

AS MUCH JUSTICE AS YOU CAN AFFORD

HAWAII'S ACCUSED FACE AN UNEQUAL BAIL SYSTEM



As Much Justice As You Can Afford: Hawaii's Accused Face An Unequal Bail System

is a report by the ACLU of Hawai'i, researched and written by Ainsley Dowling.

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A Report by the ACLU of Hawai‘i

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Executive Summary

Pretrial incarceration is one of the growing drivers of overcrowding in Hawai'i jails. While all community correctional centers are operating around double their design capacity, about 1,145 men and women, around half of those jailed in those correctional facilities, have not been convicted of any crime and are merely awaiting trial, many for misdemeanors and minor offenses. The primary reason for this indiscriminate jailing of people who should be presumed innocent until proven guilty is that they cannot afford the amount of bail set in their case.

To better understand why so many in Hawai'i are being jailed pretrial, the ACLU of Hawai'i conducted an in-depth study of bail setting practices by reviewing online all cases filed in circuit court during the first semester of 2017. Our findings were unsurprising yet shocking. During that period of time, circuit courts in Hawai'i set money bail as a condition of release in 88 percent of cases with only 44 percent of people managing to eventually post the amount of bail set by the court. In other words, while only 12 percent of people were released on their own recognizance or supervised release, in the 88 percent of cases where money bail was used, the majority of people simply could not afford the amount of bail set by the court. With the average bail amount for a class C felony on Oahu being \$20,000, it's understandable why most people can't afford it.

Setting money bail at an unaffordable amount not only contravenes equal protection and due process rights but also permanently destroys the lives and

livelihoods of thousands of families in Hawai'i with little to no benefit to society. Bail is supposed to be set based on a consideration of multiple factors, including flight risk, ability to pay, and danger to the community. Instead, in 91 percent of cases in Hawai'i, initial money bail simply mirrors the amount set by the police in the arrest warrant. And that amount is based solely only on the crime charged. Thus, initial money bail determinations are overwhelmingly being made without any individualized consideration of flight risk, ability to pay, or danger to the community, resulting in some of the longest lengths of pretrial detention in the country.

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. The bail setting process in Hawai'i, however, does not achieve any of these purposes. Instead, it regularly causes individuals to waive their constitutional rights simply to get out of

jail. In fact, while cases where an individual could not afford bail constituted 49 percent of the cases reviewed, 69 percent of the arrestees who changed their pleas from innocent to guilty or no contest did so while held in jail, primarily because they could not afford bail.

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Like many other states, Hawai'i is in dire need of meaningful bail reform, particularly as it considers plans to relocate the Oahu Community Correctional Center. Any such reform must, at a minimum, result in prompt and individualized bail hearings with adequate procedural protections, in which the government bears the burden of showing that the defendant poses a flight risk or danger to the community and in which narrowly tailored and necessary conditions of release are set to address specific and credible risks. There are many ways of achieving these reforms and we call on the Judiciary, the Legislature, the Prosecutor's Office, and the Department of Public Safety to help us achieve such a constitutional pretrial system. ■

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NON-FELONY
CONVICTION RATES JUMP
FROM 50% FOR PEOPLE
RELEASED PRE-TRIAL TO

92%

FOR THOSE JAILED
PRE-TRIAL.

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Introduction

When a person is accused of a crime, the government bears the burden of showing that they are guilty beyond a reasonable doubt, and until then, they are presumed innocent. At least, that is how our criminal justice system is supposed to work under the U.S. and Hawai'i constitutions.¹ However, each year 12 million people—about 11,000 people in Hawai'i alone—are booked into local jails at a cost to the state of around \$60 million per year.² They are overwhelmingly forced to either pay for their freedom or face incarceration for months or years before their trial begins.

And because people in Hawai'i can expect weeks, even months to pass before they appear before a judge for a meaningful hearing on bail, the reality of being forced to pay money upfront in exchange for freedom causes scores of people — even those who are ultimately released on their own recognition or with non-financial conditions — to be in jail solely due to their inability to afford bail.

In Hawai'i, the consequences of pretrial detention fall disproportionately on Native Hawaiians and Pacific Islanders, who are more likely to be arrested, detained, and unable to afford money bail.³ The consequences are both permanent and harsh, not just for the person who has not yet been convicted of a crime, but also their families and

loved ones. Even just a few days of pretrial detention can lead to loss of employment, housing, and custody of children, as well as an increase in debt if the upfront bond was borrowed from a bail bond company.

In Hawai'i, the consequences of pretrial detention fall disproportionately on Native Hawaiians and Pacific Islanders, who are more likely to be arrested, detained, and unable to afford money bail.

