The Judiciary, State of Hawai'i

Testimony to the House Committee Finance
Representative Sylvia Luke, Chair
Representative Ty J. K. Cullen, Vice Chair

Friday, March 29, 2019 3:30 PM – Agenda #3
State Capitol, Conference Room 308

WRITTEN TESTIMONY ONLY

by
Judge Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge
Circuit Court of the First Circuit
Reporter, HCR 134 Criminal Pretrial Task Force

Bill No. and Title: Senate Bill No. 192, S.D. 1, H.D. 2, Relating to Bail.

Purpose: Implements recommendations of the Criminal Pretrial Task Force convened pursuant to House Concurrent Resolution No. 134, House Draft 1, Regular Session of 2017. Authorizes a defendant in custody to petition a court for unsecured bail. (SB192 HD2).

Judiciary's Position:

The Judiciary respectfully supports Senate Bill No. 192, S.D. 1, H.D. 2, in as much as it reflects the recommendations of the H.C.R. 134, H.D. 1 (2017) Criminal Pretrial Task Force submitted to this Legislature on December 14, 2018.

I. In support, the Judiciary provides the following additional comments:

1. Regarding Section 5, relating to Unsecured Bail: The Judiciary continues (as stated in prior testimony this session) to believe that unsecured bonds may be unnecessary, but does not oppose this section and appreciates the House Committee on Judiciary's amendment to paragraph (b). To restate prior testimony, this section may be unnecessary because defendants eligible for supervised release are already released without any financial obligation. Non-financial release alternatives are already utilized. Defendants can be released on their own recognizance, on supervised release to the Department of Public Safety's Intake Service Center,

on supervised release to a sponsor (often a family member or friend with a stable residence), or on supervised release to a treatment program. Because non-financial release alternatives are already available, there is little need for unsecured bonds. Nevertheless, the Judiciary does not oppose this section.

2. The Judiciary also notes what is *not* included in S.B. 192, S.D. 1, H.D. 2. Notably, it appears that two sections in particular from H.B. 1289, H.D. 2 (Relating to Criminal Pretrial Reform)[1] that appear to have raised concerns among one or more law enforcement or other agencies or community groups have been omitted. These omissions (Section 5[2] relating to law enforcement discretion for citation in lieu of arrest and Section 7 relating to a right to a prompt hearing on release or detention and release on own recognizance for non-violent offenders with exceptions where bail may be set in a reasonable amount) may be related to apparent concerns expressed in testimony by one or more testifiers.

Even without these provisions, this bill will make meaningful statutory revisions that can supplement improvements to practices that do not require statutory amendments. As a result, the Judiciary acknowledges the House Committee on Judiciary's responsiveness.

3. Consistent with the above, and focusing on the goal of enacting meaningful statutory revisions, the Judiciary acknowledges that several agencies would also appear to have concerns with section 6 (establishing a rebuttable presumption for release or admitted to bail under the least restrictive conditions) of S.B. 192, S.D. 1, H.D. 2. Specifically, the Judiciary notes that section 6 of S.B. 192, S.D. 1, H.D. 2 is a duplicate of section 8 of H. B. 1289, H.D. 2, and the latter appears to have raised concerns in testimony before the Senate Committee on Public Safety, Intergovernmental, and Military Affairs by one or more testifiers.

Although section 6 reflects the recommendations of the Criminal Pretrial Task Force, nevertheless, even if this section is deleted, the bill will achieve significant reform.

4. The Judiciary also notes that the Department of Public Safety has expressed concern with adequate funding and resources, considering that it will be responsible for implementing several aspects of this bill. Consistent with recommendation #3 of the Task Force, the Judiciary understands the need that adequate funding and resources be provided for these purposes as contemplated in sections 17 and 22.

---

[1] The Judiciary testified in support of H.B. 1289, H.D.2 in as much as it reflects the recommendations of the Criminal Pretrial Task Force. Similarly, the Judiciary has testified in support of S.B.1422 and S.B.1539, both of which relate to the same subject matter of these two sections omitted from S.B. 192, S.D. 1, H.D. 2.

[2] Section numbers in this sentence refer to H.B. 1289, H.D.2.

II. In support, the Judiciary also provides the following background on the Criminal Pretrial Task Force and its recommendations.

Chief Justice Mark E. Recktenwald established the instant Criminal Pretrial Practices Task Force to examine and recommend legislation to reform Hawai‘i’s criminal pretrial system.

