this amendment would preclude that person from receiving jail credit for time that he or she may be serving. To create a blanket release by the Public Safety Department based on an arbitrary bail amount (\$99 or less) after a judge has deemed detention was necessary for public safety would be an unwarranted and an unsafe risk, not only for victims and witnesses, but potentially for the general public as well.

Section 3 (pg. 8-11, ln. 11-20, 1-3)

The Department would note that although this section was a recommendation by the task force, no proposed legislation was provided and this section merely contains as much substantive language from the task force's recommendation. This bill seeks to create a rebuttable presumption for release of all offenses with the exception of Murder, Attempted Murder, Class A felonies, and B and C felonies involving violence or threats of violence. This places the burden on the prosecution to establish, via an evidentiary hearing, that individuals charged with offenses such as Habitually Operating a Vehicle Under the Influence of an Intoxicant, Burglary, Criminal Property Damage, felony Theft, car theft, Forgery, Fraud, Bribery, Computer Crimes, Credit Card offenses, Money Laundering, Arson, Cruelty to Animals, Violation of Privacy, Gambling, Promoting Pornography, and various drug offenses should not be automatically released from custody. This proposal appears to create a mandated contested hearing by shifting the burden to the state to show, by clear and convincing evidence that a serious risk exists to require an individual's continued detention. This would only add to the "victimization" that victims in these cases already feel, in the course of their involvement with our criminal justice system, and all prior to the actual trial. For examples, victims of Sex Assault in the Third Degree would first be subpoenaed to testify regarding the sexual assault in a preliminary hearing or grand jury. Then, as proposed in S.B. 1244, this same sex assault victim would be required to testify in a bail hearing; then they would be subpoenaed for court (at minimum) a third time for trial, to recount and re-live their sexual assault on the witness stand, subject to cross-examination, face-to-face with the perpetrator. And the minimum three appearances would only apply if the proceedings are never continued, which is rarely the case. The added time-commitment, stress, and potential re-traumatization, could potentially lead to reduced participation by victims who feel re-victimized by the system, which is ostensibly put in place to provide protection. This section will additionally create a huge influx of contested hearings which will delay trial cases, create a backlog, and impose a large financial burden for a number of agencies without proper funding. Lastly, as currently written, this section does not outline any procedure or mechanism to initiate such a hearing on behalf of the defendant.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of S.B. 1244. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney



Rebecca Vogt Like
Second Deputy

Jennifer S. Winn
First Deputy

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Victim/Witness Program Director

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THE HONORABLE CLARENCE K. NISHIHARA, CHAIR
THE HONORABLE J. KALANI ENGLISH, VICE CHAIR
SENATE COMMITTEE ON PUBLIC SAFETY
Thirty-First State Legislature
Regular Session of 2021
State of Hawaii

February 9, 2021

RE: S.B. 1244 – RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE

Chair Nishihara, Vice Chair English, and members of the Senate Committee on Human Services, the Office of the Prosecuting Attorney of the County of Kauai submits the following testimony in support of S.B. 1244.

This bill eliminates the use of monetary bail, with certain exceptions and requires individuals charged with traffic offenses, violations, non-violent petty misdemeanor and misdemeanor offenses to be released on their own recognizance.

Article 1, Section 12 of the Hawaii State Constitution prohibits excessive bail and states, "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." Further, the Hawaii Revised Statutes allow bail to be denied in four circumstances: (1) flight risk, (2) serious danger to witness or juror, (3) serious danger to person or community, or, (4) serious risk that person will engage in illegal activity.

Monetary bail disproportionately affects people of color and low-income individuals. It results in people being held in jail while their case is pending. Thus, the presumption of innocence rests on whether an individual can produce enough cash to bail out. The two main purposes for denying bail, or holding someone pretrial, as articulated by the Hawaii Constitution and the Hawaii Revised Statutes are to make sure an individual appears and to protect

the public from serious harm. The current bail system does not accomplish these goals. Instead, monetary bail prevents an individual from maintaining housing, employment, custody of children, connections in the community and access to services. Monetary bail also puts pressure on individuals to plead guilty to offenses in order to get released.

The consequences of the current monetary bail system make our community less safe by eliminating an individual's ability to contribute to and participate in their community solely based on their income. Further, jails have been one of the epicenters of COVID-19 transmission leading to further spread in adjacent communities making bail reform not just a public safety concern, but a public health concern as well.

For these reasons, the Office of the Prosecuting Attorney supports the passage of S.B. 1244. Thank you for this opportunity to testify.

STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai'i to the Senate Committee on
Public Safety, Intergovernmental, and Military Affairs**

February 9, 2021

S.B. No. 1244: RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE.

Chair Nishihara, Vice Chair English, and Members of the Committee:

The Office of the Public Defender (“OPD”) supports abolishing money bail, ending mandatory sentencing, decriminalizing drug offenses, and expanding sentencing options and alternatives to incarceration in our state. For these reasons, we are here to testify in **support of S.B. No. 1244** because it is a good first step toward righting injustice and to offer some recommendations to strengthen it.

Hawai'i should abolish money bail as a condition of release. It is a poor tool for achieving pretrial justice. The money bail system incarcerates poor people because they are poor, not because they have been convicted of a crime and not because they are a danger to others. Meanwhile, that same system allows dangerous but wealthy people to post their bond and be released.

The United States Supreme Court affirmed over thirty years ago that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹ In practice just the opposite is true. A 2018 report by the American Civil Liberties Union Hawai'i (“ACLU Hawai'i”) found that, overall, judges in the State of Hawai'i require bail as a condition of release in 88 percent of cases, with judges on Kaua'i imposing bail in 98.5 percent of cases, and on O'ahu in 93 percent of cases.²

The use of money bail is often justified on the grounds that it makes us safer by keeping dangerous people in jail. But the Hawai'i Criminal Pretrial Reform 134 Task

¹ Salerno v. United States, 481 U.S. 739, 755 (1987).

² ACLU Hawai'i, “As Much Justice As You Can Afford” (2018) at 23, <https://www.acluhi.org/sites/default/files/2018/01/aclu-of-hawaii-bail-report.pdf>

Force Report chaired by judge (now U.S. magistrate) Rom A. Trader stated, “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.”³ Thus, money bail is a poor method of assessing and managing a defendant’s risks.