In Hawai'i, like in most of the United States, people with financial resources are able to get out of jail and return to their jobs, families, and communities while they await trial by posting money bail. However, people who are unable to afford the money bail amount must stay in jail. There, they await a trial date that could be months away or accept a plea bargain as a means of getting back to their lives, while their employment, housing, and custody of children are all in jeopardy. This all happens with little regard to guilt, proportionality, or public safety. Essentially, the size of your wallet determines whether you are granted freedom. Moreover, arrestees detained during the pretrial period are three to four times more likely to be

1 *Taylor v. Kentucky*, 436 U.S. 478 (1978).

2 State of Hawai'i Dep't of Pub. Safety, Annual Report 2016 (2016), available at <https://dps.hawaii.gov/wp-content/uploads/2017/10/2016-PSD-ANNUAL-REPORT.pdf>.

3 See Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), available at <https://19of32x2y133s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/native-hawaiians-criminal-justice-system.pdf>.

sentenced to jail and prison and are likely to receive longer sentences.⁴

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determines whether you are
granted freedom.

Today, many jurisdictions across the country at the state and county level are adopting proposals to reform their pretrial and bail practices, recognizing that high rates of pretrial detention are a threat to civil liberties, public safety, and community stability. Increasing the use of non-financial release (release with no conditions or release with non-monetary conditions) is fairer, more effective, and ultimately cheaper than keeping people locked up prior to case disposition. There are just too many people in jail, and not just nationally. Around half of the people sitting in Hawaii's jails have not been convicted of the crime for which they have been charged. This preliminary report will identify the many contributing factors to Hawaii's unjust and flawed pretrial detention system and will conclude with recommendations for the Judiciary and the Legislature to consider when contemplating reform.

Around half of the people in Hawaii's
jails have not been convicted of a crime.

National Movement for Bail Reform

The United States currently incarcerates 2.3 million people in our prisons and jails; 443,000 of those people behind bars (about 20%) have not been convicted of any crime and are merely awaiting trial.⁵ The costs of this system are enormous. The United States spends over \$13.6 billion on pretrial detention each year. To incarcerate a single individual, the State of Hawai'i spends about \$53,290 annually, which is roughly around \$60 million dollars per year for about 1,100 pretrial detainees in Hawai'i.⁶ In addition to the financial costs, mass pretrial detention has high economic and social costs on the detained individuals and their families, which have reverberating and permanent effects in vulnerable communities.⁷ Loss of income, lack of assistance with childcare, separation of parents and children, and criminogenic (producing or causing criminal behavior) effects of jail are just some of the consequences of a system that relies on mass pretrial detention, even in situations where convictions would result in little to no prison time. Believing the system to be unsustainable as an economic and social justice matter, many jurisdictions in the United States have begun focusing on ways to reduce the number of people in jail, ushering in a new era of criminal justice in America.

Among the areas of reform, many states have begun looking to bail as a way to address mass

4 According to the Pretrial Justice Inst., low risk arrestees who are held longer than three days in jail, compared to identical people who are released, are arrested 74% more frequently during the pretrial phase and 51% more frequently up to two years later; are 30% more likely to be convicted or plead guilty, with sentence lengths being 18 months longer; are four times more likely to receive a jail sentence and three times more likely to receive a longer jail sentence; three times more likely to receive a prison sentence and two times as likely to receive a longer prison sentence. Pretrial Justice Inst., *Pretrial Justice: How Much Does It Cost?* 5 (2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66faded&forceDialog=0>.

5 Peter Wagner and Bernadette Rabuy, Prison Pol'y Inst., *Mass Incarceration: The Whole Pie 2017* (March 2017), available at <https://www.prisonpolicy.org/reports/pie2017.html>.

6 State of Hawai'i Dep't of Pub. Safety, End of Month Population Report (December 31, 2017), available at <https://dps.hawaii.gov/wp-content/uploads/2018/01/Pop-Reports-EOM-2017-12-31.pdf>; Dep't of Pub. Safety, Annual Report, *supra* note 2.

7 Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1282 (2004), available at [https://www.law.upenn.edu/cf/faculty/roberts1/workingpapers/b56StanLRev1271\(2004\).pdf](https://www.law.upenn.edu/cf/faculty/roberts1/workingpapers/b56StanLRev1271(2004).pdf).

pretrial detention and racial justice.⁸ Colorado, Kentucky, New Jersey, and New Mexico are but a few of the many jurisdictions that have taken steps towards reforming their pretrial system.⁹ Meaningful efforts to reform bail are also taking place in New York and California.