The Task Force embarked on its yearlong journey in August 2017 and began with an in-depth study of the history of bail and the three major generations of American bail reform of the 1960s, 1980s, and the last decade. The Task Force researched the legal framework underlying our current practices, which are firmly rooted in our most basic constitutional principles of presumption of innocence, due process, equal protection, the right to counsel, the right to confrontation and that in America, liberty is the norm and detention is the very limited exception. National experts were invited and the Task Force members delved into the latest research and evidence-based principles and learned from other jurisdictions where pretrial reforms are well underway. Previous studies conducted in the State of Hawai‘i were reviewed, community experts were engaged and the views of our local stakeholders were considered. Task Force members visited cellblocks, jails, ISC offices and arraignment courts in an effort to investigate and present an unbridled view of our criminal pretrial process.

The recommendations in the report seek to improve current practices, with the goal of achieving a more just and fair pretrial release and detention system, maximizing defendants’ release, court appearance and protecting community safety. With these goals in mind, the Task Force respectfully submitted the following recommendations to be considered and implemented as a whole:

1. Reinforce that law enforcement officers have discretion to issue citations, in lieu of arrest, for low level offenses and broaden discretion to include non-violent Class C felonies.

For low-risk defendants who have not demonstrated a risk of non-appearance in court or a risk of recidivism, officers should issue citations rather than arrest.

2. Expand diversion initiatives to prevent the arrest of low-risk defendants.

Many low-risk defendants have systematic concerns (homelessness, substance abuse, mental health, etc.) which lead to their contact with law enforcement. Diversion initiatives allow law enforcement to connect such defendants with community social service agencies in lieu of arrest and detention. This allows defendants to seek help and address their concerns, reducing their future risk of recidivism. Initiatives such as the Honolulu Police Department’s Health, Efficiency, Long-Term Partnerships (HELP) Program and Law Enforcement Assisted Diversion (LEAD) Program, as well as initiatives such as Community Outreach Court (COC) should be expanded.

3. Provide adequate funding, resources and access to the Department of Public Safety, Intake Service Center.

At the heart of Hawai‘i’s pretrial process is the Intake Service Center (ISC), a division of the Department of Public Safety (DPS). ISC is tasked with two primary responsibilities. First, ISC helps the court determine which pretrial defendants should be released and detained. More specifically, ISC conducts a risk assessment of the defendant to evaluate his/her risk of nonappearance and recidivism. The results of the risk assessment are reported to the court via a bail report, which recommends whether the defendant be held or released.

Second, once a defendant is released, ISC provides pretrial services to supervise the defendant and monitor his/her adherence to any terms and conditions of release. Pretrial services minimize the risk of nonappearance at court hearings while maximizing public safety by supervising defendants in the community.

Though Hawai‘i benefits from a dedicated and centralized pretrial services agency, staff shortages and limited funding hinders the administration of essential functions. ISC should be consulted to prepare an estimate of resources required to comply with current demand, as well as any potential future demands which may be triggered by any recommendations herein.

4. Expand attorney access to defendants to protect defendant’s right to counsel.

Attorneys need access to clients to discuss matters of bail, case preparation and disposition. Inmate-attorney visiting hours and phone calls from county jails should be expanded to protect defendant’s right to counsel.

5. Ensure a meaningful opportunity to address bail at the defendant’s initial court appearance.

A high functioning pretrial system requires that release and detention decisions be made early in the pretrial process, at the defendant’s initial court appearance. Prior to the initial appearance, parties must be provided with sufficient information (risk assessments and bail reports) to meaningfully address a defendant’s risk of non-appearance, risk of recidivism and ability to pay bail. Adequate funding and resources must be provided to the ISC, courts, prosecutors and public defenders to ensure that such information is accessible to all parties and ensure that low risk defendants are released and high risk defendants are detained.

6. Where bail reports are received after the defendant’s initial appearance, courts should automatically address pretrial detention or release.

In the event that a bail report is not provided for use at defendant’s initial court appearance, especially when the bail report recommends release, courts should set an expedited bail hearing without requiring a filed, written motion.

7. Establish a court hearing reminder system for all pretrial defendants released from custody.

To decrease the number of defendants that fail to appear in court, a court hearing reminder system should be implemented. Each defendant who has been released from custody should receive an automated text message alert, email notification, telephone call or other similar reminder of the next court date and time.