Hawai‘i’s practice of making the payment of a money bond a condition for pretrial release discriminates based on wealth, exacerbates racial disparities, results in over-incarceration, and imposes unnecessary costs on individuals and society at large.⁴ On February 1, 2021, 883 people were incarcerated throughout the State even though they have not been convicted of a crime. Feeding and caring for an incarcerated person costs \$198 a day in Hawai‘i.⁵ Pre-COVID19 the State was spending approximately \$209,000 a day (\$76 million annually) of taxpayer dollars to incarcerate more than 1,000 people statewide simply because they were too poor to afford bail.⁶ Data collected over the years tell us that 80 percent of these individuals are charged with relatively low-level offenses and many are homeless or living with mental illness or substance use disorders.⁷

These costs come with trade-offs in other state spending priorities like education and healthcare. Between 1987 and 2007, corrections budgets rose by 127 percent while higher education funding increased by only 21 percent forcing the cost of attending higher education to increase each year. The cost of attending the University of Hawai‘i at Mānoa for the 2019-2020 school year, including tuition, room, board,

³ Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawai‘i “HCR 134” (December 2018), https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR134-Task-Force-on-Pretrial-Reform_Final-Report_12.14.18.pdf.

⁴ Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai‘i Legislature 2019 Regular Session, “Creating Better Outcomes, Safer Communities” (December 2018), https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform_Final-Report_12.28.18.pdf.

⁵ State of Hawai‘i Department of Public Safety Annual Report FY 2019 at 16, <https://dps.hawaii.gov/wp-content/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf>.

⁶ HCR 85 Report at 64.

⁷ HCR 85 Report at 65.

books, supplies, and personal expenses, was \$30,000.⁸ With the daily savings from bail reform we could pay all expenses for a full year of education for 7 students at U.H. Mānoa, and with the savings from a year of bail reform we could pay all expenses for more than 2,500 students.

Beyond the wasteful money, pretrial incarceration leads to devastating collateral consequences that can impact individuals for lifetime and families for generations. People who can't make bail stand to lose their job and with that the money that pays the rent and utilities and puts food on the table for their family. They may lose their house, their car, their health insurance, and after maxing out on their credit cards the family may end up deep in debt or even homeless. Holding people in jail who do not pose a significant safety risk of danger also exacerbates overcrowding, creates unsafe conditions, places a huge financial burden on taxpayers, and compromises public safety.⁹

Our current bail practice in Hawai'i is not punishing the most guilty, but rather the people who cannot afford to pay for their release. As an attorney assigned to represent indigent clients, many of whom are in jail because they cannot afford to make bail; I have seen firsthand that some innocent people plead guilty just to get out jail, and people are more likely to be acquitted if they pay bail, in part because they are less likely to take plea deals just to get out of jail.

For these reasons, the OPD supports limiting pretrial detention and eliminating money bail and believes that this Act, which eliminates the use of monetary bail, with certain exceptions, and creates a rebuttable presumption regarding both release and detention for certain offenses and specific circumstances, is a step in the right direction.

These critical pieces of the pretrial system were sorely missing in Act 179. Implementing just these two recommendations, will enhance the system and reduce the population without sacrificing public safety.

⁸ University of Hawai'i at Mānoa, 2019-2020 Cost of Attendance, Accessed December 31, 2019, <https://www.collegesimply.com/colleges/hawaii/university-of-hawaii-at-manoa/price/>.

⁹ National Institute of Corrections, "The Hidden Costs of Pretrial Detention" (2018) at 4, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (Finding the longer low-risk defendants are detained, the more likely they are to commit another low-level offense).

The OPD offers a few suggestions to strengthen and clarify the Act for consideration.

1. Release on own recognizance should be the presumption for all arrestees.

The OPD supports the intention to release non-violent offenders that can be safely returned to our community. However, the OPD believes that certain portions of the bill are too restrictive and may prevent consideration of certain individuals who can be safely released. For example, under the proposed legislation, **section 804-B(b)(2)(B)** “a defendant with one prior conviction for a misdemeanor crime of violence or felony crime of violence within the last ten years” would not be eligible for release on own recognizance. Here, there is no clear definition of what constitutes a crime of violence. This provision will restrict a court from releasing a defendant even if it determines that it is safe and reasonable to do so.

OPD recommends this section be amended to include a presumption of release on own recognizance for all arrestees. Additionally, the burden should be on the state to prove with clear and convincing evidence that detention or conditional release is necessary to assure the defendant’s appearance in court, or the safety of any other person or the community.

2. Add “significant” to qualify risk of danger to any other person or to the community.

The current wording in proposed **section 804-B(b)(2)(F)** is too vague and may lead to individuals being detained that should otherwise be released. As written, this section would prevent release on own recognizance for defendants that present “a risk of danger to any other person or to the community.” This section is vague as to the kind of risk that would be necessary to detain an individual. Even someone of “minimal” risk, as opposed to “substantial” or “serious” risk of danger to another would not be eligible for release under the current proposal. Civil commitment hospitalization criteria under H.R.S. section 334-60.2 requires a court finding that a person be *imminently* dangerous to others before a person can be committed. Hence, many of our mentally ill will be at risk of being jailed in a punitive setting under the proposed statutory language, even if they do not fit the criteria for hospital level civil commitment. This is clearly not the intention of anyone. OPD recommends this section be amended as follows: “a *significant* risk of danger to any other person or to the community.”

OPD strongly supports Part III of the Act to review the Hawai‘i Penal Code to review areas of concern and that improve the system. The next review is in 2025. We cannot wait until then. Mandatory sentencing provisions and drug offenses are severely unfair to people living in poverty, with mental health and substance use disorders, women, and Native Hawaiians, Pacific Islanders, and Black communities and fail to make us safer.¹⁰

Mass incarceration is a result of many systems failing to support basic community needs people need to thrive. To end it, we must develop policies that better address inadequacies throughout our education, health care, and economic systems – to name a few. This Act is a step in the right direction to eliminate money bail and establishing a committee to review and recommend changes to the Hawai‘i Penal Code in order to create a justice system that treats everyone equally and makes us all safer.