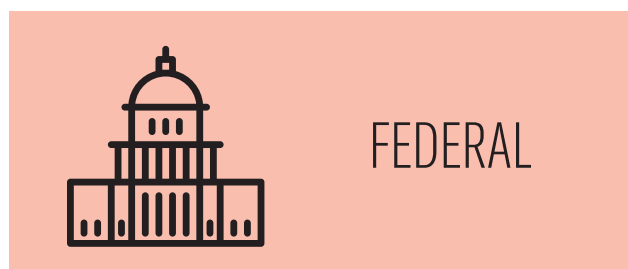
Need For Bail Reform in Hawai'i

Hawai'i has not been immune to the dire costs of over-incarceration. Six out of nine correctional facilities are over design capacity, and four are over "operational capacity," meaning people behind bars exceed "the number of inmates that can be accommodated based on a facility's staff, existing programs, and services."¹⁰ Four of these overcrowded facilities are jails, operating well above their design and operational capacities with about half of their jail population being held pretrial.¹¹ Because of overcrowding, the facilities are in dismal condition. To address the inhumane and unconstitutional conditions of confinement, the ACLU of Hawai'i filed a letter of complaint in January 2017 with the U.S. Department of Justice asking the Department to investigate the State of Hawai'i.¹²

The Department of Public Safety's most recent proposed solution to the problem of overcrowding is to build a new 1,380-bed jail on Oahu to replace one of its jails. However, replacing one out of six overcrowded facilities will only act as a temporary

fix to a greater problem. Before taking on the construction of a costly new facility, the State should have a plan to address overcrowding and to significantly reduce the population in its correctional facilities. Hawaii's criminal justice system is ripe for reform, and reforming Hawaii's bail system is a necessary step to permanently address overcrowding in Hawai'i. Moreover, those who are free pending trial are less likely to be sentenced to jail or prison and face shorter sentences than similarly situated arrestees. This means that through bail reform, Hawai'i can also reduce the size of its prison population.

Legal Background



Several provisions in the U.S. Constitution grant arrestees certain rights in the pretrial context. The Fifth and Fourteenth Amendments prohibit depriving a person of his or her liberty – including while awaiting trial – without due process of law. In the pretrial detention context, the Supreme Court of the United States has declared that "liberty is

8 See Pretrial Justice Inst., *Where Pretrial Improvements are Happening* (October 2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=80fd2d2a-2a37-b7d1-9185-33eead0d2ba&forceDialog=0>; Kamala Harris and Rand Paul, *To Shrink Jails, Let's Reform Bail*, N.Y. Times (July 20, 2017), available at <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>.

9 Pretrial Justice Inst., *supra* note 8.

10 Dep't of Pub. Safety, End of Month Population Report, *supra* note 6.

11 *Id.*

12 ACLU of Hawai'i, Complaint to the U.S. Dep't of Justice (Jan. 6, 2017), available at <https://acluhawaii.files.wordpress.com/2018/01/1-6-17-doj-complaint-prison-overcrowding2.pdf>.

the norm, and detention prior to trial or without trial is the carefully limited exception.”¹³ The use of money bail also implicates equal protection, which in turn prohibits courts from imposing jail based on the arrestee’s indigence.¹⁴ In 2017, plaintiffs from Harris County, Texas successfully challenged the county’s bail system under the Due Process and Equal Protection clauses.¹⁵ An appeal of the district court’s decision is currently before the Fifth Circuit. The ACLU is litigating similar cases in Alabama and Colorado, challenging the use of money in determining pretrial liberty.¹⁶

When the government arrests someone suspected of committing a crime, it has an interest in maintaining the peace and serving justice. Thus, the government may want to hold someone pretrial if that person is a flight risk or poses a danger to the community. Bail mediates the tension between this government interest and the individual’s constitutional rights. Bail is essentially a series of conditions set by the government for releasing someone pretrial to manage flight risk and, sometimes, danger to the community. Under the Eighth Amendment, however, such conditions—which may or may not be financial—cannot be excessive. The Supreme Court has not defined a specific numerical threshold for what constitutes an “excessive” amount of money bail, but it has held that bail set

in an amount higher than reasonably calculated to ensure the accused’s appearance is considered excessive and therefore, constitutionally impermissible.¹⁷ The Court further explained that “[s]ince the function of bail is limited, the fixing of bail for any individual arrestee must be based upon standards relevant to the purpose of assuring the presence of that arrestee.”¹⁸



Like the U.S. Constitution, the Hawai’i Constitution prohibits “excessive bail” but does not guarantee an absolute right to bail in all cases.¹⁹ In this context, the Supreme Court of Hawai’i has stated that “bail is not excessive merely because [an] arrestee is unable to pay it, ‘but he is entitled to an opportunity to make it in a reasonable amount.’”²⁰ In *Sakamoto v. Won Bae Chang*, the Hawai’i Supreme Court held that where the state failed to show a likelihood of conviction of murder in the first degree, where the trial court found the arrestee to be “not [a] man of means,” and where there was no

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

14 *Bearden v. Georgia*, 461 U.S. 660, 667 (1983).

