



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

ON THE FOLLOWING MEASURE:

S.B. NO. 1260, S.D. 1, RELATING TO CRIMINAL PRETRIAL REFORM.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, March 16, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Landon M.M. Murata,
Deputy Attorney General, at 586-1049)

Chair Nakashima 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; and (2) create a rebuttable presumption for both release and detention for certain offenses and specify the circumstances in which the presumptions apply.

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 the process. At this point in time, the effects of the 2019 changes have not been assessed and no determination about what metric properly measures the success or failure of the prior changes exists. 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 16-21) does not consider a number of important interests, including the need to secure the appearance of defendants and to protect the public. Should this 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 (Act 179), 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. A substantial number of the task force's recommended changes to the bail statutes were made in Act 179. In addition, 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 perspective that "there is a need to address the substantial and continued overcrowding of facilities used to house pretrial defendants through the adoption of certain recommendations made by the criminal pretrial task force regarding pretrial detention and release," page 1, lines 1-5, 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 "pretrial population in Hawaii's jails", page 2, lines 16-18. 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:

The new section being added to chapter 804, Hawaii Revised Statutes (HRS), by section 2 (page 3, line 15, through page 5, line 21) of the bill, requires defendants charged with traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses be released. On page 4, line 8, through page 5, line 15, the bill sets forth a number of exceptions that would allow the court to set bail "in a reasonable amount." See page 5, line 17. 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. Additionally, the list of exceptions to the mandatory release on page 4, line 8, through page 5, line 15, does not address every possible scenario under which release on recognizance may not be appropriate. For example, pursuant to the bill's amendments to chapter 804, the courts would be required to release defendants who are arrested for violating the State's mandatory travel self-quarantine, even if they were still within their period of self-quarantine or if they had no place to self-quarantine. 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.

Should the committee choose not to delete section 2 of the bill in its entirety, the Department recommends that, at a minimum, the following changes be made in order

for the amendments set forth in section 2 to be consistent with the rest of chapter 804. The wording at page 3, line 18, to page 4, line 7, should be replaced with the following:

§804- Monetary bail; non violent offenders. (a) Any defendant arrested, charged, and held for a traffic offense, violation, nonviolent petty misdemeanor offense, or nonviolent misdemeanor offense shall be ordered by the court to be released on the defendant's own recognizance at arraignment and plea conditioned upon:

- (1) The general conditions of release on bail set forth in section 804-7.4; and
- (2) Any other least restrictive, non-monetary condition necessary to:
 - (A) Ensure the defendant's appearance in court; and
 - (B) Protect the public.

Additionally, the wording at page 5, lines 16-21, should be replaced with the following:

(c) If any of the exceptions in subsection (b) apply, bail may be set as permitted by section 804-9. If defendant is unable to post the amount of bail set, the defendant shall be entitled to a prompt hearing as set forth in section 804-7.5.

The bill's proposed amendment on page 5, lines 19-21 regarding a defendant's inability "to post bail in the amount of \$99 or less," is unnecessary and is thus not included in the Department's proposed changes to the bill. This type of "nominal bail" is generally set for defendants who are already in custody on other matters when they are arrested for a new offense. The setting of nominal bail allows the defendant to begin earning credit on the new case.

Section 3 (page 6, line 1, through page 8, line 12) seeks to amend section 804-3, HRS, to change the definition of "serious crime," separate the definition of "bail," from the definition of "serious crime," 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 6, lines 4-12, regarding the definitions of "serious crime" and "bail." However, the Department

recommends deleting the bill's proposed amendments to section 804-3(b), HRS, on page 6, line 13, through page 7, line 15, 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 6, line 13, through page 7, line 15. The courts already have the authority, pursuant to the current statute, to release defendants on their own recognizance, 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"~~]:

"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.

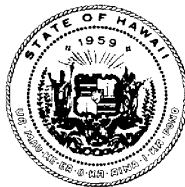
(c) Under subsection (b)(1) a rebuttable presumption arises that there is a serious risk that the person will flee or will not appear as directed by the court where the person is charged with a criminal offense punishable by imprisonment for life with or without possibility of parole. For purposes of 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 against a person];~~ or
- (3) The defendant is on probation or parole for a ~~[serious crime involving 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) it is clear that the courts retain the discretion to determine whether defendants should be released on recognizance, supervised release, or conditional release, and whether circumstances exist to deny bail only for those defendants charged with serious crimes;

and (3) the amendments to section 804-3(a), HRS, on page 6, lines 4-12, are consistent with the rest of the chapter.

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.



STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION

March 16, 2021

TO: Honorable Representative Mark M. Nakashima, Chair
House Committee on Judiciary and Hawaiian Affairs

FROM: Ronald Ibarra, Commissioner
Hawaii Correctional System Oversight Commission

SUBJECT: SB 1260 SD1 RELATING TO CRIMINAL PRETRIAL REFORM

POSITION: The HCSOC **Strongly Supports** SB1260 SD1

PUPOSE: Eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions. Creates rebuttable presumptions regarding release and detention for certain offenses and specifics circumstances in which these presumptions apply.

The Hawai'i Correctional System Oversight Commission (HCSOC) urges the legislature to revisit pretrial reform efforts, as presented in SB1260 SD1, to help realize the important goals of the HCR 134 Task Force on Pretrial Reform to reduce unnecessary, costly, and dangerous pretrial incarceration.

This bill was originally proposed by the HCSOC, in its 2020 report to the Legislature. Its intent is to incorporate two additional recommendations of the HCR 134 Task Force on Pretrial Reform that were not implemented in Act 179 (2019). This measure will help Hawai'i realize the more complete pretrial reform vision of the HCR134 Task Force and help reduce costly and unnecessary pretrial incarceration. Ensuring the safety of those in state custody as well as envisioning potential change for the future depends on responsible population reduction and fair and reasonable bail reform.

Therefore, the Hawai'i Correctional System Oversight Commission continues to support SB1260 SD1. Mahalo nui loa for the opportunity to testify on this measure.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

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

March 16, 2021

S.B. No. 1260, SD1 : RELATING TO PRETRIAL BAIL REFORM

Chair, Nakashima Vice Chair Matayoshi and Members of the Committee:

The Office of the Public Defender (“OPD”) supports S.B. 1260 SD 1. This measure eliminates the use of money bail for low level, non-violent offenses. This is a good start and should be implemented as soon as possible. We ask to defer action relating to creating rebuttable presumptions as the current language in Section 3 may result in unintended consequences of preventing release of qualified individuals. This phased approach may be a better way toward bail reform. The OPD therefore further supports the Office of Hawaiian Affairs (“OHA” proposed draft of S.B. 1260 SD1 HD 1.

The Pretrial Task Force sought to create a more efficient pretrial system and to reduce the State’s pretrial population without sacrificing public safety. Currently, the jail and prison populations have not been reduced. The jail and prison system continues to remain above operational and design capacity.¹ Hence, this proposal is consistent with the intention of the Pretrial Task Force, the Hawai‘i Correctional System Oversight Commission and the legislative purpose to prevent unnecessary pretrial incarceration, reduce the costs to our taxpayers while protecting against risks to public safety.

Given some concerns regarding the language of the Bill, the OPD suggests striking Section 3, which relates to higher level (felony) offenses with the hopes of strengthening the proposal and creating clearer legislation that will reduce the jail population without sacrificing public safety. The OPD will be available for further comment on Section 3 if necessary.

The Office further concurs with the recommendation of OHA proposed draft SB 1260 SD1 HD1, which incorporates most of the following amendments:

¹ Hawai‘i Correctional System Oversight Commission Annual Report December 2020, <https://ag.hawaii.gov/wp-content/uploads/2021/01/HCSOC-Final-Report.pdf>

Proposed Amendments

1. Include Non-violent Class C felonies. DPS statistics clearly show that pretrial felony cases have continued to increase. These felonies should be considered for release on own recognizance conditioned upon the defendant's appearance in court and any other least restrictive, non-financial condition necessary to ensure appearance and public safety along with other low-level non-violent offenses. Monetary bail could still be ordered, and defendant detained in appropriate circumstances.

2. Amend HRS 804(b)(2)(B), (Section 2 page 5), lines 3-5

We believe the look back provision of 10 years in HRS §804(b)(2)(B) should be reduced to five (5) years. Ten (10) years is a very long time to have a prior charge disqualify a person particularly for a new, non-violent offense. It appears to be too restrictive and would otherwise prevent consideration of certain individuals who can be safely released. An incident that happened, for example, 9 years ago may have very little to do with the current or present-day dangerousness, appearance, and risk of flight determinations. Currently the provision will restrict a court from releasing a defendant even if the he or she determines that it is safe and reasonable to do so, and despite a number of intervening years since the prior offense or the current circumstances of the accused.

3. Amend HRS § 804-3(b)(2)(F) (Section 2, page 5), lines 14-15

The proposed language in Section 2, 804-3(b)(2)(F), page 5, line 14 and 15 should be amended from "presents a risk of danger to any person or the community" to clarify the level of risk to "significant" and state a "specific threat of imminent harm to an identifiable person or persons. The suggested language should read as "The defendant presents a significant risk of danger with a specific threat of imminent harm to an identifiable person or persons."

4. Amend HRS § 804(c) (Section 2, page 5), lines 16-17

To be consistent with Act 179, the courts should be allowed to consider the financial circumstances of the defendant. Therefore, the language in Section 3, page 5, 804(c) should read: "bail may be set in a reasonable amount, in light of the financial circumstances of the defendant."

For these reasons, the OPD supports S.B. No. 1260 SD1 with the above proposed amendments.

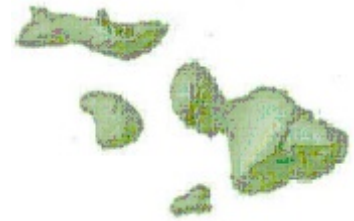
We thank you for the opportunity to comment on S.B. No. 1260 SD 1.

MICHAEL P. VICTORINO
Mayor

ANDREW H. MARTIN
Prosecuting Attorney

MICHAEL S. KAGAMI
First Deputy Prosecuting Attorney

ROBERT D. RIVERA
Second Deputy Prosecuting Attorney



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TESTIMONY
ON
S.B. 1260 SD1 RELATING TO
CRIMINAL PRETRIAL REFORM

March 15, 2021

The Honorable Mark M. Nakashima
Chair
The Honorable Scot Z. Matayoshi
Vice Chair
and Members of the Committee on Judiciary & Hawaiian Affairs

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 1260 SD1, Relating to Criminal Pretrial Reform. We would like to respectfully express our opposition to S.B. 1260 SD1 in its current form.

We share the Department of the Attorney General's concerns about S.B. 1260 SD1 in their entirety, including the Department's concerns about the lack of time to assess the effects of the 2019 changes to our pretrial systems. Accordingly, we would request that this bill be deferred.

However, should this Committee choose to move forward with this bill, we respectfully request that the Department's proposed amendments to S.B. 1260 SD1 be implemented in their entirety. We believe that those proposed amendments are sufficient to preserve judicial discretion on bail decisions, ensure the appearance of the defendant and protect the public, while maximizing the potential for pretrial release of those who do not pose a danger or a flight risk.

For these reasons, the Department of the Prosecuting Attorney, County of Maui respectfully requests that S.B. 1260 SD1 be deferred or, in the alternative, amended per our comments above. 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.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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STEVEN S. ALM
PROSECUTING ATTORNEY



THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

March 16, 2021

RE: S.B. 1260, S.D. 1; RELATING TO CRIMINAL PRETRIAL REFORM.

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to S.B. 1260, S.D. 1.

The purpose of S.B. 1260, S.D. 1, 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, and while we support the eventual elimination of the cash bail system provided there is a robust and well-funded process that allows for alternatives such as release on recognizance, signature bonds, and/or appropriate supervision by the Department of Public Safety's Intake Services Center Division, 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 the problematic provisions contained in this bill. Additionally, the Judiciary has the ability to implement some of the changes proposed in S.B. 1260, S.D. 1 without statutory amendments.