We thank you for the opportunity to comment on S.B. No. 1244.

¹⁰ ACLU Hawai‘i, “Blueprint for Smart Justice Hawai‘i” (2019), <https://50stateblueprint.aclu.org/states/hawaii/>.

SB-1244

Submitted on: 2/5/2021 6:18:48 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

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

Comments:

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

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS

Senator Clarence Nishihara, Chair

Senator Kalani English, Vice Chair

Tuesday, February 9, 2021

1:20 PM

SUPPORT FOR SB 1244 - THE MODERNIZATION OF CRIMINAL JUSTICE

Aloha Chair Nishihara, Vice Chair English, 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 more than 4,100 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 1,000 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.

Community Alliance on Prisons is in strong support of eliminating money bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses. A report from Harvard on Bail Reform¹ highlights the urgency of bail reform:

Money bail exacerbates the disparities of the criminal justice system. By nature, money bail discriminates against low-income people through bond amounts that are either burdensome or unaffordable. Because wealth and race are correlated, money bail disproportionately harms Black and Latinx defendants. Implicit and explicit racial biases make this worse. Recent empirical research finds that judges overpredict the risk of Black defendants committing crimes on pretrial release and underpredict the risk of white defendants committing crimes on pretrial release.¹

THE DATA

Hawai'i data show that non-felony conviction rates jump from 50% for people released pre-trial to 92% for those jailed. (ACLU Bail Report).

¹ Bail Reform: A Guide for State and Local Policymakers by the Criminal Justice Policy Program (CJPP) at Harvard Law School (2019). <https://university.pretrial.org/viewdocument/bail-reform-a-guide-for-state-and>

David Arnold et al., Racial Bias in Bail Decisions, 133 Q. J. ECON. 1885, at 1889–90 (2018).

We have asked the Department of Public Safety's Administrator of the Intake Services Division if they could look through the 2020 intake records to determine how many people were living unsheltered at the time of arrest. PSD has been very helpful in obtaining this information.

Here is the information I received from PSD regarding 2020 jail admissions:

Of the 6591 people who were admitted into the community correctional centers in 2020, 37.5% of them (2474) reported being unsheltered. There were another 20 who reported staying in an emergency or transitional shelter. The information gathered was self-reported and unverified. Also, the number of unsheltered is likely higher as 3.5% of the people (233) who were admitted could not or did not disclose any information.

Unfortunately, the data that was pulled was not identified by county. The numbers are for Statewide admissions. For some perspective, Oahu accounts for 59% of the admissions, Hawaii 21%, Maui 12%, and Kauai 8%.

This data reveals that in 2020, more than 40% of admissions to Hawai'i jails statewide were living unsheltered or in an emergency or transitional shelter at the time of arrest. number of incarcerated Kanaka Maoli, far from their ancestral lands.

Hawai'i has to face the fact that our policies have created this travesty and blaming individuals and families for their hardship does not address the challenges our communities face daily. We have a pitifully low minimum wage, outrageously over-priced rental market, high utility rates, and food prices as policies have encouraged and incentivized businesses from elsewhere to come to Hawai'i rather than supporting and lifting up our local businesses. Waikiki is a good example of how Wall Street has benefited on the backs of our people and environment. Poverty crimes should be a clarion call to the legislature that we are on the wrong course.

And where has that left our people? The most vulnerable people in our community have been pushed to the margins where they then might commit petty 'crimes' just to feed themselves. Does throwing struggling people in jail do anything to change their situation? Our community correctional centers have become the defacto mental health centers and shelters. This is a perversion of justice.

THE RESEARCH

A 2016 report² on the impact of detaining the poor stated: People in local jails are significantly poorer than non-incarcerated people, and even poorer than people in prison, finds a new report by the nonprofit Prison Policy Initiative. The recommendations:

1. Stop locking people up for failure to pay fines and fees
2. Eliminate the use of money bail

² DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016)
<http://www.prisonpolicy.org/reports/incomejails.html>

3. Reduce the number of arrests that lead to jail bookings through increased use of citations and diversion programs
4. Increase funding of indigent criminal defense
5. Eliminate all pay-to-stay programs
6. Reduce the high costs of phone calls home from prisons and jails and stop replacing in person jail visits with expensive video visitation.

Another report³, also from 2016, examined the consequences of pretrial detention and found that it has a significant impact on downstream criminal justice outcomes— both in the immediate case, and through the future criminal activity of detained defendants. **Detention increases the rate of guilty pleas, and leads detained individuals to commit more crime in the future.**

WHO BENEFITS?

This data begs the question: Cui Bono? Who benefits? It is certainly not the people who have now been burdened with a criminal record. It is not the taxpayers who are footing the bill to incarcerate some of the most vulnerable people in our communities at a rate of \$198 a day.

WHO PAYS?⁴

- People with convictions are saddled with copious fees, fines, and debt
- Families lose income when a family member is removed
- Women bear the brunt of the costs— both financial and emotional
- Communities across Hawai`i who bear the cost of draconian policies

BETTER ALTERNATIVES:

A report on the price of jails⁵ is an important resource, a synopsis of the report reads:

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. This 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.

- **Widening the lens—looking beyond the jail to the decisions made by police, prosecutors, judges, and community corrections officials**

³ THE DOWNSTREAM CONSEQUENCES OF MISDEMEANOR PRETRIAL DETENTION (2016)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809840

⁴ WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015)
<http://whopaysreport.org/>

- **Significantly reduce the size of 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.”**

Community Alliance on Prisons implores the committee to look at the policies that have driven people into poverty.

We urge the committee to pass this important measure, especially in these challenging times for our economy, that will reduce overcrowded jail populations, will save precious resources, will help jail management as people have more room to breathe, and will start to promote a more just and humane system as recommended in the HCR 85 Final Task Force Report⁵.