15 *O’Donnell v. Harris County, Texas*, Case No. 4:16-cv-01414, (S.D.T.X. Apr. 28, 2017), available at <https://static1.squarespace.com/static/57fd58f937c581b957965f8e/t/5904e776db29d65078236db6/1493493624230/25721540-0-16858.pdf>.

16 *See Still v. El Paso County, Colorado*, No. 1:17-cv-02656 (D. CO Nov. 7, 2017); *Edwards v. Cofield*, No. 3:17-CV-321, 2017 WL 3015176, (M.D. AL May 18, 2017).

17 *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

18 *Id.* at 5.

19 Haw. Const. art. 1 § 12, (“Excessive bail shall not be required . . .”); *see also Huihui v. Shimoda*, 64 Haw. 527 (1982).

20 *Sakamoto v. Won Bae Chang*, 56 Haw. 447, 451 (1975).

evidence presented that indicated that the arrestee would not be present for future proceedings, a bail set at \$300,000 violated the state constitutional provision prohibiting excessive bail.²¹ The Supreme Court ultimately reduced the bail to \$100,000.

The Supreme Court of Hawai‘i has also interpreted Article I Section 12 as protecting against unreasonable or arbitrary denial of bail.²² Judges cannot infer from the arrestee’s criminal indictment alone a need for bail in an unusually high amount, such as in *Sakamoto*, where bail was set at \$300,000 because of the arrestee’s murder charge. Such acts are deemed arbitrary.²³

Hawaii’s bail statute provides additional guidance. The Hawai‘i Revised Statutes (“HRS”) provides for a right to bail, generally, but does not include a statutory presumption that all individuals, regardless of the charged crime, be released under no conditions, unsecured bonds, or non-financial conditions. Nor does it state what burden of proof the state has when arguing that an individual poses a risk that requires more restrictive conditions or detention. And while Hawai‘i law requires courts to set money bail at a reasonable amount and to consider an individual’s ability to pay when doing so, it does not require that money bail be used as a last resort by courts. These are just some of the concerns the ACLU of Hawai‘i has with the current statutory law on bail. The following paragraphs describe in more detail what Hawaii’s pretrial system looks like under the HRS.

The statutes governing bail fall under Chapter 804 of the HRS. If an offense is a “bailable offense,” the arrestee has a right to bail—in any form: unconditional, conditional, or financial—before conviction.²⁴ However, HRS section 804-4 is silent on what form of bail courts should presume when making individual determinations. A right to bail also exists after conviction for misdemeanors, petty misdemeanors, and violations; bail after convictions for felonies is up to the discretion of the court.²⁵

Section 804-3 defines bailable offenses. The section provides that anyone charged with a criminal offense “shall be bailable by sufficient sureties,” and recognizes that “bail” includes more than just financially-tethered release.²⁶ In fact, judges have several options to choose from when setting bail and deciding an arrestee’s release status:

- *release on recognizance*, which means unconditional non-financial release;
- *supervised release*, meaning non-financial release subject to conditions such as a curfew or drug testing;
- *money bail*, which tethers the arrestee’s freedom to a financial condition meant to assure the person appears in court, where said condition can be met through either a cash payment or a bail bond to obtain release from custody;

21 *Id.*

22 *Huihui*, 64 Haw. at 539.

23 *Sakamoto*, 56 Haw. at 451.

24 Haw. Rev. Stat. §804-4(a) (“If the charge is for an offense for which bail is allowable under section 804-3, the defendant may be admitted to bail before conviction as a matter of right.”).

25 *Id.* at § 804-4(a)-(a)(3).

26 *Id.* at § 804-3(a)-(b).

- *conditional release*, which is a release status reserved for individuals who have been acquitted and are trying to get released from the Hawai'i State Hospital; and
- *release on conditions*, which is release status reserved for individuals who are pending mental health evaluations to determine their fitness or penal responsibility.

Under the statute, the judge could also decide that bail is inappropriate and deny it, essentially ordering preventative detention. Section 804-3 provides that bail may be denied where the charge is for a “serious crime” and there is a serious risk of either flight, obstruction of justice, (such as injuring, intimidating, or attempting to injure or intimidate prospective witnesses or juror), danger to the community, or re-arrest.²⁷ “Serious crime” for this section is defined as murder or attempted murder in the first or second degree, or a class A or class B felony, except forgery in the first degree.²⁸

As explained earlier, under the constitution, bail serves three purposes: (1) reduce the risk of flight, (2) maintain public safety, and (3) preserve an arrestee’s due process right to liberty before trial. Bail is not meant to be a form of pretrial punishment and should not be used as such. Although judges may consider public safety and judicial integrity when setting bail, they must be careful not to infringe upon an arrestee’s due process rights by limiting or depriving the arrestee of liberty without cause.