With regards to the specific contents of S.B. 1260, S.D. 1, we note the following issues:

Section 2 (pg. 3-5, ln. 18-20, 1-21)

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 the 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 that the courts be allowed 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 is concerned with the amendments made in S.B. 1260, S.D. 1, pertaining to the release of defendants who are unable to post bail that is set at an amount of \$99 or less. The Department notes 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. 6-8, ln. 4-21, 1-12)

The Department notes 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 section 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 creates 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 example, 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 proceeding. Then, as proposed in S.B. 1260, S.D. 1, this very 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 for their 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. 1260, S.D. 1. 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

Diana Gausepohl-White
Victim/Witness Program Director

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**THE HONORABLE MARK M. NAKASHIMA, CHAIR
THE HONORABLE SCOT Z. MATAYOSHI, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawaii**

March 16, 2021

RE: S.B. 1260, S.D. 1 – RELATING TO CRIMINAL PRETRIAL REFORM

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary & Hawaiian Affairs, the Office of the Prosecuting Attorney of the County of Kauai submits the following testimony in support of S.B. 1260, S.D. 1 as an initial step in the process of eliminating money bail in Hawaii.

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.

In August of 2020, the Hawaii Supreme Court limited the types of cases in which a court could set bail to felony persons offenses, including sexual assault, burglary, robbery, abuse of family or household member, restraining order and protective order violations, and violation of quarantine requirements. Outside of these specific offenses, courts are prohibited from setting bail. This

rule is currently still in effect. This bill would codify some of what the Hawaii Supreme Court ordered in August of 2020, while allowing for bail to be set in additional offenses and articulating more exceptions in which bail can be set.

Overcrowding remains a problem in all jails in Hawaii. This bill would allow the pretrial release of individuals who do not pose a danger to society or a flight risk. It balances public safety concerns by allowing bail to be set in cases where defendants have a history of nonappearance, prior convictions, pending cases, or charges involving violence. Bail can also be set if the defendant was on probation, parole or conditional release when arrested or if the court determines that the defendant presents a risk to an individual or the community.

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. 1260, S.D. 1. Thank you for this opportunity to testify.

Hawaii
*Holding Power Accountable*Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, March 16, 2021

2:00 PM

Via Video Conference, Conference Room 325

in consideration of
SB 1260, SD1
RELATING TO CRIMINAL PRETRIAL REFORM.

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the Judiciary & Hawaiian Affair Committee

Common Cause Hawaii comments in support of SB 1260, SD1 which (1) eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions and (2) creates rebuttable presumptions regarding release and detention for certain offenses and specifies circumstances in which these presumptions apply.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening democracy - one that is equitable and works for everyone.

Cash bail – monetary bail – is rarely used in other nations besides the United States. Cash bail is to ensure that an individual charged with a crime will return to court for hearings or trial. If a person is unable to afford the bail amount set by the court, there are private bail bond companies that will “agree to be responsible for the defendant’s bail obligation in exchange for a nonrefundable fee, called a bond premium, that is generally 10 to 15 percent of the bail amount.” See <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>. However, the individual charged must have the requisite collateral to secure the services of the private bail bond companies.

If a person cannot afford bail or the bond premium, including collateral charged by private bail bond companies, she or he is then detained in jail. “Pretrial detention has dramatically [negative effects](#) on the outcome of a defendant’s case: those who are held pretrial are four times more likely to be sentenced to prison than defendants released prior to trial.” *Id.* Research clearly shows that cash bail discriminates against racial minorities and the poor. *Id.*

Illinois, New York, and New Jersey and the City of Philadelphia have all implemented some form of cash bail reform. *Id.*

Common Cause Hawaii advocates for the ending unfair policies that do not result in any public gain, unfairly target BIPOC communities, and undermine the promise of a democracy that works for everyone. For these reasons, we are commenting in support of SB 1260, SD1. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,
Sandy Ma
Executive Director, Common Cause Hawaii



Young Progressives Demanding Action
P.O. Box 11105
Honolulu, HI 96828

March 13, 2021

TO: HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
RE: Testimony in Support of SB1260

Dear Representatives,

Young Progressives Demanding Action (YPDA) stands in **strong support of SB1260 SD1**, which eliminates the use of monetary bail in Hawai'i. This policy change would be a huge victory for social, economic and racial justice in our communities. Here are 10 solid reasons to abolish cash bail.

- 1. Cash bail does not serve the function for which it was intended.** The purpose of bail is not pretrial punishment. Bail is supposed to minimize the risk of flight and danger to society while preserving the defendant's constitutional rights. However, requiring cash bail does not achieve any of these outcomes. Jurisdictions like [Washington D.C.](#) that have all-but replaced cash bail with [smart justice](#) reforms have seen better rates of court attendance and lower rates of re-arrest, all while satisfying the intent of bail without violating civil liberties.
- 2. Cash bail has serious societal costs.** Incarceration always disrupts lives, often leading to loss of employment, custody issues and loss of housing. These worsened outcomes derail people from the trajectory of their lives, leading to increased criminality, homelessness, health problems and [other societal costs for which we all pay the price](#).
- 3. Cash bail is overused and arbitrary.** Hawai'i's courts require bail as a condition of release in [88 percent of cases](#). More than half of the arrestees in those cases were unable to post the amount required by the court. Although Hawai'i's Constitution prohibits "excessive bail," many judges in Hawai'i admit to arbitrarily setting bail at a certain amount based solely on the offense the individual is accused of committing.

- 4. Cash bail violates the right to presumption of innocence.** In the United States, the accused is presumed innocent until proven guilty, and the Fifth and Fourteenth Amendments to U.S. Constitution prohibit depriving a person of their liberty without due process of law (including while awaiting trial and regardless of indigence). Yet, in Hawai'i, some [1,145 individuals are currently being held](#) behind bars without having been convicted of a crime. Nationwide, [443,000 people are being detained](#) without ever having been tried in a court of law. This is a gross violation of their civil liberties and amounts to an unconstitutional, extrajudicial punishment.
- 5. Cash bail makes a mockery of justice.** In Hawai'i, 64 percent of those who could not afford bail [changed their plea to guilty to get out of jail sooner](#). Using pre-trial detention to coerce arrestees into guilty pleas is [routine practice](#) for prosecutors throughout the country. Furthermore, a 2012 study conducted by the New York City Criminal Justice Agency [found that pretrial detention has a negative impact on trial outcomes](#): among non-felony cases with no pretrial detention, 50 percent ended in conviction compared to a 92 percent conviction rate among cases with an arrestee who was detained.
- 6. Cash bail allows the wealthy to buy their way out of jail.** Most bail for all felony charges in the First Circuit is set in the [\\$11,000 to \\$25,000](#) range, but it was as high as \$1 million in eight cases and \$2 million in two cases in 2015. Detention or release should not be conditioned on an individual's wealth or income. A wealthy person can be just as dangerous as a poor person.
- 7. Cash bail exacerbates institutional racism within the penal system.** In Hawai'i, Native Hawaiians and Pacific Islanders are [more likely to be arrested and detained with a bail amount set to an unreasonable cost](#) based on their charge, record or lack thereof, and socioeconomic status. This is reflected nationally with other communities of color.
- 8. Cash bail is a way for corporations to exploit poor communities.** Often, the only way a person can maintain their freedom and return to their lives while awaiting trial is to pay a bail bondsman to front the cost of bail. These bail bondsmen do not reimburse accused people for the cost of their services should they be found innocent. Nor are they small businesses providing a service, as they often claim. In fact, [they are fronts for multinational insurance companies](#) that use America's backward penal system to extract wealth from poor communities that are over-targeted by police departments and suffer disproportionately from racist policies like "Three Strikes" and mandatory minimum sentences.
- 9. Hawai'i spends more than \$60 million on pretrial incarceration each year.** It costs a lot of money to lock people up behind bars: about [\\$54,500 per detainee each year, or \\$150 per day](#). Compare this to Washington D.C., which releases 85-90 percent of pretrial arrestees and spends a mere [\\$18 a day](#) in supervising costs per individual. The U.S. spends [\\$13.6 billion annually](#) to detain people who have not been convicted of a crime.

10. Hawai'i's correctional facilities are a liability. [Six out of nine Hawai'i facilities are "over design capacity" and a four are over "operational capacity."](#) The Department of Justice has warned the State of Hawai'i that it will sue unless the issue is addressed quickly. While building a newer, larger, prison will alleviate crowding, it won't address the underlying causes of over-incarceration. Bail reform is the swiftest and most sure-fire way to reduce our overcrowded jail population, while simultaneously beginning to reform the penal system toward true justice.

Mahalo for the opportunity to testify,

Will Caron
Board President & Secretary
action@ypdahawaii.org

SB-1260-SD-1

Submitted on: 3/13/2021 6:29:27 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lorenn Walker	Hawai'i Friends of Restorative Justice	Support	No

Comments:

Dear Honorable Senators,

Mahalo for your public service.

The Hawai'i Friends of Restorative Justice supports this measure to eliminate bail for low level offenses. We have researched and designed processes to increase law abiding behavior and reduce repeat crime for 25 years. Most of our work is published and some has been replicated in other states and countries.

Cash bail [criminalizes poverty](#) and incarceration often leads to further criminal behavior. To protect our community the legislature should pass this bill to eliminate jailing people for low level offenses and their failure to post bail. Bail elimination is fair. ["Pretrial liberty should not be a question of money."](#) Our jails and prisons are full of people who mostly live below the poverty limit.

Bail is inequitable and is especially unjustifiable for low level offenses. [Illinois completely eliminated](#) cash bail recently, which Hawai'i should also do and until it does, this bill is a positive step in that direction.

The argument that defendants may not appear in court or that they commit new crimes without posting cash bail has been refuted by research. New Jersey eliminated bail for certain offenses and found ["defendants are no more likely](#) to be charged with a new crime or fail to appear in court than defendants released on bail under the old system" (p. 3). The same is [true for Washington DC](#), which releases about 95% of all defendants charged.

Our state, as well as our "country's uniquely swollen jail population and new economic reality have created a fiscal appetite for reform that is almost as great as the country's moral obligation to reassess its pretrial detention practices. We have a system in which detention is the default choice. Overestimating pretrial risks has driven the jail population's growth" (p. 741). [Lauryn Gouldin, University of Chicago Law Review, 2018.](#)

Please help our community and end cash bail as described in this bill.

Aloha,

Lorenn Walker, JD, MPH

Director, Hawai'i Friends of Restorative Justice

SB-1260-SD-1

Submitted on: 3/13/2021 8:45:31 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	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.

Hawai'i Association of Criminal Defense Lawyers

Testimony of the Hawai'i Association of Criminal Defense Lawyers to
House Committee on Judiciary & Hawaiian Affairs

March 14, 2021

S. B. No. 1260, SD1: RELATING TO CRIMINAL PRETRIAL REFORM

Chair Mark M. Nakashima
Vice-Chair Scot Z. Matayoshi
Honorable Committee Members

The Hawai'i Association of Criminal Defense Attorneys (HACDL) is an organization comprised of members of the bar practicing criminal defense in state, federal, and appellate courts throughout the State of Hawai'i. HACDL members include public defenders, private counsel, and other attorneys asserting the rights of the accused in criminal cases.

HACDL strongly **SUPPORTS** S.B. No. 1260, but **OPPOSES** Section 6, which would not implement modest bail reform for more than a century. Our current criminal justice system cannot wait that long. Pretrial release typically depends on how much money a defendant can afford to either deposit with the court or give to a third-party bond company.

In doing so, our system loses sight of the twin goals of pretrial release: safety to the community and ensuring that the accused will come to court when ordered by the court. The cash bail system has resulted in the mass confinement of poor people who are not guilty and have not been found guilty of a crime. It has converted county jails into an overcrowded, modern-day poorhouse.