Let’s build a system of justice that is a shining example of reason, compassion, and humanity and that embraces the Hawaiian values to which we should all aspire:

- Aloha: caring, compassion for others, love, affection.
- Ha`aha`a: humility, humbleness, modesty.
- `Ike Pono: to know, to feel, to understand.
- Kokua: help, assist, comfort, support.
- Kuleana: privilege, responsibility, title, job.
- Laulima: many hands working together
- Lokahi: unity, agreement, accord
- Malama: caring, nurturing others, to protect
- Pono: right, good, moral, fair, just

Mahalo for this opportunity to share our research and aloha with the committee on the importance of eliminating money bail and promoting justice!

“Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.”

Dr. Martin Luther King, Jr.

⁵ CREATING BETTER OUTCOMES, SAFER COMMUNITIES, Final Report of the HCR 85 Correctional Reform Task Force, 2019. https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf



SB 1244, RELATING TO THE MODERNIZATION OF CRIMINAL JUSTICE

FEBRUARY 9, 2021 · SENATE PUBLIC SAFETY,
INTERGOVERNMENTAL, AND MILITARY AFFAIRS
COMMITTEE · CHAIR SEN. CLARENCE K.
NISHIHARA

POSITION: Support.

RATIONALE: Imua Alliance supports SB 1244, relating to the modernization of criminal justice, which requires bail to be set in reasonable amounts based upon all available information, including the alleged offense, possible punishment upon conviction, and the offender's financial ability to afford bail; and repeals the requirement of an officer letting to bail to consider the punishment to be inflicted on conviction and the pecuniary circumstances of the party accused.

Imua Alliance is one of the state's largest victim service providers for survivors of sex trafficking. Over the past 10 years, we have provided comprehensive direct intervention services to over 160 victims, successfully emancipating them from slavery and assisting in their restoration, while providing a range of targeted services to over 1,000 victims in total. Each of the victims we have assisted has suffered from complex and overlapping trauma, including post-traumatic stress disorder, depression and anxiety, dissociation, parasuicidal behavior, and substance abuse. Trafficking-related trauma can lead to a complete loss of identity. A victim we cared for in 2016, for example, had become so heavily trauma bonded to her pimp that while under his grasp, she couldn't remember her own name. Yet, sadly, **many of the victims with whom we work are misidentified as so-called "voluntary prostitutes" and are subsequently arrested and incarcerated, with no financial resources from which to pay for their release.**

Hawai'i has approximately 5,500 inmates, over 1,500 of whom are incarcerated overseas, away from their families and homeland. According to a report by the American Civil Liberties Union released last year, pre-trial detainees in Honolulu wait an average of 71 days for trial because they cannot afford bail. Additionally, researchers found that circuit courts in Hawai'i set money bail as a condition of release in 88 percent of cases, though only 44 percent of those people managed to post the amount of bail set by the court. Moreover, the study found the average bail amount for a Class C felony on O'ahu is set at \$20,000. Even with help from a bail bonding agency, posting bond, in such cases, would require an out-of-pocket expense of roughly \$2,000. Finally, while officials claim that bail amounts are supposed to be based on a consideration of multiple factors—including flight risk, ability to pay, and danger to the community—researchers learned that in 91 percent of cases in Hawai'i, money bail mirrored the amount set by police in arrest warrants, an amount based solely on the crime charged. These injustices led the ACLU to declare that our state's pretrial detention system was and remains unconstitutional.

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



TESTIMONY OF TINA YAMAKI, PRESIDENT
RETAIL MERCHANTS OF HAWAII

February 9, 2021

Re: SB 1244 Relating to Modernization of Criminal Justice

Good afternoon Chairperson Nishihara members of the Senate Committee on Public Safety, Intergovernmental and Military Affairs. I am Tina Yamaki, President of the Retail Merchants of Hawaii and I appreciate this opportunity to testify.

The Retail Merchants of Hawaii was founded in 1901, RMH is a statewide, not for profit trade organization committed to the growth and development of the retail industry in Hawaii. Our membership includes small mom & pop stores, large box stores, resellers, luxury retail, department stores, shopping malls, local, national, and international retailers, chains, and everyone in between.

While we understand the intent, RMH is **STRONGLY OPPOSED** to SB 1244 Relating to Modernization of Criminal Justice. This measure eliminates the use of monetary bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses; creates a rebuttable presumption regarding both release and detention for certain offenses and specifies circumstances in which these presumptions apply; requires the judicial council to appoint a committee to review and recommend changes to the Hawaii penal code.

We are very concerned as this bill essentially gives those who have been arrested for a non-violent petty misdemeanor crime like shoplifting, harassment, disorderly conduct to name a few to be released without much consequence or an assurance they will in fact show up for court. **It's a big win for the offenders especially career criminals and an even bigger loss for anyone in the community who is a victim of a crime including shop lifting, break ins of home and car.**

Retailers have major concerns on this measure.

- **Many thieves know the exact value of what they are stealing and makes sure that what they are taking is valued right under the minimum threshold.** Retailers have been facing an upward increase in theft - from designer clothing to handbags to sunglasses to electronics to spam to cosmetics to liquor to tobacco to name a few.
- **Because there is NO monetary bail set and NO reporting or supervision of any type, the offenders that are caught and released will be back in our stores stealing once again within hours.** This bill highlights that there is no real consequence to those offenders of non-violent crimes including career criminals.
- **For organized retail criminals, they consider stealing from our stores their daily job.** The thieves are part of organized retail crime and come into the stores daily with a list of items, like your grocery list, of things that they are going to steal.
- **It is a losing battle for many retailers** where the police may or may not catch and arrest the thieves. When HPD does arrests them and lets them go after being processed, the thieves are right back into the stores stealing again. Then it is the prosecutors who may or may not prosecute them regardless of the number of priors they have. IF they don't prosecute, the thieves are right back in the stores stealing. If we are lucky to get a prosecution, the judges often let the thieves off easy with a slap on the wrist as it is a non-violent crime and within hours the thieves are back in the stores stealing again. **Bills like this give criminals the green light to do nonviolent illegal activities as there are no real consequences for their actions only a slap on the wrist.**
- **Although these crimes are not violent, they are still crimes and the victims are not just the retailers but the community as well.** There is only so much a retailer can absorb before we must raise the prices of items to cover the loss. And there is a limit on how much we can raise our prices to remain competitive and in business. **When we raise our prices the cost of living in Hawaii also increases. The alternative we have is to let go hard-working law-abiding employees or close our doors for good.**

We urge you to hold this measure. Mahalo again for this opportunity to testify.