Section 804-3 provides for a rebuttable presumption of an arrestee’s risk of flight when the arrestee is charged with a criminal offense punishable by life imprisonment without possibility of parole.²⁹ A rebuttable presumption also exists that arrestees who are charged with a “serious crime” are likely to be a danger to the community or engage in illegal activity when: (1) the arrestee has previously been convicted of a serious crime involving violence against a person within the ten-year period preceding the date of the charge against the arrestee; (2) the arrestee is already on bail on a felony charge involving violence against a person; or (3) the arrestee is on probation or parole for a serious crime involving violence to a person.³⁰ However, it is important to note that despite the statutory language allowing for denial of bail, the Supreme Court of Hawai'i has been clear that denial is the exception, and that the state holds the burden to show that this is such a case.³¹

BAIL IS NOT MEANT TO BE A FORM OF PRETRIAL PUNISHMENT.

As for who can set bail in Hawai'i, a judge, including a district judge, or justice of the court may set bail for felonies.³² In addition to the aforementioned

²⁷ *Id.* at § 804-3(b).

²⁸ *Id.* at § 804-3(a).

²⁹ *Id.* at § 804-3(c).

³⁰ *Id.*

³¹ *Bates v. Hawkins*, 52 Haw. 463, 466-67 (1970).

³² Haw. Rev. Stat. § 804-5.

authorities, the sheriff, sheriff's deputy, chief of police or any person named by the chief of police have independent authority and discretion to set bail when the punishment for the charged offense does not exceed two years of imprisonment with or without fine, except for charges of prostitution.³³

A court, when establishing bail, may set non-financial conditions on the arrestee's release. The conditions the court is authorized to set are laid out in HRS section 804-7.1. Judges may enter orders prohibiting the arrestee from approaching or communicating with particular people, going to certain geographical areas or premises, possessing any dangerous weapons, engaging in certain activities, or using alcohol or drugs.³⁴ The judge may also require the arrestee to report regularly and remain under the supervision of an officer of the court, maintain employment or seek employment if unemployed, attend an education or vocational institution, comply with a curfew, seek and maintain mental health or substance abuse treatment, remain in the jurisdiction where the charges are pending unless travel is approved, or any other condition to assure the appearance of the arrestee and the safety of the community.³⁵ A judge may revoke an arrestee's bail upon proof that the arrestee has not complied with any of the conditions imposed, and further impose different or additional conditions.³⁶

Despite the legal obligations to consider ability to pay and to individualize the bail setting process, our research demonstrates that courts have been largely overlooking these inquiries.

The amount of bail rests in the discretion of the judge or officers specified in section 804-5. But that discretion is not limitless. The bail amount must be reasonable and reflect a consideration of the financial status of the arrestee and the possible punishment so as not to "render the privilege useless to the poor."³⁷ And in setting bail, the determination must be made "on an individualized basis."³⁸

Despite the legal obligations to consider ability to pay and to individualize the bail setting process, our research demonstrates that courts have been largely overlooking these inquiries, and instead setting bail amounts solely based on the classification of the charged crime, often well beyond the amounts and conditions needed to ensure the appearance in court and community safety. ■

³³ *Id.*

³⁴ Haw. Rev. Stat. § 804-7.1.

³⁵ *Id.*

³⁶ *Id.*; Haw. Rev. Stat. § 804-7.3.

³⁷ Haw. Rev. Stat. §804-9 ("The amount of bail . . . should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor. In all cases, the officer letting to bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused."); *Sakamoto*, 56 Haw. at 451.

³⁸ *Peleikai v. White*, 75 Haw. 357, 366 (1993).

Bail Practices in Hawai‘i

Overview

In Hawai‘i the bail process for cases where the police decide to arrest a suspect starts with the issuance of an arrest warrant. A police detective first sets bail and its amount after a telephone discussion with a judge, or in some circuits, after referring to the bail guidelines (an advisory list of bail amounts based on the classification of the charged offense), adopted and provided by the circuit court. This initial bail setting occurs *ex parte*, that is without notice to the arrestee or an opportunity to be heard. At this point, no one determining the conditions of bail has had the benefit of an interview with the arrestee, reviewed the arrestee’s financial conditions, considered non-financial alternatives, or individualized the assessment in any way.