S. B. 1260 is a step in the right direction. It is a progressive and equitable approach to our criminal justice system that should reduce the number of people who find themselves in jail and unsentenced simply because they are poor. This bill is overdue. Putting off these reforms long after we are gone is worse than doing nothing at all. These reforms should be implemented sooner—let alone in our lifetime.



SB 1260, SD 1, RELATING TO CRIMINAL PRETRIAL REFORM

MARCH 12, 2021 · HOUSE JUDICIARY COMMITTEE ·
CHAIR REP. MARK M. NAKASHIMA

POSITION: Support.

RATIONALE: Imua Alliance supports SB 1260, SD 1, relating to criminal pretrial reform, which eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions; and creates rebuttable presumptions regarding release and detention for certain offenses and specifies circumstances in which these presumptions apply.

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.

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

Representative Mark Nakashima, Chair

Representative Scott Matayoshi, Vice Chair

Tuesday, March 16, 2021

2:00 PM

SUPPORT FOR SB 1260 SD1 - REFORMING THE BAIL SYSTEM

Aloha Chair Nakashima, Vice Chair Matayoshi, 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 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 and releasing defendants on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses.

We support the HCR 134 Task Force recommendation 20: Eliminate the use of money bail and require defendants to be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor offenses with certain exceptions. Our testimony is specific to this recommendation,

A review of the Department of Public Safety Population Report¹ shows that as of March 1, 2021 there were 893 pretrial detainees (innocent until proven guilty) statewide. This costs taxpayers \$176,814 a day, \$1,237,698 a week, \$4,950,792 a month, and \$59,409,504 a year.

Community Alliance on Prisons asked the Department of Public Safety Intake Services Division if they could 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 we received on January 28, 2021 regarding 2020 jail admissions:

¹ Dept. of Public Safety, Bi-Monthly Population Report, March 1, 2021.

<https://dps.hawaii.gov/wp-content/uploads/2021/03/Pop-Reports-Weekly-2021-03-01.pdf>

“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%.”

The data show that in 2020, more than 40% of admissions to Hawai`i jails statewide were persons living unsheltered or in an emergency or transitional shelter at the time of arrest.

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).

A report from Harvard on Bail Reform 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.²

Blaming individuals and families for their hardship does not address the challenges they face daily. The ALICE³ data show that 48% of our families are barely making it. It is impossible to ignore the data that show that more than 40% of the people at Intake Services have reported living unsheltered. These are some of the folks who cannot make bail. Eliminating money bail for low-level offenses and offering services to assist the person is a more sustainable option than using our jails as housing and as de facto mental health centers.

Criminalizing poverty should be a clarion call that we are on the wrong course.

Community Alliance on Prisons urges the committee to pass this important bill that will start to address the inhumane practice of criminalizing poverty.

Mahalo for this opportunity to testify.

“Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.”

Nelson Mandela

² David Arnold et al., Racial Bias in Bail Decisions, 133 Q. J. ECON. 1885, at 1889–90 (2018).

³ ALICE: A Study in Financial Hardship in Hawaii. <https://www.unitedforalice.org/Hawaii>



AMERICANS FOR DEMOCRATIC ACTION

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P.O. Box 23404
Honolulu
Hawaii 96823

March 15, 2021

TO: Chair Nakashima and members of JHA Committee

RE: SB 1260 SD1 Relating to Criminal Pretrial Reform

Support for hearing on March 16

Americans for Democratic Action is an organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

We support SB 1260 SD1 as it would eliminate the use of monetary bail and would require defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions. The expense of pretrial detention of defendants who are too poor to afford bail is a cost to the State we should not incur.

Thank you for your favorable consideration.

Sincerely,
John Bickel, President



SB1260 SD1
RELATING TO CRIMINAL PRETRIAL REFORM
Ke Kōmike Hale o ka Ho‘okolokolo a me ke Kuleana Hawai‘i
House Committee on Judiciary & Hawaiian Affairs

Malaki 16, 2021

2:00 p.m.

Lumi 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB1260 SD1. This measure would 1) generally eliminate the use of monetary bail for low-level, non-violent offenses, subject to certain exceptions; and 2) create rebuttable presumptions regarding detention and release for higher level offenses. SB1260 SD1 offers a prudent approach to pretrial reform that can reduce unnecessary, costly, and dangerous pretrial incarceration while preserving public safety. **To address concerns raised in the previous hearing on this measure, OHA does offer a proposed HD1 below, for the Committee’s consideration.**

Unfortunately, Hawai‘i’s bail system remains overwhelmed, inefficient, and ineffective, and continues to result in harmful, unnecessary socioeconomic impacts¹ on low-income individuals and their families, a disproportionate number of whom may be Native Hawaiian. The purpose of bail is not to punish the accused, but allow for their pretrial release while ensuring their return to court. However, cash-secured bail has effectively served as a substantial punishment specifically for poor individuals, before they are provided with any trial or found guilty of any crime. In Hawai‘i, indigent defendants must often decide between posting hefty cash bail or bond amounts that impose considerable financial hardship on themselves and their families, or remain in pretrial incarceration that places their employment and housing at risk. Notably, detaining individuals for days or weeks before their trial simply because they are too poor to post bail also represents a substantial cost to taxpayers,² and further exacerbates the danger of overcrowding in our strained pretrial detention facilities.

SB1260 SD1 represents a prudent, process-oriented approach to pretrial reform, to reduce Hawai‘i’s overreliance on cash bail and ensure that bail and detention determinations are instead tailored to individualized risks of flight or danger to the community. Executing this measure will (1) align with the vision of the House Concurrent Resolution 134 (Reg. Sess. 2017) Task Force and the Hawai‘i State Correctional Systems Oversight Commission, and (2) further the

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 \$198 per day—\$72,270 per year—to incarcerate an inmate in Hawai‘i. STATE OF HAWAII DEPARTMENT OF PUBLIC SAFETY: FISCAL YEAR 2019 ANNUAL REPORT 16 (2019) available at <https://dps.hawaii.gov/wp-content/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf>.

State's vision to improve public safety while reducing unnecessary pretrial incarceration and its cost to taxpayers and the community.

OHA does note that, in addition to the overwhelming community support for this reform concept, some astute observations and concerns were raised in the previous hearing for this bill. Accordingly, OHA does offer a SB1260 SD1 HD1 Proposed draft to address these concerns and to further strengthen this measure. **The attached Proposed HD1 draft narrows the focus of this reform effort to lower-level non-violent offenses and addresses additional concerns raised by the Office of the Public Defender, the Honolulu Prosecutor's Office, and the ACLU.** Additionally, as noted in the prior testimony of the Kaua'i Prosecutor's Office, the proposed measure continues to align with the current Supreme Court order³ limiting the application of cash bail to certain violent offenses. Specifically, this Proposed HD1 draft includes the following changes to the current draft of this measure:

1. Deletes Section 3, which would have amended the HRS § 804-3 definition of "serious crimes" and established rebuttable presumptions relating to release and detention for most higher level (felony) offenses;
2. Adds non-violent class C felony offenses to the list of lower-level, non-violent offenses covered by the proposed new pretrial determination guidelines;
3. Further ensures that conditional release will be tailored to ensure defendants' appearance in court and protect against specific risks of danger;
4. Narrows exceptions from the application of the proposed new pretrial determination guidelines; and
5. When exceptions apply, requires courts to consider non-financial conditions before setting cash bail.

OHA appreciates that this bill represents a necessary next step in Hawai'i's phased approach to pretrial reform, and does believe that this measure can even further reduce unnecessary pretrial incarceration and the reduce harms of the cash bail system upon the community, and especially upon Native Hawaiians.

For these reasons, OHA urges the Committee to **PASS** SB1260 SD1. Mahalo piha for the opportunity to testify on this measure.

³ *Order re: Petty Misdemeanor, Misdemeanor, and Felony Defendants*, SCPW-20-0000509, Supreme Court of the State of Hawai'i (Aug. 27, 2020).

A BILL FOR AN ACT

RELATING TO CRIMINAL PRETRIAL REFORM.

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

1 SECTION 1. The legislature finds that there is a need to
2 address the substantial and continued overcrowding of facilities
3 used to house pretrial defendants.

4 The purpose of this Act is to amend chapter 804, Hawaii
5 Revised Statutes to, with certain exceptions, eliminate the use
6 of monetary bail and require defendants to be released on their
7 own recognizance for traffic offenses, violations, nonviolent
8 petty misdemeanor offenses, nonviolent misdemeanor offenses, and
9 nonviolent class C felony offenses.

10 SECTION 2. Chapter 804, Hawaii Revised Statutes, is
11 amended by adding a new section to be appropriately designated
12 and to read as follows:

13 "§804- Monetary bail; nonviolent offenders. (a) Any
14 defendant arrested and charged with a traffic offense,
15 violation, nonviolent petty misdemeanor offense, nonviolent

1 misdemeanor offense, or nonviolent class C felony offense shall
2 be released on the defendant's own recognizance conditioned
3 upon:

4 (1) The defendant's appearance in court; and

5 (2) Any other least restrictive, non-financial condition
6 necessary to:

7 (A) Ensure the defendant's appearance in court; and

8 (B) Protect against specific threats of imminent harm
9 to an identifiable person or persons.

10 (b) This section shall not apply if:

11 (1) The offense involves:

12 (A) Assault;

13 (B) Terroristic threatening;

14 (C) Sexual assault;

15 (D) Abuse of family or household members;

16 (E) Violation of a temporary restraining order;

17 (F) Violation of an order for protection;

18 (G) Violation of a restraining order or injunction;

19 (H) Operating a vehicle under the influence of an
20 intoxicant;

21 (I) Negligent homicide; or

1 (J) Any other crime of violence; or

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

3 (A) The defendant has a pattern of convictions for
4 non-appearance in the last twenty-four months;

5 (B) The defendant has at least one prior conviction
6 for a misdemeanor crime of violence or felony
7 crime of violence within the last five years;

8 (C) The defendant was pending trial or sentencing at
9 the time of arrest;

10 (D) The defendant was on probation, parole, or
11 conditional release at the time of arrest;

12 (E) The defendant is also concurrently charged with a
13 violent petty misdemeanor, a violent misdemeanor,
14 or any felony offense arising from the same or
15 separate incident; or

16 (F) The defendant presents a specific threat of
17 imminent harm to any identifiable person or
18 persons.

19 (c) If any of the exceptions in subsection (b) apply, and
20 the court finds no condition or combination of non-financial
21 conditions in § 804-7.1 will ensure the defendant's appearance

S.B. NO. 1260
S.D. 1
H.D. 1 Proposed

1 or protect against specific threats of imminent harm to an
2 identifiable person or persons, bail may be set in a reasonable
3 amount based upon the defendant's financial ability to afford
4 bail pursuant to § 804-9. If the defendant is unable to post
5 the amount of bail, the defendant shall be entitled to a prompt
6 hearing under section 804-7.5. If the defendant is unable to
7 post bail in the amount of \$99 or less, the director of public
8 safety shall be authorized to release the defendant."

9 SECTION 3. This Act does not affect rights and duties that
10 matured, penalties that were incurred, and proceedings that were
11 begun before its effective date.

12 SECTION 4. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 5. This Act shall take effect on July 1, 2021.



Hawai'i

Committees: Committee on Judiciary & Hawaiian Affairs
Hearing Date/Time: Tuesday, March 16, 2021, 2:00 p.m.
Place: Via videoconference
Re: Testimony of the ACLU of Hawai'i with comments regarding S.B. 1260, S.D 1, Relating to Criminal Pretrial Reform

Dear Chair Nakashima, Vice Chair Matayoshi, and members of the Committee:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") offers comments regarding S.B. 1260, S.D 1, which seeks to reform the current bail system in Hawai'i. While we generally support the intent of this bill, as written, the broad exceptions in this bill will significantly limit its impact. We urge the Committee to adopt the draft proposed by the Office of Hawaiian Affairs ("OHA").