LATE



Hawai'i

Committees: Committee on Public Safety, Intergovernmental, & Military Affairs
Hearing Date/Time: Tuesday, February 9, 2021, 1:20 p.m.
Place: Via videoconference
Re: Testimony of the ACLU of Hawai'i with comments regarding S.B. 1244, Relating to the Modernization of Criminal Justice

Dear Chair Nishihara, Vice Chair English, and members of the Committee,

The American Civil Liberties Union of Hawai'i offers comments regarding S.B. 1244 which seeks to reform the current bail system in Hawai'i.

Pretrial incarceration is one of the major drivers of overcrowding in Hawaii's jails. Currently, roughly one-third of all individuals housed in Hawaii's correctional facilities and more than half of those housed at the Oahu Community Correctional Center have not been convicted of any crime and are merely awaiting trial,¹ most often because they cannot afford the amount of bail set in their case.

Bail, in any form, *should never be used* as a punitive tool, and any conditions set for release should be only as restrictive as is absolutely necessary to ensure that the accused shows up to court. In *United States v. Salerno*, 481 U.S. 739, 755 (1987) the United States Supreme Court advised that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” But over the years our State has fallen short of that dictate. And, unfortunately, the list of exceptions in S.B. 1244 is not “carefully limited” and will only cement a system in which detention prior to trial *is* the norm. While we support the general intent behind this legislation, we have concerns that with its broad exceptions, this legislation will not sufficiently address the problems within our pretrial system. We therefore respectfully request the Committee amend this bill to reflect the following:

- 1) Throughout, *see, e.g.*, P. 6, lines 16-17; P. 9, line 10: References to nonappearance in court and “protect[ing] the public” should be amended. As a matter of policy, the appropriate risks should be that of: 1) intentional, willful flight; or 2) specific threat of imminent harm to an *identifiable* person or persons.
- 2) P. 7, lines 10-11: This provision should be amended to clarify the word “history” to mean a pattern of non-appearance, not a single occurrence. The period of time should also be reduced.
- 3) P. 7, lines 12-14: This provision excludes anyone with a history of a violent misdemeanor or violent felony offense within the last decade. While this seems reasonable on first pass,

¹ State of Hawai'i Dep't of Pub. Safety, Weekly Population Report (February 1, 2021).

Chair Nishihara and Members of the Committee on Public Safety, Intergovernmental, & Military Affairs

February 9, 2021

Page 2 of 2

a person's actions nine years ago do not automatically determine a person's present-day flight risk or dangerousness to a specific person in the community. This provision should be narrowed further.

- 4) P. 8, lines 3-4: This should be amended to read “The defendant presents a risk specific threat of imminent harm ~~of danger~~ to any other identifiable person or persons ~~to the community.~~”
- 5) P. 8, lines 5-6: This should be amended to read “bail may be set in a reasonable amount, in light of the financial circumstances of the defendant.”
- 6) P. 9, lines 19-20: This provision could be used to justify detaining all houseless people who are arrested, because if they go back on the street and sleep on the sidewalk or in the park, they will be engaging in illegal activity. This should be narrowed further.
- 7) Section 3: References to “threats of violence” are vague and should be deleted.

Thank you for the opportunity to testify.

Sincerely,



Mandy Fernandes
Policy Director
ACLU of Hawai'i

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

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SB 1244 Testimony, James Waldron Lindblad. Support with Caution and Amendment.

COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS

Senator Clarence K. Nishihara, Chair

Senator J. Kalani English, Vice Chair

NOTICE OF HEARING

Agenda Item #10 SB 1244

Relating to Modernization Criminal Justice

DATE: Tuesday, February 9, 2021

TIME: 1:20 p.m.

PLACE: Via Videoconference

Testimony in Support with Caution & Subject to Amendment To Page 9, Sufficient Sureties

By: James Waldron Lindblad. Ph: 808-780-8887 James.Lindblad@gmail.com

Chair and Members of the Committee:

My name is James Waldron Lindblad. I am a former pretrial worker and am presently a bail bond agent. I also sell surety bonds including licensing bonds. I have followed bail and pretrial release matters since 1973.

The first purpose of proposed SB1244 is to change the criminal justice system in Hawaii by deleting bail requirements for certain classes of crime. SB1244, eliminates the use of monetary bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses. The measure does not seek to eliminate bail by sufficient sureties nor does the bill impact bail agents or those persons requiring secured bail when set by the court. The second purpose is SB1244 creates a rebuttable presumption regarding both release and detention for certain offenses and specifies circumstances in which these presumptions apply. Third, SB1244 requires the judicial council to appoint a committee to review and recommend changes to the Hawaii penal code. In other words, SB 1244, implements recommendation numbers 20 and 21, on page 6, of the HCR 134 Criminal Pretrial Task Force Report dated December, 2018.

*This testimony is primarily focused and limited to page 9, of the Proposed SB 1244 where the SB 1244 removes bail by sufficient sureties, which I think was by accident or mistake or confusion as there is no purpose to removing this language. The same mixup occurred on SB 192 and HB 1552 of the 2019 legislative sessions and the language was restored and left intact. I ask that the language be restored here in SB 1244 as well. The reasons are as follows.

The HCR 134 Task Force Report never asked for elimination of bail by sufficient sureties, also known as secured bail. Since 2019, we now also have HRS 804-9.5, Unsecured bail. This is in addition to judges releasing almost everyone from HPD as noted in booking logs available online. <https://www.honoluluupd.org/information/arrest-logs/> Thus, I urge caution as this bill seems rushed. The judiciary has taken many steps to release many more pretrial defendants both at court and even at HPD where judges routinely release almost everyone as seen on the booking logs. Further, HPD arrest and booking numbers are reduced. HPD arrested and booked 15,426 people in 2019, 14,727 people in 2018, 14,616 people in 2017, 20,907 people in 2016 and 24,438 in 2015. In 2009 there were 30,413 arrested, in 2010 there were 30,601 arrested and in 2011 29,814 arrested. In 2015, HPD processed 17,738 adults and juveniles, provided 41,491 meals and transported 9,654 arrestees to the court detention facility. In 2007, there were 41,748 combined adult and juvenile arrests. (32,722 adults and 9006 juveniles) And 2008 and 2009 the numbers were close to this with about 39,000 combined arrests. The 2014 numbers were 15,600 adults 37,600 meals and 9,100 transported to court detention facilities. The 2015 booking logs showed 4,760 OUVII - Driving Drunk arrested.