8. Implement and expand alternatives to pretrial detention.

The Task Force recommends broadening alternatives to pretrial detention in two primary ways. First, home detention and electronic monitoring should be used as an alternative to incarceration for those who lack the finances for release on bail. Second, the use of residential and treatment programs should be expanded. Many low-risk defendants may be charged with crimes related to their inability to manage their lives because of substance abuse, mental health conditions, or homelessness. Rather than face incarceration, defendants should be afforded the opportunity to obtain services and housing while awaiting trial. Providing a structured environment to address any potential criminogenic factors reduces the defendant's risk for non-appearance and recidivism.

9. Regularly review the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision.

Generally, court determinations as to whether a defendant is detained or released are made at or about the time of the initial arraignment hearing. Thereafter, there is no systematic review of the pretrial jail population to reassess whether a defendant may be appropriate for release. Absent a court appearance or the filing of a bail motion, there is no current mechanism in place to potentially identify low-risk defendant who may safely be released pretrial. In order to afford the pretrial detainee greater and continuing opportunities to be released, ISC should conduct periodic reviews to reassess whether a detainee should remain in custody.

10. Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center.

Currently, ISC is required to conduct risk assessments within three (3) working days. There is no correlating time requirement for bail reports. Following a felony defendant's arrest, defendants charged by way of complaint are brought to preliminary hearing within two (2) days of defendant's initial appearance. Thus, requiring both risk assessments **and** bail reports to be completed in two (2), rather than three (3), days would enable bail to be addressed at the earliest phases of the pretrial process, including at felony preliminary hearings. The current three (3) day requirement forgoes this opportunity to address bail early on.

11. Inquire and report on the defendant's financial circumstances.

Federal courts have held that a defendant's financial circumstances must be considered prior to ordering bail and detention. Hawai'i statute also instructs all officers setting bail to "consider [not only] the punishment to be inflicted on conviction, [but also] the pecuniary circumstances of the party accused." At present, little, if any, inquiry is made concerning the defendant's financial circumstances. Courts must be provided with and consider the defendant's financial circumstances when addressing bail.

12. Evaluate the defendant's risk of violence.

Currently, the risk assessment tool used in Hawai'i does not evaluate the defendant's risk of violence. While risk of non-appearance and recidivism remain critical components to an informed decision concerning pretrial release or detention, it is imperative that any evidence-based assessment also take into account whether the defendant is a danger to a complainant or the community.

13. Integrate victim rights by considering a victim's concerns when making pretrial release recommendations.

The perspective of victims should be integrated into the pretrial system by requiring that ISC consider victims' concerns when making pretrial release recommendations. While ISC is mindful of the victim's concerns and does make efforts to gather this information (generally from the prosecutor's office) and report it to the court, an effective and safe pretrial system must actively provide victims with a consistent and meaningful opportunity to provide input concerning release or detention decisions. Balance and fairness dictate that the defendant's history of involvement with the victim, the current status of their relationship, and any prior criminal history of the defendant should be better integrated into the decision-making process.

14. Include the fully executed pretrial risk assessment as part of the bail report.

ISC and correctional center staff who administer the risk assessment tool often employ overrides that frequently result in recommendations to detain. Furthermore, the precise reasons for these overrides are generally not provided. To increase transparency and clarity, ISC should provide to judges and counsel, as part of the bail report, the completed risk assessment, including the score and written explanations of any overrides applied.

15. Periodically review and further validate the risk-assessment tool and publicly report any findings.

In 2012, Hawai'i began using a validated risk-assessment tool, the Ohio Risk Assessment System Pretrial Assessment Tool ("ORAS-PAT"), which had been validated in Ohio in 2009 and in Hawai'i in 2014. Pre-trial risk assessments, including the ORAS-PAT, are designed to provide an objective assessment of a defendant's likelihood of failure to appear or reoffend upon

pre-trial release. Regular validation of the ORAS-PAT is vital to ensure Hawai‘i is using a reliable tool and process. This validation study should be done at least every five years and findings should be publicly reported.

16. Provide consistent and comprehensive judicial education.

A high-functioning pretrial system requires judges educated with the latest pretrial research, evidence-based principles and best practices. Release and detention decisions must be based on objective risk assessments used by judges trained to systematically evaluate such information. Judges must be regularly informed of reforms implemented in other jurisdictions and embrace the progression toward a fairer system which maximizes the release of low-risk defendants, but also keeps the community safe.

17. Monetary bail must be set in reasonable amounts, on a case-by-case basis, considering the defendant's financial circumstances.

Federal case law mandates that monetary bail be set in reasonable amounts based upon all available information, including the defendant's financial circumstances. Hawai‘i statutes already instruct officers setting bail to "consider . . . the pecuniary circumstances of the party accused." This recommendation makes clear that information regarding a defendant's financial circumstances, when available, is to be considered in the setting of bail.