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.

To better understand why so many people, who are innocent in the eyes of the law, are being held pretrial in Hawaii's jails, the ACLU of Hawai'i conducted an in-depth study of the state's bail setting practices in all cases filed in Hawaii's circuit courts in 2017. While we only published the preliminary findings of cases between January and June of 2017,² this testimony reflects the findings for all of 2017.

Our research revealed that circuit courts heavily rely on the use of money bail to secure court appearances instead of individualizing the process. The ACLU of Hawai'i found that circuit courts set cash bail as a condition of release in 90 percent of cases, meaning that other forms of bail such as release on recognizance or supervised release were rarely assigned even if these options were more appropriate for arrestees. Moreover, the courts assigned bail at amounts without regard to an individual's financial circumstances but rather solely based on the crime charged. Indeed, the average bail amount on Oahu for a single class C felony was over \$20,000.

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

² Ainsley Dowling, *As Much Justice As You Can Afford: Hawaii's Accused Face An Unequal Bail System*, American Civil Liberties Union of Hawai'i (January 2018), <https://www.acluhi.org/sites/default/files/2018/01/aclu-of-hawaii-bail-report.pdf>.

This is despite the lack of any serious inquiry into someone's ability to pay or specific risks of flight or danger to the community. Given these large amounts, it was not a surprise when we learned that only 46 percent of arrestees were able to post bail.

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. 1260, S.D. 1 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 created by our existing pretrial system. We therefore respectfully request the Committee amend this bill to reflect the changes below. The draft language proposed by OHA incorporates most of these suggestions.

- 1) Throughout, *see, e.g.*, P. 4, lines 3-7: 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. 5, lines 1 & 2: This provision should be amended to clarify the word “history” to mean a pattern of convictions for non-appearance, not a single occurrence.
- 3) P. 5, lines 3-5: This provision excludes anyone with a history of a violent misdemeanor or violent felony offense within the last decade. While this may sound reasonable on first pass, a person's actions nine years ago do not indicate a person's present-day flight risk or dangerousness to a specific person in the community. This provision should be narrowed further.
- 4) P. 5, lines 14-15: 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. 5, lines 16-17: 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. 7, lines 9-10: If the Committee is included to retain Section 3 of the bill, we ask that it address this provision, which 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 provision of HRS § 804-3(b) should be narrowed further.

ACLU of Hawai'i comments on S.B. 1260, S.D. 1
March 16, 2021
Page 3 of 3

- 7) Section 3: Should the Committee retain Section 3 in the H.D. 1, references to “threats of violence” are vague and should be deleted. We ask the Committee to also consider that, as written, this section could be interpreted in a way that allows bail to be denied based solely on the fact that the charges involve a serious crime, which raises constitutional concerns.

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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SB1260

RELATING TO CRIMINAL PRETRIAL REFORM

SENATE COMMITTEE ON JUDICIARY

March 16, 2021

2:00 p.m.

Room 325

Aloha e Chair Rhodes, Vice Chair Keohokalole, and members of the Committee,

The Native Hawaiian Legal Corporation (NHLC) **SUPPORTS SB1260**, which would reform our criminal justice system by (1) abolishing, subject to certain exceptions, the use of monetary bail for low-level and non-violent offenses and (2) making bail and detention determinations based on individualized risks of flight and community safety.

Pretrial incarceration accounts for one of the major reasons of overcrowding in Hawai'i jails, accounting for approximately one-third of all individuals housed in Hawai'i correctional facilities and more than half of those housed at O'ahu Community Correctional Center.¹ In a comprehensive study conducted by the Hawai'i American Civil Liberties Union (ACLU), circuit courts in Hawai'i have set cash bail as a condition of release in 90 percent of cases with an average bail amount for class C felonies at \$20,000 with only 46 percent of arrestees being able to afford this high-cost amount.² Those that remain incarcerated are merely awaiting trial and are detained because they cannot afford to post bail.

There are numerous socioeconomic impacts that negatively affect indigent defendants, including, but not limited to, the significant financial hardship placed on defendants and their families who cannot afford high bail amounts. However, this hardship is balanced against the alternative of remaining in pretrial incarceration for an indeterminate amount of time running the risk of losing employment and housing. The current bail system unfairly targets the poor, and these inequities fall disproportionately on Native Hawaiians, who are over-represented in the prison system, are more likely to be arrested, and unable to afford bail once detained.

The HCR 134 Criminal Pretrial Task Force stated in its 2019 report that there is "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[,] and, therefore,

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

² Ainsley Dowling, *As Much Justice As You Can Afford: Hawaii's Accused Face An Unequal Bail System*, American Civil Liberties Union of Hawai'i (January 2018), <https://www.acluhi.org/sites/default/files/2018/01/aclu-of-hawaii-bail-report.pdf>.

“money bail is a poor method of assessing and managing a defendant’s risks.”³ In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the United States Supreme Court recognized that “in our society liberty is the norm and detention prior to trial, or without trial, is the exception.” Unfortunately, the opposite is true under Hawai‘i’s current bail system, which disproportionately affects the non-wealthy defendants while increasing costs to taxpayers, who must foot the bill to house them before trial.⁴

If passed, SB1260 would reduce the unnecessary pretrial incarceration of those who are accused of low-level and non-violent crimes who pose no flight risk or threat to public safety. Allowing for the setting of bail and retention determinations on a more individualized basis is a sensible policy solution to reduce overcrowding in pretrial detention facilities and help alleviate the overwhelming socioeconomic disadvantages that already plague the Native Hawaiian community. SB 1260 will mitigate the disparate impacts to indigent Native Hawaiian defendants, forced to decide whether to obligate their family to post a costly bail or to remain detained for an untold amount of time awaiting trial. It is especially timely in the midst of the COVID-19 pandemic’s disproportionate effect on Native Hawaiians, both in terms of percentage of infections as well as in loss of economic opportunities.

Ultimately, SB 1260 is an opportunity to help level the playing field for those with less monetary resources, including Native Hawaiians, while also significantly reducing taxpayer costs.

For all of the above-stated reasons, **NHLC SUPPORTS SB1260**. Mahalo for the opportunity to testify.

Summer L.H. Sylva



Executive Director
Native Hawaiian Legal Corporation

³ House Concurrent Resolution 134 Task Force, “Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature,” December 2018, p. 68.

⁴ On average, it costs \$198 per day—\$72,270 per year—to incarcerate an inmate in Hawai‘i. State of Hawai‘i Department of Public Safety: Fiscal Year 2019 Annual Report 16 (2019) available at <https://dps.hawaii.gov/wpcontent/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf>.



TESTIMONY IN SUPPORT OF SB 1260, SD 1

TO: Chair Nakashima, Vice-Chair Matayoshi, and Judiciary & Hawaiian Affairs Committee

FROM: Nikos Leverenz
Grants, Development & Policy Manager

DATE: March 16, 2019 (2:00 PM)

Hawai'i Health & Harm Reduction Center (HHRC) **supports** SB 1260, SD 1, which eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions. HHRC hopes that this bill could be amended to include drug possession offenses that are currently a Class C felony.

The Department of Public Safety relayed a critical data point to the HCR 85 Prison Reform Task Force, which published its final report in January 2019: *only 26% of the combined jail and prison population is incarcerated for class A or B felony, while the remaining 74% are incarcerated for a class C felony or lower (misdemeanor, petty misdemeanor, technical offense, or violation).*

HHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions. Incarceration for any length of time for those with undiagnosed or undertreated behavioral health conditions compounds their suffering and is neither wise nor compassionate public policy.

HHRC strongly believes that those who use substances should not be subject to criminal sanctions absent actual harm to others, including those who use substances because of underlying mental health conditions. Criminalizing drug users significantly perpetuates lasting social, medical, and legal stigma. Hawai'i should instead increase its capacity to provide low-threshold, evidence-based care and medical treatment for those who need it apart from the criminal justice framework.

Thank you for the opportunity to testify on this measure.



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Washington, D.C. 20005
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Testimony from:
Anthony Lamorena, Government Affairs Specialist, R Street Institute

In SUPPORT of SB 1260, RELATING TO CRIMINAL PRETRIAL REFORM.

March 16, 2021

House Judiciary & Hawaiian Affairs Committee

Chair Nakashima and members of the committee,

My name is Anthony Lamorena, and I am a government affairs specialist for the R Street Institute and a former Hawai'i resident and Hawai'i legislative staffer. R Street is a nonprofit, nonpartisan public policy research organization whose mission is to engage in policy research and outreach to promote free markets and limited, effective government in many areas, including criminal justice reform, which is why SB 1260 is of special interest to us.

Here at R Street, we have long supported initiatives that aim to reduce pretrial detention while promoting public safety and a fair, effective and efficient justice system. By limiting the use of cash bail in Hawai'i's criminal justice system, this bill would do just that.

Cash bail is a poor tool for mitigating an individual's risk of not appearing at trial or committing a new crime. Rather than ensuring an effective, fair system of justice, it leads to bloated pretrial systems where the rich can buy their freedom while the impoverished languish in jail. Today in Hawai'i, nearly 1,200 people sit in jail, many awaiting trial who have yet to be convicted of any crime and are presumed innocent.¹

Some critics of cash bail reform argue that limiting cash bail and releasing individuals ahead of their trial date would lead to an increase in crime within the community. However, jurisdictions who have embraced similar reforms have not seen that occur. Indeed, a study by Loyola University found there to be "no significant change" in Chicago's crime rate or the likelihood an individual would commit a new crime when they studied the effects of bail reform that was passed in Cook County, Illinois.² And other studies evaluating reforms in New York City and Philadelphia provide further evidence that limiting the use of cash bail can reduce pretrial detention populations without jeopardizing public safety.³

Indeed, when cash bail is overused, mothers and fathers are needlessly removed from their families, jobs and communities, a scenario which is always disruptive and even painful.⁴ In addition, defendants



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who are unable to post bail are not able to put on a strong defense; jail makes communicating with one's attorney difficult and can serve as a bargaining chip to the benefit of prosecutors. It is thus little surprise that a 2018 study found that being assigned monetary bail alone resulted in a 12 percent increase in someone's likelihood of conviction and increased their likelihood of returning to crime by as much as 9 percent, rather than preventing it.⁵

The problems with cash bail and pretrial detention become all the more glaring during a pandemic. While families and friends are forced to socially distance to prevent the spread of COVID-19, that same precaution is not always possible in jails and prisons. According to the Marshall Project, Hawai'i has had almost 2,000 prisoners test positive for COVID-19.⁶ Judicious use of cash bail and pretrial detention should be considered an immediate necessity in the state's pandemic plan.

Limiting the use of cash bail and thus pretrial detention can also help solve the state's budget crisis. Gov. David Ige has already projected that the State of Hawai'i is looking at a shortfall of \$1.4 billion.⁷ Relying more on alternatives to cash bail and detention, such as pretrial services, can help reduce this damage. For example, in Iowa, an audit of their pretrial service program found that \$15,393 was saved for every person that was released. Similarly limiting pretrial detention in Hawai'i could be a creative way to help address the state's current economic quagmire.

The truth is the current cash bail system is ripe for reform. As the state's economy and clear inequities in justice loom large on legislators' minds, reforming cash bail could be an easy fix. These changes will make much needed improvements to Hawai'i's criminal justice system, but these reforms could also help lawmakers save big and show they are willing to think outside the box when it comes to helping their constituents during the pandemic.

Mahalo!

Anthony Lamorena
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¹ “Department of Safety Weekly Population Report,” Department of Public Safety, March 2, 2021.

<https://dps.hawaii.gov/wp-content/uploads/2021/03/Pop-Reports-Weekly-2021-03-01.pdf>.