These massive numbers of arrests result in very few people languishing at OCCC. This is especially true on a percentage basis. Taking 3% of 20,000 is 600. That means on average about 3% are held at OCCC. This proves Hawai'i has a high functioning pretrial process. Many states have much higher averages, including Washington D.C., where approximately 11% or about 2000 of those 19,000 arrested annually are held pretrial. Another report quotes 1,265 held as of June, 2020 due to covid. Plus there is the burden of added crime. The 2017 Pretrial Service Agency Financial report states 16,407 offenders were supervised over the course of one year with about 10,500 on any given day. This cost was about \$65MM annually. There was an approximate 12% failure rate in 2017 according to the annual report.

https://www.psa.gov/?q=about/budget_and_performance

Washington D.C., measures incarceration rates relevant to overall population and not those numbers arrested but we can approximate that pretrial services supervises the same numbers of those arrested and these numbers are close to that of Honolulu if using 17,000 arrests annually. This again proves Hawai'i has a very high functioning pretrial process.

Reducing Jail Populations in Washington, DC - Vera Institute ...

www.vera.org › [downloads](#) › [publications](#) › [coronaviru...](#)

Jul 7, 2020 – Though DC has already made some progress on reducing the jail's population—which declined from 1,854 people on March 18, 2020, to 1,265 people on June 29, 2020—the District can and must do much more—and do it quickly.

The urgency of the COVID-19 crisis requires far greater action from DC's criminal justice stakeholders than the steps that have been taken to date. Though DC has already made some progress on reducing the jail's population—which declined from 1,854 people on March 18, 2020, to 1,265 people on June 29, 2020—the District can and must do much more—and do it quickly. DC lags behind decarceration efforts in other cities. Prior to the COVID-19 crisis, DC's jail incarceration rate (263 per 100,000) was substantially higher than both San Francisco's (124 people per 100,000) and New York City's (65 people per 100,000). Yet, despite their significantly lower incarceration rates, both New York City and San Francisco have

reduced their jail populations at nearly the same rate or higher than DC: New York City has decreased by 27 percent; San Francisco by 35 percent; and DC by 32 percent.¹⁰ Indeed, across the country, the typical jail has reduced its population by more than 30 percent.¹¹ DC's jail incarceration rate still remains far too high—with a rate more than twice that of San Francisco and four times higher than New York City.

This article implies Washington D.C. has a high incarceration rate.

<https://wamu.org/story/19/09/10/district-of-corrections-does-d-c-really-have-the-highest-incarceration-rate-in-the-country/>

The point here is much is being done on the mainland that we can learn from and follow and we can avoid the pitfalls. HCR 134 Task Force members included members of the judiciary who are all taking steps to reduce jail populations. Not much time has gone by since Act 179 of 2019 and our judiciary is taking many steps to reduce the jail population. The HPD logs show this and the lowered numbers at OCCC show this. Why rush into this with more new legislation now? My feeling is more time is needed to allow both our Judiciary and our DPS to sort out Act 179 of 2019. We still do not have 24 hour bail implemented as required by Act 179. We still do not have bail release uniformity statewide but we are in the process and DPS cooperates in every way.

The intent of the SB 1244 is to improve the pretrial process and not to eliminate bail by sufficient surety and not to eliminate bail agents. There is no purpose or reason I know of that requires the bill to eliminate the *sufficient sureties* language from our statutory scheme such as on Page 9 of the bill seems to do. Further, even if the intent is not to eliminate bail agents now by eliminating these words, ***bailable by sufficient sureties***, the taking out of this language would make it easier to eliminate bail agents later and this is not the purpose or intent of SB 1244. I ask that the committee report reflect the intent of this measure is not to eliminate bail agents or any other means of bail or pretrial release by sufficient sureties. This is known as “secured bail.” In other words, the bill does not want to limit judicial options or choices but the bill wants to add options and choices for our judges.

Limiting “cash only bail,” or bail paid only by cash differs greatly from limiting or canceling out or denying the right to bail by sufficient sureties. There is no intent in SB 1244 to limit bail by sufficient sureties. The intent of SB 1244 is to drop the bail requirement altogether for certain crimes and release those accused without bail. I favor this and I have testified many times in support of reform to help reduce the jail population and to ensure justice and fairness in the criminal justice system but there is always a rebound effect that must be paid and monitored and this is more crime and more warrants. In 2011, HPD listed 1,356 felony warrants received and listed 1,146 felony warrants served. In 2011 there were 9,189 misdemeanor warrants received by HPD and 5,771 served. Unbelievably HPD lists another 2,150 Felony warrants on file and 21,210 misdemeanor warrants on file in their 2011 annual report on page 32. That is a lot of warrants but that is what happens when courts cannot set bail and ISC cannot find defendants and we must prepare our infrastructure to deal with more warrants. Bail agents utilize third party co-signers to avoid almost every problem regarding failure to appear and ISC cannot do this and must deal only with the defendant which is a disadvantage. Even with a \$65MM annual budget Washington D.C., is worse off than Honolulu.

Bail by sufficient sureties or secured bail is very important and I ask that Section (b) be restored as restoring Section (b) will have no impact on the intent and purpose of SB 1244. A good solution would be to insert the word, “however,” and then leave it alone and include all of the language. For instance,

(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 however, there shall be a rebuttable presumption...

There is no need to take out the language bailable by sufficient sureties.

S.B. NO. 1244

1 "Bail" includes release on one's own recognizance,
2 supervised release, and conditional release.

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

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

Just imagine yourself late at night at HPD needing \$500 or \$1000 v paying a percentage or signing an agreement or pledge to pay. This is why our judiciary sends a judge to HPD to release many of those arrested. See booking logs.