18. Permit monetary bail to be posted with the police or county correctional center at any time.

Defendants should be able to post bail and be released on a 24 hours, 7 days a week basis. Defendants should not be detained simply because of an administrative barrier requiring that bail or bond be payable only during normal business days/hours. Further, reliable forms of payment, beyond cash or bond, should be considered.

19. Require prompt bail hearings.

The current system is inconsistent as to whether and when a pretrial defendant is afforded a bail hearing. This recommendation would establish a new provision requiring defendants who are formally charged with a criminal offense and detained be afforded a prompt hearing to address bail.

20. Eliminate the use of money bail for low level, non-violent misdemeanor offenses.

The use of monetary bail should be eliminated and defendants should be released on their own recognizance for traffic offenses, violations, non-violent petty misdemeanor and non-violent misdemeanor offenses with certain exceptions. Many jurisdictions across the nation have shifted away from money bail systems and have instead adopted risk-based systems. Defendants are

released based on the risks they present for non-appearance and recidivism, rather than their financial circumstances. At least for lower level offenses, the Task Force recommends a shift away from money bail.

21. Create rebuttable presumptions regarding both release and detention.

This recommendation would create rebuttable presumptions regarding both release and detention and specify circumstances in which they apply. Creating presumptions for release and detention will provide a framework within which many low-risk defendants will be released, while those who pose significant risks of non-appearance, re-offending and violence will be detained.

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

Courts, when setting conditions of release, must set the least restrictive conditions required to assure the purpose of bail: (1) to assure the defendant's appearance at court and (2) to protect the public. By requiring conditions of release to be the least restrictive, we ensure that these true purposes of bail are met. Moreover, pretrial defendants, who are presumed innocent, should not face "over-conditioning" by the imposition of unnecessary and burdensome conditions.

23. Create a permanently funded Criminal Justice Institute, a research institute dedicated to examining all aspects of the criminal justice system.

Data regarding pretrial decisions and outcomes is limited. Collecting such data and developing metrics requires deep understanding of the interactions of the various agencies in the system. A Criminal Justice Research Institute should be created under the office of the Chief Justice. The Institute should collect data to monitor the overall functioning of the criminal justice system, monitor evidence-based practices, conduct cost benefit analysis on various areas of operation and monitor national trends in criminal justice. The Institute should further develop outcome measures to determine if various reforms, including those set forth herein, are making positive contributions to the efficiency of the criminal justice system and the safety of the community.

24. A centralized statewide criminal pretrial justice data reporting and collection system should be created.

As part of our obligations pursuant to HCR No. 134, this Task Force is required to "[i]dentify and define best practices metrics to measure the relative effectiveness of the criminal pretrial system, and establish ongoing procedures to take such measurements at appropriate intervals." This Task Force recommends that a centralized statewide criminal pretrial justice data reporting and collection system be created. A systematic approach to gathering and analyzing data across every phase of our pretrial system is necessary to assess whether reforms,

suggested by this group or others, are effective in improving the quality of pretrial justice in Hawai‘i.

25. Deference is given to the HCR 85 Task Force regarding the future of a jail facility on O‘ahu.

House Concurrent Resolution No. 85 (2016), requested that the Chief Justice establish a task force, now chaired by Hawai‘i Supreme Court Associate Justice Michael Wilson, to study effective incarceration policies (HCR 85 Task Force). Our Task Force was directed to consult with the HCR 85 Task Force and "make recommendations regarding the future of a jail facility on O‘ahu and best practices for pretrial release". Reforms to the criminal pretrial system will have a direct impact upon the size and needs of the pretrial population, as well as the design and capacity of any future jail facility. This Task Force respectfully defers to the HCR 85 Task Force regarding the future of a jail facility on O‘ahu.

Each recommendation put forward by the Task Force came as a result of an extensive critical review and examination of each phase of our criminal pretrial system to identify strengths, weaknesses and missed opportunities which have prevented our system, thus far, from doing a better job of not only meaningfully protecting an individual arrestee's rights, but also in a way which makes our communities much safer. Notably, despite the marked differences of opinion and concerns expressed by our diverse group of criminal justice stakeholders, our members nonetheless were able to set aside their differences and work together toward the common goal of improving the quality of pretrial justice in Hawai‘i. This slate of recommendations represent a set of measured, practical and achievable reforms to our present pretrial system. The fact that each recommendation garnered broad consensus speaks volumes with respect to the careful thought and effort that the Task Force brought to this endeavor.

Thank you for the opportunity to testify on this measure.