² Don Stemen and David Olson, “Dollars and Sense in Cook County,” Loyola University Chicago, Nov. 19, 2020, pp. X. <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf>.

³ *Ibid.*, p. 1.

⁴ Lars Trautman, “Why the cash bail system will make the coronavirus pandemic much worse,” *Washington Examiner*, April 2, 2020. <https://www.washingtonexaminer.com/opinion/why-the-cash-bail-system-will-make-the-coronavirus-pandemic-much-worse>.

⁵ Arpit Gupta et al., “The Heavy Costs of High Bail: Evidence from Judge Randomization,” *The Journal of Legal Studies* 45:2 (April 18, 2016). <https://www.journals.uchicago.edu/doi/abs/10.1086/688907>.

⁶ “A State-by-State Look at Coronavirus in Prisons,” The Marshall Project, last updated March 12, 2021. <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

⁷ Audrey McAvoy, “Hawaii lawmakers face tough choices amid pandemic recession,” *AP News*, Jan. 18, 2021. <https://apnews.com/article/david-ige-coronavirus-pandemic-hawaii-financial-markets-economy-f234acc4b45a151cca5775c8d4c10057>

SB-1260-SD-1

Submitted on: 3/12/2021 9:41:33 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Andrew Foy	Individual	Support	No

Comments:

I support SB1260 because it abolishes the outdated cash bail system that disproportionately affects and harms low-income individuals (who, on Hawaii, are more likely to be Native Hawaiian & Pacific Islander). Not having the financial means to post bail can result in folks having to miss work & bill payments, lose their jobs, and not be able to support their families/loved ones. The cash bail system unequally and unjustly privileges people with wealth and harms people without it. As long as someone hasn't committed a violent crime and is not a threat to their community, they should be allowed to go home and use the money they would've spent on bail on getting sound & reasonable legal support. This bill aims to do just that.

SB-1260-SD-1

Submitted on: 3/13/2021 2:11:08 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dana Keawe	Individual	Support	No

Comments:

I support sb1260 sd1

SB-1260-SD-1

Submitted on: 3/13/2021 3:20:26 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

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

Comments:

My name is Carla Allison and I am writing in strong support of **SB1260**. With this bill, we have the opportunity to significantly decrease Hawaii's incarcerated population. With almost 50% of the people in our overcrowded jails being pre-trial detainees, we are locking up people who have not been convicted because they cannot afford bail. What kind of justice is this? Too many poor and unhoused people are being locked up when they aren't even dangerous. Other states have adopted bail reform, recognizing that the cash bail system is racially biased and disparately impacts black, indigenous and people of color. With Hawaii's jails being severely overcrowded and inmates experiencing inhumane conditions SB1260 makes both logical and humane sense. We can divert the almost \$200 dollars a day we spending locking up a person to help people receive community based resources. Please support SB1260. Thank you.

SB-1260-SD-1

Submitted on: 3/13/2021 3:48:44 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jessica dos Santos	Individual	Support	No

Comments:

I support ending cash bail.

SB-1260-SD-1

Submitted on: 3/13/2021 4:54:35 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Matthew Swalinkavich	Individual	Support	No

Comments:

End cash bail now.

SB-1260-SD-1

Submitted on: 3/13/2021 5:11:34 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ruta Jordans	Individual	Support	No

Comments:

Please pass so that our jails are not full of people who could not pay bail. Justice should not depend on the amount of money in your pocket.

SB-1260-SD-1

Submitted on: 3/13/2021 6:34:17 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Brandt	Foresight/Policy Analysis	Support	No

Comments:

I strongly support this bill, which will improve Hawaii's financial, medical, and social health in multiple ways, both direct and indirect.

Hawai'i's 40-year-old community correctional centers are dilapidated and horribly overcrowded, and have now become a liability. Simply building newer, larger incarceration facilities anchors our society more firmly in an antiquated and injurious punitive system with a poor track record of reducing crime and, instead, a legacy of destroying lives and communities.

*Over the past 20 years, it's become clear **the draconian austerity of the prison system incurs a high and multi-faceted cost on inmates.***

It's also clearly a strain on overburdened state budgets, and on taxpayers themselves.

*On top of this, **the prison system has been shown to be less effective at keeping communities safe compared to restorative, rather than punitive, solutions** which seek to heal and restore troubled people, returning them back to society in a condition in which they can be productive and contribute to society.*

1. ***Bail is supposed to minimize the risk of flight and danger to society while preserving the defendant's constitutional rights. However, requiring cash bail does not achieve any of these outcomes.***

Jurisdictions like [Washington D.C.](#) that have all-but replaced cash bail with [smart justice](#) reforms have seen better rates of court attendance and lower rates of re-arrest, all while satisfying the intent of bail without violating civil liberties.

2. ***Cash bail has serious societal costs.*** *Incarceration always disrupts lives, often leading to loss of employment, custody issues and loss of housing. These worsened outcomes derail people from the trajectory of their lives, leading to increased criminality, homelessness, health problems and [other societal costs for which we all pay the price.](#)*
3. ***Cash bail is overused and arbitrary.*** *Hawai'i's courts require bail as a condition of release in [88 percent of cases.](#) More than half of the arrestees in those cases*

were unable to post the amount required by the court. Although Hawai'i's Constitution prohibits "excessive bail," many judges in Hawai'i admit to arbitrarily setting bail at a certain amount based solely on the offense the individual is accused of committing.

4. **Cash bail violates the right to presumption of innocence.** In the United States, the accused is presumed innocent until proven guilty, and the the Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty without due process of law (including while awaiting trial and regardless of indigence).

Yet, in Hawai'i, some [1,145 individuals are currently being held](#) behind bars without having been convicted of a crime. Nationwide, [443,000 people are being detained](#) without ever having been tried in a court of law. This is a gross violation of their civil liberties and amounts to an unconstitutional, extrajudicial punishment.

5. **Cash bail makes a mockery of justice.** In Hawai'i, 64 percent of those who could not afford bail [changed their plea to guilty to get out of jail sooner](#). Using pre-trial detention to coerce arrestees into guilty pleas is [routine practice](#) for prosecutors throughout the country.

Furthermore, a 2012 study conducted by the New York City Criminal Justice Agency [found that pretrial detention has a negative impact on trial outcomes](#): among non-felony cases with no pretrial detention, 50 percent ended in conviction compared to a 92 percent conviction rate among cases with an arrestee who was detained.

6. **Cash bail allows the wealthy to buy their way out of jail.** Most bail for all felony charges in the First Circuit is set in the [\\$11,000 to \\$25,000](#) range, but it was as high as \$1 million in eight cases and \$2 million in two cases in 2015. Detention or release should not be conditioned on an individual's wealth or income. A wealthy person can be just as dangerous as a poor person.
7. **Cash bail exacerbates institutional racism within the penal system.** In Hawai'i, Native Hawaiians and Pacific Islanders are [more likely to be arrested and detained with a bail amount set to an unreasonable cost](#) based on their charge, record or lack thereof, and socioeconomic status. This is reflected nationally with other communities of color.
8. **Cash bail is a way for corporations to exploit poor communities.** Often, the only way a person can maintain their freedom and return to their lives while awaiting trial is to pay a bail bondsman to front the cost of bail. These bail bondsmen do not reimburse accused people for the cost of their services should they be found innocent.

Nor are they small businesses providing a service, as they often claim. In fact, [they are fronts for multinational insurance companies](#) that use America's backward penal system to extract wealth from poor communities that are over-

targeted by police departments and suffer disproportionately from racist policies like Three Strikes and mandatory minimum sentences.

9. **Hawai'i spends more than \$60 million on pretrial incarceration each year.** It costs a lot of money to lock people up behind bars: about [\\$54,500 per detainee each year, or \\$150 per day](#). Compare this to Washington D.C., which releases 85-90 percent of pretrial arrestees and spends a mere [\\$18 a day](#) in supervising costs per individual. The U.S. spends [\\$13.6 billion annually](#) to detain people who have not been convicted of a crime.
10. **Hawai'i's correctional facilities are a liability.** [Six out of nine Hawai'i facilities are "over design capacity" and a four are over "operational capacity."](#) The Department of Justice has warned the State of Hawai'i that it will sue unless the issue is addressed quickly.

While building a newer, larger, prison will alleviate crowding, it won't address the underlying causes of over-incarceration. **Bail reform is the swiftest and more sure-fire way to reduce our overcrowded jail population, while simultaneously beginning to reform the penal system toward true justice.**

Thank you for the opportunity to submit these comments.

SB-1260-SD-1

Submitted on: 3/13/2021 7:39:43 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

I support this bill for the following reasons:

1) Cash bail violates the right to presumption of innocence and due process. In the United States, the accused is presumed innocent until proven guilty, and the the Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty without due process of law (including while awaiting trial and regardless of indigence). Yet, in Hawai'i, some 1,145 individuals are currently being held behind bars without having been convicted of a crime. Nationwide, 443,000 people are being detained without ever having been tried in a court of law. This is a gross violation of their civil liberties and amounts to an unconstitutional, extrajudicial punishment.

2) Hawai'i spends more than \$60 million on pretrial incarceration each year. It costs a lot of money to lock people up behind bars: about \$54,500 per detainee each year, or \$150 per day. Compare this to Washington D.C., which releases 85-90 percent of pretrial arrestees and spends a mere \$18 a day in supervising costs per individual. The U.S. spends \$13.6 billion annually to detain people who have not been convicted of a crime.

Please pass SB1260 SD1

SB-1260-SD-1

Submitted on: 3/14/2021 9:21:56 AM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Christine Weger	Individual	Support	No

Comments:

These reform measures have been considered favorably by the Criminal Pretrial Task Force in 2018 and supported by recommendations of the HCR 85 Task Force in 2016. These groups were not composed of outsiders or "do-gooders" but instead composed of prosecutors, judges, police, corrections personnel and members of the Legislature.

Their reports overwhelmingly point to the need for massive overhaul of the pretrial criminal justice process in Hawaii. In particular, Recommendations 20 and 21 of the Criminal Pretrial Task Force support the elimination of money bail for low-level, non-violent misdemeanor offenses and the use of rebuttable presumptions and risk assessment as the basis for bail, rather than financial circumstances.

The HCR 85 Task Force similarly recommended that the cash bail system be reformed in order to reduce the jail population.

The purposes of these reforms are not only to make the system more humane for accused persons, but to streamline the judicial system and save state funds desperately needed for other purposes, all the while safeguarding the public.

These measures are long overdue. The Legislature has considered these and similar reforms numerous times during the last ten years. We have endlessly studied the problems of pretrial injustices and overcrowded jails. Now is the time for action.

Christine Weger

Diehl & Weger, Attorneys at Law, ALC

HOUSE OF REPRESENTATIVES
THE THIRTY-FIRST LEGISLATURE
REGULAR SESSION OF 2021

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

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Rep. Scot Z. Matayoshi, Vice Chair

Rep. Linda Ichiyama	Rep. Nadine K. Nakamura
Rep. Dale T. Kobayashi	Rep. Roy M. Takumi
Rep. Matthew S. LoPresti	Rep. Chris Todd
Rep. Nicole E. Lowen	Rep. James Kunane Tokioka
Rep. Angus L.K. McKelvey	Rep. Gene Ward

NOTICE OF HEARING

DATE: Tuesday, March 16, 2021
TIME: 2:00
PLACE: VIA VIDEOCONFERENCE
Conference Room 325
State Capitol
415 South Beretania Street

[SB 1260, SD1](#)
[\(SSCR759\)](#)
[Status](#)

RELATING TO CRIMINAL PRETRIAL REFORM.