<https://www.honolulu.hpd.org/information/arrest-logs/>

As such, please see the Barton Case: Barton explains bail by sufficient surety and how cash only bail differs. Cash only bail is different than surety bail as cash only bail is more restrictive and is different too than when money is substituted and paid using cash money rather than surety.

<http://blog.808bail.com/2015/02/>

In my view, the Barton case explains the importance of bail by sufficient sureties best. Substituting cash or property for bail by sufficient sureties is explained. I think it is the restriction of bail to cash only that is objectionable and unfair as bail is community based. Most of my bail bonds are issued to parents posting bail for their children. We rarely, if ever issue a bail bond to defendants on their own. This is because we require 3rd party indemnity and sometimes collateral to ensure compliance. Courts and Intake Services cannot do this and must deal only with the defendant, one on one.

History: 2019 Testimony on Same Subject of Removing Bail By Sufficient Sureties.

Attached here are previously submitted concerns during the 2019 legislative session relevant to this section on Page 9 of SB 2044 that I believe is needed to preserve our right to bail by sufficient sureties. This testimony inserted here applies to reasons and negative effects or unintended consequences of taking out the bail sufficient sureties language.

SB 1244 Page 9.

2 supervised release, and conditional release.
3 (b) [~~Any person charged with a criminal offense shall be~~
4 ~~bailable by sufficient sureties; provided that bail may be~~
5 ~~denied where the charge is for a serious crime, and:] There
6 shall be a rebuttable presumption that a person charged with a~~

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

Adverse outcome #1 - Removing the specific words “sufficient sureties” inadvertently removes the practice of third party actors assisting the most vulnerable of detainees and strengthening their argument for release.

For example, a bail agent is a third party, which functions as a “sufficient surety” to guarantee a detainee will return to court after release from custody. It’s critical to recognize sufficient sureties, because stand alone, many detainees do not qualify for release upon review of their attendance record, previous arrests, and mental health/substance abuse/housing history.

Adverse outcome #2 - A liberal defining of “sufficient sureties” can expand access to pre-trial release by involving many “alternative sureties” that are both sufficient and effective.

For example, the concept of a sufficient third party as surety, maybe also be applied to:

- social service agencies-military chain of command units
- church or faith based groups-non-profit and community outreach groups
- clean and sober home programs-drug treatment programs (inpatient & outpatient)
- mental health agencies -sponsors pledged to assist in supervised released programs
- innovative, but yet to be discovered or implemented third parties which can assist and support detainees through novel alternative programming

As I interpret the future of pretrial release, I think it’s critical to keep the term “sufficient sureties” in the statutes because the more options that may be associated with the term, the more cause a judge may find to release a detainee.

Adverse outcome #3 - A undefined benefit to removing the term “sufficient sureties.”

Unfortunately, I cannot see the benefit of the sentence’s removal. Although the upside is unclear, I admit I could be missing a detail or even the bigger picture as to why the sentence must be removed. In conclusion, my experience has been that the help of a third party, sufficient surety, overwhelmingly strengthens the case for a detainee’s release. Without a sufficient surety’s involvement, a Judge essentially releases a detainee on their “own recognizance,” with optional conditions set by the court; which is fine, but it’s also the least effective way to guarantee a defendant appears in court and highest category for re-arrest according to the US Department of Justice’s Bureau of Justice Statistics report on pre-trial released felony defendants: <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>

Table 7. State court felony defendants in the 75 largest counties charged with pretrial misconduct, 1990-2004

Variable	Number of defendants	Percent of released defendants charged with pretrial misconduct			
		Any type	Rearrest	Failure to appear	Fugitive
Type of pretrial release					
Release on recognizance	80,865	34%	17%	26%	8%
Surety bond	78,023	29	16	18	3
Conditional release	31,162	32	15	22	6
Deposit bond	20,993	30	14	22	7
Unsecured bond	17,001	36	14	30	10
Full cash bond	11,190	30	15	20	7
Property bond	3,649	27	17	14	4
Emergency release	2,656	52	17	45	10

I see no reasoning or upside of the aforementioned sentence's removal.

My feeling is the removal is a goof or a mistake and needs correcting. This is because it is my understanding removal or banning of money bail itself or bail agents or bail by sufficient suretyship is not intended with the SB 1421 intent or reasoning. As a suggestion, putting the language back would clarify the true intention as there is nothing in the HCR 134 report demanding the removal or banning of bail agents or modifying bail suretyship in Hawaii."

Summary:

I also take the following quote from an attorney familiar with pretrial release and bail matters who has 50 years of practicing law in Hawaii:

... "when judges paid more attention to the individuals brought before them. Perhaps it was because the judges had the responsibility to make the decision and could not defer to institutional cover."

Institutional cover in this context means the bail report.

We all want fewer people in jail, we are all concerned about the decrepit conditions of our present facilities and we all know the need for adequate jail/prison bedspace and I think HCR 134 report positions us for a giant step in the right direction and I support any and all recommendations of the HCR 134 Task Force. The HCR 134 Task Force did not ask for bail by sufficient sureties to be eliminated and the report does not want to ban bail agents. The HCR 134 report wants to improve the process. The recommendations in the report seek to improve current pretrial 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.

HPD arrests between 15,000 and 20,000 on average annually and there are only about 500/750 persons at OCCC that cannot make bail or be released on their own recognizance or on supervised release. The Intake Service Center in Hawai'i is among the best in the nation. The HCR 134 Task Force report proves Hawai'i has a high functioning pretrial process. Booking logs at HPD prove almost everyone is released before court and those 500 to 750 at OCCC that are left are among the lowest numbers percentage wise nationwide as Hawai'i ranks in the top 5 of all 50 states for fewest numbers of those held pretrial. When I was a recognizance officer at Clark County Community Corrections we ignored the truly needy and concentrated our efforts on those who could pay bail which is why I decided to become a bail agent. Bail is community based and has been since Socrates asked Plato to become surety. Family members should decide bail issues and we should support family based decisions. Jail saves lives and we need a new jail. A good comparison is Washington D.C., where 20,000 persons are arrested annually and at least \$65MM is spent on pretrial matters with worse results than Honolulu as over 10% are detained in D.C. (2000) and crime is rampant. We can do better in Hawai'i.