After the individual is arrested, he or she may post the bail amount set in the warrant or may also be interviewed by a member of the Hawai‘i Intake Service Center Division of the Department of Public Safety. As part of this interview, Intake Services will fill out a risk assessment form and determine a risk rating. The tool used in Hawai‘i is the Ohio Risk Assessment System Pretrial Assessment Tool (“ORAS-PAT”). A further explanation of ORAS-PAT is provided in Section II(B). Based on the rating, Intake Services will recommend either release or supervised release, or no [non-financial] release. Intake Services does not inquire into the financial circumstances of the arrestee, and therefore, no recommendation is given to the amount of bail.

After the interview with Intake Services, a bail hearing before a judge will take place. At the bail hearing, the judge will review the bail study prepared by Intake Services. Within the bail study, the judge, the arrestee’s attorney, and the prosecutor will find the following information: 1) a paragraph summarizing the residential circumstances of the arrestee; 2) a paragraph summarizing the arrestee’s family ties; 3) the arrestee’s employment status; 4) the arrestee’s prior record; and 5) a comments section, which includes the recommendation and an explanation for the recommendation based on the information provided in the above sections.³⁹ In addition to the recommendation for bail, recommended conditions for supervised release are included in the comments section. On the last page, the judge receives the ORAS-PAT score of “low,” “moderate,” or “high risk,” without further explanation, such as the numerical score itself, the contributing factors, or what the risk level is referring to: failure to appear or re-arrest. At no point do the defense attorneys receive the completed risk assessment tool or have an opportunity to challenge any errors in its inputs or calculation; nor is there evidence that the judge overseeing the bail hearing receives a completed copy either.

After reviewing the bail study, the parties briefly argue whether the judge should follow the Intake Services’ recommendation. Court observations reveal that courts regularly place the burden on the defense to show why the financial condition to release should not be maintained. After the hearing,

³⁹ This description is based on the bail studies prepared by the Intake Services Department in Maui County. The studies may slightly differ in other counties.

the judge will set bail.⁴⁰ The judge may later revisit bail and issue a new order pertaining to bail, which will instruct the arrestee on their bail status and any conditions imposed, based on the bail study, either maintaining or adjusting the arrestee's bail status.

Compared to jails nationwide, Hawai'i jails have extraordinarily long lengths of stay for pre-trial arrestees.

Lengths of Stay

Compared to jails nationwide, Hawai'i jails have extraordinarily long lengths of stay for pre-trial arrestees. In 2014, a report on Justice Reinvestment in Hawai'i noted that OCCC had the longest jail lengths of stay among large counties across the country for people ultimately released under non-financial conditions.⁴¹ Of the 39 counties considered across the country, 32 were able to release arrestees under non-financial conditions in 15 days or fewer, but Honolulu's average lengths of stay for the same type of arrestee was 71 days. Three years after the Justice Reinvestment report was issued, the problem has yet to improve. In 2017, arrestees who were released on their own recognizance stayed in jail on average 85 days and an average of 97 days on supervised release.⁴² To underscore the problem: arrestees in Hawai'i who are ultimately

released *without having to pay money bail* are still held in jail—at tremendous cost to the state—for almost three *months*; while the average time in similar jurisdictions on the mainland is two *weeks*.

The problem seems to stem from a delay in issuing the individual bail reports by Intake Services. A public defender for the First Circuit (City and County of Honolulu) explained that instead of providing bail reports for every arrestee at the arraignment stage, which already occurs one to two weeks after the arrest, courts have no information about the individual before them and will pass off on updating the bail set by the police at the arrest stage. This might explain why, as further explained below, the initial bail set by judges in the First Circuit almost always matches the bail set by the police. Another two weeks pass before a public defender receives the individual's files. Consequently, if the individual was not initially released or could not make the bail amount set, he or she is now onto the fourth or fifth week of sitting in jail before even meeting his or her attorney. Only then is a motion for bail reduction or supervised release filed, and one to two weeks later, the individual *finally* appears before a judge with their attorney and the Intake Service bail reports. The public defender estimates that it generally takes about *five to six weeks* in the City and County of Honolulu before the arrestee can appear before a judge for a meaningful bail hearing.

Other counties in Hawai'i are also experiencing long lengths of stay.⁴³ A report done by the Hawai'i

40 Bail studies typically reach the judge after the initial bail hearing. The judge will then either maintain the arrestee's pretrial status or set a new one. For the Second Circuit, we used the pretrial status of the arrestee set by the judge after receipt of the bail study when conducting our research. For the other circuits, the information provided online did not include information on when the bail studies reached the judge, so we just used the bail set in the first Order Pertaining to Bail on each docket.

41 The Council of State Gov'ts Justice Ctr., *Justice Reinvestment in Hawaii* 4 (Aug. 2014).

42 Bree Derrick, Program Dir., CSG Justice Ctr., *Opportunities to Improve Public Safety and Avert Prison Growth in Hawaii: Presentation to HCR 85 Legislative Task Force* slide 8 (May 16, 2017).