JHA, FIN

Eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions. Creates rebuttable presumptions regarding release and detention for certain offenses and specifies circumstances in which these presumptions apply. Effective 5/6/2137. (SD1)

Testimony Comments & Subject to Amendment to Page 6, Section 3(b) 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. Bail by sufficient sureties or secured bail and its cousins cash bail, money bail, property bail and even credit card bail have helped to make the American justice system a worldwide leader and an example of fairness and accountability. Bail is at the

foundation of justice in America and is a constitutional right upheld by the Eighth Amendment to our Constitution. Bail by sufficient sureties is mentioned in at least 39 state constitutions.¹ My decision to become a bail agent was precipitated by my work as a recognizance officer at Clark County Community Corrections in Washington State, where we concentrated most of our efforts on those who could pay cash bail and consequently ignored too many of the truly needy.² My work to provide bail by sufficient sureties addresses the needs of defendants and provides a good option for pretrial release. 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.

The purpose of proposed SB 1260 SD1 is to change the criminal justice system in Hawai`i by deleting bail requirements for certain classes of crime. The proposed bill seeks to eliminate the use of monetary bail for traffic offenses, violations, non-violent petty misdemeanor offenses, and non-violent misdemeanor offenses, with certain exceptions, and requires defendants to be released on their own recognizance. **The measure does not (and should not) seek to eliminate bail by sufficient sureties, nor does the bill seek to impact bail agents or those persons requiring secured bail when set by the court.**

As such, my testimony will focus on page 6 of the proposed SB 1260 SD1 and its attempt to amend Chapter 804, Hawai`i Revised Statutes by striking the following line: *“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...”*. It is my opinion, which will be substantially supported in the following pages, that the removal of language regarding access to bail by sufficient sureties is unnecessary as it does not apply to those with lesser criminal offenses as described in this bill. Further, the removal of such language does not support the purpose of this bill which is not to eliminate bail for those offenses for which it has been deemed necessary by a judge. (Note: During the 2019 legislative session, there was an attempt to remove this type of language from SB 192 and HB 1552 which ultimately resulted in the language being restored and left intact.) I ask that the language regarding *bail by sufficient sureties*, referenced above, be restored to any version of SB 1260 SD1 to be adopted by the Hawai`i State Legislature.

¹ Reform considerations for states with a constitutional right to bail:
[Devil Take The Hindmost: Reform Considerations for States with a Constitutional Right to Bail \(uakron.edu\)](http://uakron.edu)

² The Barton Case explains bail by sufficient surety and how cash bail differs.
<http://blog.808bail.com/2015/02/>

Among the many reasons to restore the aforementioned language to this bill prior to the consideration of its passage is the fact that the HCR 134 Task Force Report never asked for elimination of bail by sufficient sureties (i.e. secured bail). The removal of this language would be counter intuitive as it would result in less options for pretrial defendants and not more. As the report proves, any attempt to remove options or limit pretrial release contributes to the overcrowding of Hawai'i's jails and increases the burden on taxpayers.

We all want fewer people in jail, are concerned about the decrepit conditions of our present facilities, and know the need for adequate jail/prison bedspace. The 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 Task Force, however, did not ask for bail by sufficient sureties to be eliminated and the report does not seek to ban bail agents. The recommendations in the report instead seek to improve current pretrial practices, with the goal of achieving a more just and fair pretrial release and detention system. They also seek to maximize the release of defendants, ensure their appearance in court and, importantly, protect the public.³

Since 2019, we have had HRS 804-9.5 in place regarding unsecured bail, which outlines the terms for this type of bail. With this legislation already in place, it would be harmful to remove the language regarding bail by sufficient sureties from the newly proposed SB 1260 SD1 as doing so would remove options for pretrial release.

A quick review of the booking logs available online at <https://www.honolulu.org/information/arrest-logs/> will confirm that judges currently release the majority of detainees from HPD. The judiciary has taken many positive steps to release more pretrial defendants both at court and at HPD. Further, HPD arrest and booking numbers have been greatly reduced. A look at the number of arrests for each year from 2007 to 2019 when compared to those actually held at OCCC shows that less than 3% of those arrested are actually held pretrial. Hawai'i ranks in the top 5 of all 50 states for fewest numbers of those held pretrial and has a high functioning pretrial process. We are not in need of legislation that would

³ This article out of Utah speaks of lawmakers repealing bail reform and explains why: <https://www.deseret.com/utah/2021/2/6/22268717/legislature-bail-reform-took-effect-4-months-ago-utah-lawmakers-want-repeal-jail>

decrease the number of good options for release that work to ensure that criminal defendants appear in court.

The Intake Service Center in Hawai`i is among the best in the nation. The HRC 134 Task Force Report proves Hawai`i has a high functioning pretrial process. Unlike Hawai`i, there are many states that have much higher numbers of defendants being held pretrial. This includes Washington D.C., where approximately 11% or about 2,000 of those 19,000 arrested annually are held pretrial. Washington D.C. measures incarceration rates relevant to the overall population and not the actual number of those 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 an average of 17,000 arrests annually. The 2017 Pretrial Service Agency Financial Report for Washington D.C., states that 16,407 offenders were supervised over the course of one year.⁴ The cost for this is about \$65MM annually. There was an approximate 12% failure rate in 2017 according to the annual report. Even with a \$65MM annual budget, Washington D.C. is worse off than Honolulu. Clearly their system with its high incarceration rate is in need of reform and when compared to that of Hawai`i, it can be seen that our pretrial process provides diverse options for release.⁵

The point here is much testing on use of unsecured release is being done on the mainland that we can learn from and follow, but also avoid the pitfalls. Secured bail using sufficient sureties, bail bonds sold by bail agents and insured by an insurance company, real property pledged (pursuant to §804-11.5), cash, credit and debit card authorization, stocks, bonds, or real property all provide better choices that are fairer and reliable as opposed to detention. HCR 134 Task Force members included members of the judiciary who are all taking steps to reduce jail populations. OCCC numbers in pretrial have been reduced by at least 50% or more (452 as of January 2021). Prior to adopting additional legislation, it is my feeling that 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 and we still do not have bail release uniformity statewide; although we are in the process and DPS cooperates in every way.

⁴ 2017 Pretrial Service Agency Financial Report for Washington D.C.:

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

⁵ Washington D.C.'s incarceration rate is among the highest in the country.

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

The intent of SB 1260 SD1 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 that requires the bill to eliminate the *sufficient sureties* language from our statutory scheme as is the case on page 6 of the bill. Further, since the intent is not to eliminate bail agents, by eliminating the words, ***bailable by sufficient sureties***, it would make it easier to eliminate bail agents in future legislation which is not the purpose or intent of SB 1260 SD. I ask that the committee report reflect that the intent of this measure is not to eliminate bail agents or any other means of bail or pretrial release by sufficient sureties (secured bail). In other words, the bill does not seek to limit judicial options or choices but rather to add options and choices for our judges. The intent of SB 1260 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.

However, when we drop the bail requirement, there is a rebound effect that must be taken into account. There will inevitably be more crime and more warrants.⁶ In 2011, HPD listed 1,356 felony warrants received and 1,146 felony warrants served. 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. If SB 1260 SD1 is passed, 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. ISC cannot do this and must deal only with the defendant which puts them at a disadvantage.

Bail by sufficient sureties or secured bail is very important to the integrity of our judicial system and, as such, I ask that Section 3(b) be restored to the proposed bill. The existence of Section 3(b) as it is currently written does not have a negative impact on the intent and purpose of SB 1260. In fact, its existence serves to provide additional options to those assigned bail by a judge. One solution would be to insert the word, ***however***, into the clause as shown below:

⁶ Chicago's bail reform has resulted in increased crime.
<https://www.city-journal.org/bail-reform-in-chicago-has-increased-crime>

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

Another option would be to use the word, **provided**, as shown below:

(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 provided there shall be a rebuttable presumption...

A third option would be to clarify that the bail wording does not apply to the aforementioned nonviolent offenders by inserting the words, **and assigned bail by a judge**, as shown below:

(b) Any person charged with a criminal offense and assigned bail by a judge shall be bailable by sufficient sureties; provided that bail may be denied where the charge is for a serious crime, and there shall be a rebuttable presumption...

Removing the language in Section 3(b) is not necessary and doing so would lead to adverse outcomes. Its removal would both decrease equal access to pretrial release by limiting options and impede the goal of decreasing mass incarceration. 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. Additionally, a liberal definition of “sufficient sureties” can expand access to pretrial release by involving many “alternative sureties” that are both sufficient and effective. Examples of these alternatives are 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 (both inpatient and outpatient), mental health agencies and sponsors pledged to assist in supervised release programs. 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. This is the least effective way to guarantee a defendant appears in court and puts the defendant in the highest category for re-arrest according to the US

Department of Justice's Bureau of Justice Statistics report on pretrial released felony defendants.⁷

Bail by sufficient sureties and secured bail is at the heart of our American justice system. Release or detain is not in the public interest. That is why I chose to participate in the legislative process. The goal is to find more ways to reduce the jail population while keeping the safety of the public at the forefront. If we eliminate bail altogether, take away judicial discretion, insist on police citation releases, spend thousands of dollars hoping to convert criminals to law abiding citizens, change sentencing laws to reduce jail time, and legalize crimes such as drug possession, we may decrease jail populations but will certainly increase crime. I have studied pretrial release and prison population management since 1973. When I compare our Hawai`i pretrial system to those of the mainland, it is clear that we are leaders in pretrial modernization. The small number of pretrial detainees at OCCC (averaging about 500-750 in January 2021) as compared to the number of arrests (between 15,000 and 18,000) proves that our system is high functioning. To pass SB 1260 with the sufficient sureties language removed would be a move to limit pretrial release options and not expand them. Maintaining the right to bail by sufficient sureties is certainly essential to the pretrial process and I ask for this language to remain in SB 1260 or any other bill pertaining to pretrial release on bail. One size does not fit all and we need more ways to safely release, not less.

Thank you for this opportunity to testify on this measure.

James Waldron Lindblad

808-780-8887

James.Lindblad@Gmail.com

Re 03.13.2021

⁷ <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>

SB-1260-SD-1

Submitted on: 3/14/2021 3:29:38 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

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

Comments:

Strong support.

SB-1260-SD-1

Submitted on: 3/14/2021 4:04:40 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Meredith Buck	Individual	Support	No

Comments:

I strongly support SB1260 in reference to the points addressed by YPDA:
<https://www.ypdahawaii.org/bail-reform>

The cash bail system may have been well intentioned, and might make sense in a world without income inequality or systemic racism, but in our current reality it disproportionately affects the most vulnerable in our communities. It contributes to overcrowded jails, broken family systems, and greater expense for the State of Hawai'i. The result is a great strain not just on individuals or families, but on our local society as a whole, at every level. Ending the cash bail system will free up the resources needed to generate and implement truly restorative practices within the justice system.

Please pass SB1260. Mahalo nui loa !

SB-1260-SD-1

Submitted on: 3/14/2021 5:49:51 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

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

Comments:

I STRONGLY SUPPORT SB1260 SD1 for the following reasons:

- Cash bail does not serve the function for which it was intended. The purpose of bail is not pretrial punishment. Bail is supposed to minimize the risk of flight and danger to society while preserving the defendant’s constitutional rights. However, requiring cash bail does not achieve any of these outcomes. Jurisdictions like Washington D.C. that have all-but replaced cash bail with smart justice reforms have seen better rates of court attendance and lower rates of re-arrest, all while satisfying the intent of bail without violating civil liberties.
- Cash bail violates the right to presumption of innocence. In the United States, the accused is presumed innocent until proven guilty, and the Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty without due process of law (including while awaiting trial and regardless of indigence). Yet, in Hawai`i, some 1,145 individuals are currently being held behind bars without having been convicted of a crime. Nationwide, 443,000 people are being detained without ever having been tried in a court of law. This is a gross violation of their civil liberties and amounts to an unconstitutional, extrajudicial punishment.
- Cash bail is overused and arbitrary. Hawai`i’s courts require bail as a condition of release in 88% of cases. More than half of the arrestees in those cases were unable to post the amount required by the court. Although Hawai`i’s Constitution prohibits “excessive bail,” many judges in Hawai`i admit to arbitrarily setting bail at a certain amount based solely on the offense the individual is accused of committing.
- Detention or release should not be decided on an individual’s wealth or income. Money bail allows the wealthy to buy their way out of jail – a wealthy person can be just as dangerous as an indigent person. PSD reports that more than 40% of statewide admissions in 2020 were persons living unsheltered or in an emergency shelter at the time of arrest.
- In Hawai`i, 64% of those who could not afford bail changed their plea to guilty to get out of jail sooner. Using pre-trial detention to coerce arrestees into guilty pleas is routine practice for prosecutors throughout the country. Furthermore, a 2012 study conducted by the New York City Criminal Justice Agency found that pretrial detention has a negative impact on trial outcomes: among non-felony cases with no pretrial detention, 50% ended in conviction compared to a 92% conviction rate among cases with an arrestee who was detained.