I agree with the HCR 134 Task Force report and the twenty-five recommendations but we need to correct page 9, of SB 1244, and put the ***bailable by sufficient sureties*** language back in to accurately reflect the intent of the HCR 134 Task Force report.

Conclusion:

The problem is there are too many people in jail. That is why I chose to participate in the legislative process. The solution is to find ways to reduce the jail population. The actions needed are all difficult as much has already been tried. We can eliminate bail and take away

judicial discretion and we can insist on police citation releases, both of which will increase crime. We can spend thousands of dollars hoping to convert criminals to law abiding citizens. We can change sentencing laws to reduce time in jail. We can legalize crimes like drug possession as Oregon is doing. Coining of the phrase, "monetary bail," has confused the issue on pretrial release. Secured bail or bail by sufficient surety v unsecured bail and citation release are clear examples that are understandable. Then there is cash only bail which is confused further with monetary bail. I have studied pretrial release and prison population management since 1973 and I have no 100% certain answer but I can compare our Hawai'i system to mainland systems and our Hawai'i pretrial system is high functioning. The small number of pretrial persons at OCCC (500 - 750) compared to the numbers arrested by HPD, 15,000 to 18,000 prove that. As to those pleading guilty only because they are in custody just to get out of jail early, that is a problem needing study. In my experience people do not plead guilty to crimes they did not commit. They plead to lesser charges because they know they are guilty. This is not disproportionate. Like democracy, nothing is perfect but our criminal justice system is superior to most. If I were in jail I would want bail as release or detain is much worse. I think SB 1244 is rushing things and more time is needed to see the results of Act 179 of 2019. Maintaining the right to bail by sufficient sureties is certainly required and I ask for this language to remain.

Thank you for this opportunity to testify on this measure.

James Waldron Lindblad

808-780-8887

James.Lindblad@Gmail.com

Rev 02.09.2021

SB-1244

Submitted on: 2/8/2021 12:00:53 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Raelyn Reyno Yeomans	Individual	Support	No

Comments:

Support.

LATE

SB-1244

Submitted on: 2/8/2021 1:35:19 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carla Allison	Individual	Support	No

Comments:

My name is Carla Allison and I strongly support SB1244. Hawaii's cash bail system creates two system of justice: People with resources can buy their way out of jail while Hawaii's people without resources are unable to afford their freedom. We penalize the poor and reward those with more assets. The system is unjust, imprisoning people before they've had a hearing/trial, and creates risk for those without funds: the risk of losing their job, children, and home. Hawaii citizens are paying to incarcerate innocent people and people arrested for low level crime. The current cash bail system creates overcrowding in our correctional facilities. Please support the elimination of cash bail and revamping Hawaii's penal code. Please support SB1244. Thank you!

LATE

SB-1244

Submitted on: 2/8/2021 6:40:57 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Courtney Mrowczynski	Individual	Support	No

Comments:

I strongly **support** SB1244. Eliminating the use of monetary bail, with certain exceptions, and requiring defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses is something that should have been done a long time ago. Monetary bail perpetuates inequities in the justice system that are disproportionately felt by communities of color and those experiencing poverty. Humanize, not criminalize!

LATE

SB-1244

Submitted on: 2/8/2021 11:56:11 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carrie Ann Shirota	Individual	Support	No

Comments:

I support SB 1244 that would eliminates the use of monetary bail, with certain exceptions, and requires defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses. Creates a rebuttable presumption regarding both release and detention for certain offenses and specifies circumstances in which these presumptions apply. Requires the judicial council to appoint a committee to review and recommend changes to the Hawaii penal code.

This measure promotes fundamental fairness, rather than maintaining the currrent bail system that disproportionately punishes the poor.

Furthermore, enacting this measure would significantly reduce the incarcerated population in our overcrowded jails. Savings from a modernized bail system should be invested in diversion programs and other community based services. Please pass SB 1244.

LATE

SB-1244

Submitted on: 2/8/2021 10:36:48 PM

Testimony for PSM on 2/9/2021 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Diana Bethel	Individual	Support	No

Comments:

Aloha Chair Nishihara, Vice Chair English, and Members of the Committee,

I am writing in strong support of SB 1244 which would eliminate the use of monetary bail, with certain exceptions, and require defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses. It would create a rebuttable presumption regarding both release and detention for certain offenses and specify circumstances in which these presumptions apply. It would also require the judicial council to appoint a committee to review and recommend changes to the Hawaii penal code.

The public has gradually become more aware of the inherent injustices in our current criminal justice system and we expect, at very least, the same degree of awareness on the part of our legislators. It is clear that requiring bail money for pre-trial defendants disadvantages poor people who cannot afford bail and leads to future negative social and economic consequences from detention and higher rates of conviction.

Please pass SB 1244. Mahalo for your consideration.

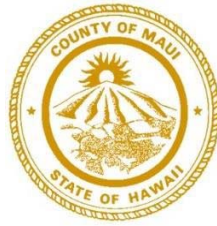
Diana Bethel, Honolulu

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TESTIMONY
ON
S.B. 1244 RELATING TO
THE MODERNIZATION OF CRIMINAL JUSTICE

February 9, 2021

The Honorable Clarence K. Nisihara
Chair

The Honorable J. Kalani English
Vice Chair

and Members of the Committee on Public Safety, Intergovernmental and Military Affairs

Chair Nisihara, Vice Chair English, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 1244, Relating to The Modernization of Criminal Justice. We would like to respectfully express our opposition to S.B. 1244 in its current form. While we appreciate the Legislature's ongoing efforts to improve our criminal justice system, including the formation of the House Concurrent Resolution 134 Task Force and the Hawaii Correctional Systems Oversight Committee, we are also concerned that the proposed amendments in the current bill do not fully address the public safety concerns inherent in creating a presumption of release for non-violent offenses. We also agree with the concerns of the Honolulu Prosecutor's Office and the Attorney General.

For these reasons, the Department of the Prosecuting Attorney, County of Maui respectfully requests that S.B. 1244 be deferred. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.