43 For the fiscal year of 2016 the average length of stay for pretrial felons was 59 days in the Fifth Circuit, 52 days in the Second Circuit, and 36 days in the Third Circuit. Hawai'i State Bar Ass'n Comm. on Judicial Admin., *Report of the 2016 Criminal Law Forum* 7 (Sept. 21, 2016).

State Bar Association Committee on Judicial Administration briefly discussed the varying reasons for the delay in Intake Services' bail reports, citing, for example, verification of sponsorship for the First Circuit and the Second Circuit (Maui County).⁴⁴ The Third Circuit (Hawai'i County) in trying to rectify this problem, conducts their own mini version of a bail study if no bail report has been prepared yet.⁴⁵

The public defender estimates that it generally takes about *one and a half months* in the City and County of Honolulu before the arrestee can appear before a judge for a meaningful bail hearing.

The extreme lengths of stay for individuals awaiting trial in Hawai'i merely because of untimely bail reports raises serious due process concerns and defeats the purpose of adopting a risk assessment tool, which is to promptly triage risk post-arrest. Investing in resources and more staffing at Intake Services can serve to alleviate the problem. Washington D.C.'s and Kentucky's pretrial services

agencies are able to prepare reports and recommendations to the judge within just a couple of days of arrest showing that an expeditious intake service process is possible.⁴⁶ This is, in part, because these jurisdictions use tools that do not rely on interviews but instead on data and records readily available to the state. Kentucky also allows its pretrial services officers to arrange an "administrative release" for individuals who scored low and moderate scores on the risk assessment, allowing many to obtain non-financial release within days before even having to wait to appear before a judge.⁴⁷ Exploring other methods of supervision that do not necessarily require interviews, and the appointment and verification of a sponsor can also shorten the time needed to prepare the report.

The process of preparing a bail report by Intake Services takes far too long, at the expense of people's liberty. Other jurisdictions like D.C. and Kentucky have been able to expedite the process without affecting their court appearance and re-arrest rates.⁴⁸ Hawai'i must prioritize finding solutions to the untimely bail reports or consider eliminating the use of risk assessment tools for the purpose of setting bail altogether.

44 *Id.*

45 *Id.* at 7 ("When there is no bail study, the court will conduct its own bail study. The court will first ask if the defense attorney has any objections to the questioning of his his/her client. If not, the court will ask: (1) where the defendant lives; (2) his/her family situation; and (3) his/her work situation. The court will also conduct a quick bail study at arraignment, asking whether a defendant is working; when the police had an arrest warrant and contacted defendant, did he/she turn himself/herself in? If the individual turned himself/herself in, that speaks volumes to the court. If a defendant has a propensity to run, he/she generally will not turn himself/herself in. The court will often conduct this mini-bail study pending [Intake Service Center's] formal bail study.").

46 Pretrial Services Agency for the District of Columbia, Court Support: *Recommendation to the Court*, available at https://www.psa.gov/?q=programs/court_support; Kentucky Court of Justice Pretrial Services, *Interview Process & Release Alternatives*, available at <https://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx>.

47 B. Scott West, *The Next Step in Pretrial Release is Here: The Administrative Release Program*, The Advocate (Jan. 2017), available at [https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20Newsletter%20Jan%202017%20\(COLOR%20-%20FINAL\).pdf](https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20Newsletter%20Jan%202017%20(COLOR%20-%20FINAL).pdf).

48 "For the last six years, appearance rates have remained at or above 87% and rearrest rates at or below 12%." Megan Stevenson and Sandra G. Mayson, *Bail Reform: New Direction for Pretrial Detention and Release* 7 (March 2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=20b99dad-5aac-9458-2347-82d901dd9ac6>. About 70% of pretrial defendants are released in Kentucky with 90% of those making all future court appearances and 92% not getting re-arrested while on pretrial release. Kentucky Court of Justice Pretrial Services, *Pretrial Reform in Kentucky* (January 2013), available at <https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf>.

ORAS-PAT

The ORAS-PAT was chosen to be the Department of Public Safety's risk assessment tool in 2012 as part of Hawai'i's justice reinvestment efforts.⁴⁹ The tool was validated in August 2014.

The ORAS-PAT weighs seven factors and is intended to forecast an arrestee's statistical likelihood of failure to appear for a court date, or risk of new arrest for any crime while released pretrial.⁵⁰ The seven factors tap into four dimensions of risk: criminal history, employment and residential stability, and drug use. The first factor is the arrestee's age at first arrest. If the arrestee was 33 years or older, the arrestee receives a score of 0. If the arrestee was under 33, the score is 1. The second factor looks at the number of "failure to appear" warrants in the past 24 months. If the arrestee had none, the score is 0. If the arrestee had one warrant for failure to appear, the score is 1, and if there were two or more failure to appear warrants, the score is 2. Third, the tool looks at whether the arrestee has three or more prior jail incarcerations. If the answer is no, the score is 0. If the answer is yes, the score is 1.