- Money bail is a way for corporations to exploit poor communities. Often, the only way a person can maintain their freedom and return to their lives while awaiting trial is to pay a bail bondsman to front the cost of bail. These bail bondsmen do not reimburse accused people for the cost of their services should they be found innocent.
- Money bail exacerbates the disparities/institutional racism in the criminal justice system. In Hawai`i, Native Hawaiians and Pacific Islanders are more likely to be arrested and detained with a bail amount set to an unreasonable cost based on their charge, record or lack thereof, and socioeconomic status. This is reflected nationally with other communities of color.
- Cash bail has serious societal costs. Incarceration always disrupts lives, often leading to loss of employment, custody issues and loss of housing. These worsened outcomes derail people from the trajectory of their lives, leading to increased criminality, homelessness, health problems and other societal costs for which we all pay the price.
- Hawai`i spends more than \$60 million on pretrial incarceration each year. It costs a lot of money to lock people up behind bars: about \$54,500 per detainee each year, or \$150 per day. Compare this to Washington D.C., which releases 85-90% of pretrial arrestees and spends a mere \$18 a day in supervising costs per individual. The U.S. spends \$13.6 billion annually to detain people who have not been convicted of a crime.
- Hawai`i's correctional facilities are a liability. Six out of nine Hawai`i facilities are "over design capacity" and four are over "operational capacity." The Department of Justice has warned the State of Hawai`i that it will sue unless the issue is addressed quickly. While building a newer, larger, prison will alleviate crowding, it will not address the underlying causes of over-incarceration. Bail reform is the swiftest and more sure-fire way to reduce our overcrowded jail population, while simultaneously beginning to reform the penal system toward true justice.
- ACLU Hawai`i Bail Report: <https://www.acluhi.org/en/aclu-hawaii-report-shows-current-bail-practices-prioritize-wealth-accused-over-risk-community>

SB-1260-SD-1

Submitted on: 3/14/2021 7:53:12 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Thaddeus Pham	Individual	Support	No

Comments:

Aloha JHA Committee,

As a public health professional and a concerned citizen, I urge you to **support SB1260 SD1**.

Covid-19 has [cost our state hundreds of millions of dollars](#), and we need to quickly find ways to stop bleeding money. Luckily, a solution is making its way through the State Legislature right now. [Senate Bill 1260](#) (SB1260) will end cash bail in Hawai'i and save us millions of dollars.

Stop Wasteful, Ineffective Spending

In February 2021, the Department Public safety reported that [899 people were imprisoned while awaiting trial](#). Astonishingly, these pre-trial detainees make up more than one-fifth of the entire incarcerated population in Hawai'i. [It costs the state \\$198 per day to imprison someone](#). This means that pre-trial detention costs us \$178,002 a day, which adds up to over \$1,000,000 each week, over \$4,000,000 each month, or an astounding \$59,808,672 each year.

To be sure, there have been efforts to reduce this costly population. In 2018, Hawai'i's [Criminal Pretrial Task Force](#) made recommendations to "maximiz[e] pretrial release of those who do not pose a danger or a flight risk." In 2019, the State Legislature passed Act 179, which adopted most of those recommendations, except those focused on bail reform. Sadly, Act 179 did not work. There has been no real decrease in the number of pre-trial detainees, and it is still costing us millions.

Protect Our Working Families

Imagine you are Leila, a single, working mom who has been imprisoned while waiting for your trial date. Like many other people in Hawai'i, you have a family to take care of, rent and loans to worry about, and a job that barely covers everything you need to survive. If you are jailed pending cash bail, you are at risk of losing all those things. According to [ACLU Hawai'i](#), more than half of pre-trial detainees cannot afford bail. Even worse, people usually stay in jail an average of 90 days before their trial hearings. This 90-day "stay" costs an average of \$17,820.

Instead of allowing people with low-level, nonviolent offenses to contribute to their economy and society, cash bail effectively forces taxpayers to cover the unnecessary imprisonment of low-wage workers. In [testimony for SB1260](#), Kaua'i County's Office of the Prosecuting Attorney sums it up perfectly:

"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."

Prioritize Public Safety

For opponents of SB1260, an immediate concern with ending cash bail is public safety. Unlike Kaua'i, Honolulu County prosecutors insist that the cash bail protects the state by removing dangerous people from our communities. To be sure, public safety is important for the functioning of a robust economy. However, SB1260 specifically seeks to end cash bail for people accused of low-level, nonviolent crimes. Prosecutors will still be able to require bail for people accused of violent crimes. If public safety is truly a priority of prosecutors and law enforcement, then SB1260 makes total sense.

Let's consider this from another angle. If SB1260 does not pass, then our local jails would remain overcrowded. Already the state has invested over [\\$10 million dollars in planning a new jail](#) to accommodate all the people imprisoned in Hawai'i. We can save the unspent money dedicated for jail construction, maintenance, and staff by reducing the number of people unnecessarily jailed. We can reinvest those funds into training people for the workforce and supporting small businesses. We can keep people in their communities, preserving social cohesion and financial self-sufficiency. We can help families stay together, promote local economies, and, in doing so, keep our public truly safe.

Hawai'i Cannot Afford the Costs of Cash Bail

The COVID-19 pandemic has shown us that our economy depends on healthy, available essential workers. Overcrowding in jails not only keeps people from the workforce but also increases exposure to costly and inhumane health risks, such as the [recent COVID-19 outbreak at Halawa Correctional Facility](#). By continuing to keep people imprisoned due to cash bail, we are costing our state millions of dollars in facilities, detainment, and healthcare.

In testimony for SB1260, the support from community and government was overwhelming. From prosecutors to unions to Native Hawaiian health systems to defense lawyers to people who were previously imprisoned, the message is clear. Ensuring safety for our communities does not have to come at the unnecessary cost of people's health, livelihood, or our economy. We simply can't afford to pay for cash bail any longer.

SB-1260-SD-1

Submitted on: 3/14/2021 8:06:37 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Mick	Individual	Support	No

Comments:

Aloha, I strongly support this Bill and ask you to pass it,

Mahalo, Marilyn Mick, Honolulu

SB-1260-SD-1

Submitted on: 3/14/2021 8:09:34 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Laura Ramirez	Individual	Support	No

Comments:

Aloha

Please support this bill to move Hawai'i in the direction of true justice.

Cash bail violates the right to presumption of innocence. In the United States, the accused is presumed innocent until proven guilty, and the the Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty without due process of law (including while awaiting trial and regardless of indigence). Yet, in Hawai'i, some [1,145 individuals are currently being held](#) behind bars without having been convicted of a crime.

Cash bail is overused and arbitrary.

Hawai'i's courts require bail as a condition of release in [88 percent of cases](#). More than half of the arrestees in those cases were unable to post the amount required by the court. Although Hawai'i's Constitution prohibits "excessive bail," many judges in Hawai'i admit to arbitrarily setting bail at a certain amount based solely on the offense the individual is accused of committing.

Cash bail exacerbates institutional racism within the penal system.

In Hawai'i, Native Hawaiians and Pacific Islanders are [more likely to be arrested and detained with a bail amount set to an unreasonable cost](#) based on their charge, record or lack thereof, and socioeconomic status.

Hawai'i spends more than \$60 million on pretrial incarceration each year. It costs a lot of money to lock people up behind bars: about [\\$54,500 per detainee each year, or \\$150 per day](#).

Hawai'i's correctional facilities are a liability. [Six out of nine Hawai'i facilities are "over design capacity" and a four are over "operational capacity."](#) The Department of Justice has warned the State of Hawai'i that it will sue unless the issue is addressed quickly. While building a newer, larger, prison will alleviate crowding, it won't address the underlying causes of over-incarceration. Bail reform is the swiftest and more sure-

fire way to reduce our overcrowded jail population, while simultaneously beginning to reform the penal system toward true justice.

Mahalo!

To: COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
From: Wendy Gibson-Viviani RN/BSN
RE: SB1260 –in Strong Support
HEARING: Tuesday, March 16, 2021 at 2:00 p.m. Via Videoconference

Aloha, Rep. Mark M. Nakashima, Chair, Rep. Scot Z. Matayoshi, Vice Chair and Members of the Committee,

I am Wendy Gibson-Viviani, a healthcare professional (RN) who has lived and worked in Hawaii for 28 years. I am also a conscientious objector in the failed, racist, violent war on drugs that has criminalized millions of non-violent people. I believe we need restorative justice and that includes ending the cash bail system.

Please read this (slightly edited for brevity) Civil Beat article by Robert Merce, dated February 21, 2021, entitled “***Most of us would like to believe that the law treats the rich and the poor alike, but it doesn’t***”. The Author Robert Merce is a retired attorney who served as vice-chair of the House **Concurrent Resolution 85 Task Force on Prison Reform** and was **the principal author of the group's final report to the 2019 Legislature**. He is on the Board of Directors of the Native Hawaiian Legal Corporation and **served on the Hawaii Reentry Commission**. He writes:

On any given day close to 900 people are locked up in Hawaii’s dismal and decrepit jails even though they are presumed innocent and have not been convicted of a crime.

The vast majority are charged with relatively low-level offenses — misdemeanors, petty misdemeanors or class C felonies — and many are homeless or suffer from mental illness or substance use disorders.

The legal system calls these people “pretrial detainees” and they are locked up not because they are dangerous or a flight risk, but because they are too poor to afford bail. They make up over half of the Oahu Community Correctional Center population, and on a statewide basis they cost taxpayers about \$175,000 a day or \$64 million a year.

Most of us would like to believe that our legal system treats the rich and poor alike, but it doesn’t, and nowhere is the disparity more evident than in our money bail system, which subverts the presumption of innocence, undermines the principle of equal protection and causes untold harm to detainees, their families and society at large.

In United States v. Salerno, the U.S. Supreme Court said that “in our society liberty is the norm and detention prior to trial, or without trial, is the exception.” Those are fine words, but in practice, just the opposite is true. In the past 45 years the number of pretrial detainees in jails nationwide has increased 433% due in large part to the increased use of money bail.

A 2018 study by the ACLU-Hawaii found that overall judges in Hawaii required bail as a **condition of release in 88% of cases**, and in the majority of those cases it was set at a level the defendant could not afford.

The reality is that in our society detention is the norm and liberty is the exception.

Pretrial detention often leads to **devastating collateral consequences** that can have an impact on individuals **for a lifetime and families for generations**. Defendants who can't make bail are at risk of **losing their jobs**, and with it the income that supports their children, pays their rent and utilities and puts food on the table.

In the long run they can also **lose their house or apartment, health insurance and custody of their children**. After maxing out their credit cards, a family may end up deep in debt or even homeless.

Pretrial detainees can be locked up for **weeks, months or even years** under terrible conditions while awaiting trial. Overcrowding, broken telephones, long lockdowns and no-contact visits have **led to riots at the Maui and Hilo jails**.

These and other inhumane and arguably unconstitutional conditions have led detainees facing relatively short sentences to waive their constitutional rights and **plead guilty just to get their sentence over with and get out of jail**. The ACLU-Hawaii found that almost **70% of pretrial detainees** who changed their pleas from innocent to guilty or no contest did so while in jail, primarily because they could not afford bail.

The money bail system was designed to ensure that those charged with a crime **would show up for trial and would pose no threat to society**. In practice, money bail now ensures that the **indigent go to jail while the affluent remain free**.

People who can't make bail face another problem: They are **more likely to be sentenced** to a term of incarceration if convicted. A national study by the Arnold Foundation found that defendants who are **detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison** when compared to defendants who are released at some point before trial or case disposition.

Studies have also shown that the inequities of the cash bail system in Hawaii fall disproportionately on **Native Hawaiians and Pacific Islanders** who are more likely to be **arrested, detained and unable to afford bail**.

The use of money bail is often justified on the grounds that it **makes us safer** by keeping dangerous people in jail. But a report from the 2018 Criminal Pretrial Task Force chaired by **Hawaii circuit judge (now U.S. magistrate) Rom Trader** found that **“there is virtually no correlation between the setting of a particular bail amount and whether the defendant will**

commit further crime or engage in violent behavior when released from custody. Thus, money bail is a poor method of assessing and managing a defendant's risks."

*The idea that we must end cash bail to create a truly just pretrial system is not a radical one. **The federal government did it**, and many jurisdictions are moving in that direction. But we are not — at least not yet.*

*Bail is the norm in Hawaii, even for low-level offenders, and those who cannot afford bail — the majority — will go to jail. On Oahu, they wind up here, inside the **Oahu Community Correctional Center**.*

*In contrast, the **District of Columbia significantly reduced its reliance on cash bail** by adopting a strong presumption of release, strict timelines for assessing defendants after arrest and procedural protections for preventative detention. Under the new system, 94% of the people who are arrested in the District are released without bail, and of that group **91% make their scheduled court dates and 98% are not arrested for a violent crime** while awaiting trial.*

*In **2017** New Jersey overhauled its pretrial justice system in a collaborative process that included a wide range of private and government stakeholders. The reforms almost entirely eliminated money bail and achieved a **94% release rate**. In cases where prosecutors did not seek preventative detention, courts made 81.3% of release decisions within 24 hours and 99.5% of release decisions within 48 hours. There has been **no spike in crime in New Jersey** since the pretrial reforms were implemented.*

*In **2016** New Mexico passed a constitutional amendment that made it easier for judges to deny bail for defendants who are deemed to be dangerous and to release low-risk defendants who are unable to make bail. A study found that four out of five defendants were not arrested for a crime while on pretrial release and **96% were not accused of a violent crime**. Of the 6,392 defendants who were released pending trial, only 12, or 0.2%, were arrested for a first-degree felony.*

*The movement to abolish money bail has grown across the United States; here a **2019 faith-based protest in Chicago calls for an end to the system**.*

*In addition to abolishing bail, to optimize the effectiveness of its pretrial system **Hawaii should also:***

- *Conduct a risk assessment of detainees and make recommendations for release or detention within 24 hours;*
- *Develop and validate a method of assessing risk that does not discriminate against minorities or the poor;*
- *Make greater use of programs and agencies that divert low-level offenders away from the criminal legal system;*
- *Conduct frequent reviews of the pretrial detainee population and where appropriate make releases without motions or court appearances; and*

- *Give Hawaii's police officers greater discretion to issue citations in lieu of arrest for low-level offenses.*

*Ending money bail could easily reduce the number of pretrial detainees statewide from close to **a thousand to a few hundred and that would save millions.** It would also **allow us to replace OCCC with a much smaller jail and that would save hundreds of millions.***

*Our bail system keeps poor people who are accused of low-level, non-violent crimes in jail because they are poor, while allowing wealthy people who are accused of major violent crimes to go free because they can bail themselves out. **The current system is expensive, ineffective, unjust and we must end it.***

Source: <https://www.civilbeat.org/2021/02/restore-justice-end-the-bail-system/>

Please consider all of these facts when making your decision. I encourage you to pass SB1260 to end the cash bail system.

Mahalo for the opportunity to share this information with you,

Wendy Gibson-Viviani RN/BSN
Kailua Resident

SB-1260-SD-1

Submitted on: 3/15/2021 11:00:49 AM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
donn viviani	Individual	Support	No

Comments:

I support SB1260. The purpose of bail is to prevent flight and to assure appearance at trial. The purpose is not to punish suspects (who under the law must be presumed innocent) or to create two classes of citizens under the law. The two classes are those who can afford bail and those who cannot. The punishment of those who cannot can be way out of proportion to the offense they are suspected of: loss of income, loss of a job, or may result in their children or kupuna not being cared for. Protection of hawaiian citizens is accomplished through pretrial incarceration of those who may be violent, not suspects of low level offences. Only the US and the Phillipines have money/commerical bail requirements. All other countries apparently see no need for this unfair, discriminatory and archaic requirement. Let's treat every person equally and not let the size of someone's wallet determine how the law treats them.

Thank you
Donn Viviani, Kailua

ROBERT K. MERCE
2467 Aha Aina Place
Honolulu, Hawai'i 96821
(808) 398-9594

TO: Committee on Judiciary and Hawaiian Affairs
RE: SB 1260 SD 1
HEARING DATE: Tuesday, March 16
TIME: 2:00 p.m.
CONF. Via Videoconference
POSITION: Support with amendments

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I support SB 1260 SD 1 **with the amendments submitted by the Office of Hawaiian Affairs.**

Our money bail system is unjust. It keeps poor people accused of minor crimes in jail simply because they are poor, while allowing rich people accused of major crimes to go free simply because they are rich.

It is also ineffective. As the HCR 134 Task Force on Pretrial Reform said in its report to the 2019 legislature, “there is virtually no correlation between the setting of a particular bail amount and whether the defendant will commit further crime or engage in violent behavior when released from custody. Thus, money bail is a poor method of assessing and managing a defendant’s risks.”

Our bail system is also incredibly expensive. Prior to the coronavirus pandemic we were spending around \$209,000 *per day* to incarcerate pretrial detainees statewide. We have reduced our pretrial population due to the pandemic, but pretrial detainees still cost taxpayers around \$175,00 a day or 64 million a year.¹ SB 1260 would permanently reduce our pretrial population and save millions of dollars a year. It would also allow us to build a smaller jail to replace OCCC which would save tens of millions in construction costs.

Studies have shown that the inequities of the cash bail system in Hawaii fall disproportionately on Native Hawaiians and Pacific Islanders who are more likely to be arrested, detained and unable to afford bail.

Other jurisdictions, including the District of Columbia, New Jersey, and New Mexico have significantly reduced their reliance on money bail with no adverse effect on public safety.

¹ On February 1, 2021 there were 883 pretrial detainees in Hawaii’s jails. See Hawaii Department of Public Safety Headcount, February 1, 2021. <https://dps.hawaii.gov/wp-content/uploads/2021/02/Pop-Reports-Weekly-2021-02-01.pdf>. It costs \$198/day to incarcerate a person in Hawaii. See *Hawaii Department of Public Safety 2019 Annual Report*, p. 16. \$198/day x 883 inmates = \$174,834 per day, or approximately \$64 million/year.

I discussed some of the problems with our money bail system in an essay that appeared in Honolulu Civil Beat on February 21, 2021. I hope you will take a moment to read it.²

The Amendments offered by OHA are sensible and prudent. They will reduce jail overcrowding, save millions, and significantly reduce the devastating effects of cash bail on the families of indigent defendants.

Thank you for allowing me to testify on this important bill.

² The essay can be found at <https://www.civilbeat.org/2021/02/restore-justice-end-the-bail-system/>

SB-1260-SD-1

Submitted on: 3/15/2021 11:32:22 AM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ivy Hsu	Individual	Support	No

Comments:

Aloha e Committee Chair and Members,

As an educator in urban Kalihi, I am witness to the effects of our criminal justice system on our keiki. Holding individuals on bail for petty misdemeanors not only imposes a strain on our system but also affects trauma and lasting damage to families residing in our poorest communities. This ultimately has a negative impact on all of us, for people of all socioeconomic levels must live alongside each other. Bail reform is needed now! Mahalo for considering my testimony.

SB-1260-SD-1

Submitted on: 3/15/2021 1:25:03 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Meleana Shim	Individual	Support	No

Comments:

I strongly support this bill because it is an important step toward ending the cash bail system in Hawai'i.

SB-1260-SD-1

Submitted on: 3/15/2021 2:15:30 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Shannon Rudolph	Individual	Support	No

Comments:

Support

SB-1260-SD-1

Submitted on: 3/15/2021 2:18:00 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jamaica Osorio	Individual	Support	No

Comments:

I write this testimony in support of SB 1260.

In Hawai'i we are in dire need of reform to our current policing and prison system—where three in four arrests are for non-violent, non-property offenses. Meaning that the primary number of people in our prisons are there because of “crimes of poverty.” The reduction of these “crimes” is not possible through an increase in policing and incarceration but rather with an increase of proper social and health programs to invest in the wellbeing and safety of our entire community. Furthermore, far too many of our people remain incarcerated simply because they (and their families) cannot afford bail. This system is specifically targeting our most vulnerable communities, including our Native Hawaiian community, and there are many more just solutions that we could invest in. Ultimately our goals should be to shrink our prison footprint, rather than expand it.

One way to decrease our jail/ prison footprint is to eliminate the cash bail system which is inherently racist and classist and results in an aggressively unequal enforcement of the law. Under this system, people who cannot afford bail (primarily Native Hawaiian and other citizens of color) can spend months (sometimes even years) awaiting trial simply for the crime of being too poor to post bail. Our criminal justice system proports itself to be founded on the value of being innocent until proven guilty. However, in practice, the cash bail system marks all citizens in poverty as guilty and relegates them to an unfair enrolment of the law before ever reaching trial.

There are too many causes for me to enumerate in this testimony that has resulted in Native, black and brown citizen experiencing a completely different criminal justice system than our white counterparts. Eliminating the cash bail system is one small but incredibly important step towards equity in our criminal justice system in Hawai'i. Failing to eliminate this racist and classist system will result in a continued reality where poor native, black and brown citizens are more accountable to the law than our financially privileged (and white) counterparts. Ultimately, this leads to the reality that these laws and regulation are in reality only in place for those who are too poor to post bail.

Hawai'i would not be the first state to reform the cash bail system. In fact the State of Illinois has already completely eliminated Cash bail. As I understand it, this bill only

eliminates cash bail in certain circumstances which is unfortunate. Hawai'i must also consider eliminating the entire cash bail system if we wish to take seriously the value of "innocence until proven guilty." Before the illegal overthrow of our Hawaiian Kingdom, Hawai'i was at the cutting edge of laws that prioritize equity and justice. Let us honor that history by taking this small (but essential) step towards equity in our criminal justice system. And then, let us be courageous and continue along on this charge until Hawai'i is a state that prioritizes justice, equity, and aloha over all else.

Dr. Jamaica Heolimeleikalani Osorio
Assistant Professor
Indigenous & Native Hawaiian Politics
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SB-1260-SD-1

Submitted on: 3/15/2021 7:10:25 PM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Imari Olipani	Individual	Support	No

Comments:

The cash bail system is a system that has operated on a class-discriminatory basis in which a person's freedom is not measured by the severity of the crime, but rather by the depth of an offender's pockets. The fact that a rich man can buy his way out of being held accountable asserts the criminalization of low-income communities, which in turn disproportionately affects black and brown communities. As someone who lives a block away from Michael Hirokawa, who posted bail after being detained for attempted murder and assault, I do not feel safer in my community knowing that man can roam free because he could afford it while someone charged with a petty misdemeanor remains detained simply because they could not. Why is freedom and accountability--and essentially justice--based on a monetary system?