Next, the tool considers whether the arrestee was employed at the time of arrest. If the arrestee is employed full time, the score is 0. Any part time work is scored at 1, and any unemployed arrestees will receive a score of 2. An arrestee's residential stability is the fourth factor. The arrestee will score a 0 if he or she lived at their current residence for the past six months, and a 1 if the arrestee has not lived at the same residence for the past six months.

The sixth and seventh factors look at the

arrestee's drug use. If the arrestee has used illegal drugs in the past six months, he or she will receive a 1. If the arrestee has not, they will receive a 0. If the arrestee has a severe drug use problem, the score will be 1, and if he or she does not, the score is 0.

After the seven factors are scored individually, the Intake Service member conducting the interview will calculate the overall score. It is important to note that the ORAS-PAT does not separately forecast failure to appear and risk of new arrest. The tool produces a single, composite score of either outcome occurring. Any arrestee who receives a total score between 0 and 2 will receive a low rating. A low rating indicates that there is a 5 percent chance of failure to appear, and a 0 percent chance of new arrest. For arrestees to receive a moderate rating they must score between 3 and 5. A moderate rating indicates a 12 percent chance of failure to appear, and a 7 percent chance of new arrest. Finally, arrestees who score 6 or 7 points will be rated as high, meaning they have a 15 percent chance of failing to appear, and a 17 percent chance of a new arrest.

At the bottom of the risk assessment form, the Intake Service member has the opportunity to override the tool's recommendation. Intake Services must state the reasons for the override and list areas of concerns that might apply. These concerns include: low intelligence*, physical handicap, reading and writing limitations*, mental health issues*, no desire to change/participate in programs*, transportation, child care, language, ethnicity, cultural barriers, history of abuse/neglect, and interpersonal anxiety. Those highlighted with an asterisk (*) are items that if checked are to be further assessed to determine level of severity.

49 Haw. Rev. Stat. § 353-10; HI SB 2776 (2012).

50 The description of ORAS-PAT in this section is based on the template found at [http://www.occaonline.org/pdf/MembersOnly/committees/ORAS%20Complete%20Binder%202-7-10\[1\].pdf](http://www.occaonline.org/pdf/MembersOnly/committees/ORAS%20Complete%20Binder%202-7-10[1].pdf). Although the ACLU of Hawai'i did not obtain the template specifically used by Intake Services from the Department of Public Safety because of possible copyright issues, the Department of Public Safety has noted that when the tool was adopted in Hawai'i no changes were made to the ones that you can find through an Internet search.

1. Concerns about the ORAS-PAT

Because existing models cannot control for racial and socio-economic disparities in risk outputs, the use of risk assessment tools for pretrial determinations has the potential to perpetuate existing social inequalities. Most pretrial risk assessment tools, including ORAS-PAT, ascribe higher degrees of risk to individuals with criminal histories as well as those with mental health concerns and challenges regarding substance abuse, and the racial disparities in the outputs of pretrial risk assessment tools are well documented.⁵¹ For example, the data point relied upon by ORAS-PAT, age at first arrest, represents a particularly strong proxy for race. Given the disparities in all stages of the criminal justice and juvenile justice system, in which people of color are much more likely to have been arrested and at a younger age than whites, the use of such a data point makes ORAS-PAT one of the most troubling tools on the market.⁵² The use of arrest and prior jail incarceration data as opposed to convictions not only disproportionately affects over policed communities but also poses strong due process concerns. Additionally, the ability to override the tool's score because of disability-related issues raises troubling equal protection concerns. Along similar lines, the use of residential stability as a data point is disconcerting given Hawaii's housing crisis and rising homeless population.

In addition to the problematic biases impacting particular populations, the labeling of risk levels is misleading. A 15 percent chance of failing to appear and a 17 percent chance of new arrest is really not that high, despite the ORAS-PAT labeling these percentages of risk as such. Grading an arrestee as "high risk" implies that there is a much greater

chance of failing to appear and of new arrest than there actually is and undoubtedly influences the judge's perception of the arrestee when determining pretrial status. This is particularly troubling because nowhere else in the law, much less in criminal law, do courts make significant decisions based on such a low burden of proof (for example, even the relatively low "more likely than not" standard requires showing that something is at least 51 percent likely of occurring). ■

OHIO RISK ASSESSMENT SYSTEM: PRETRIAL ASSESSMENT TOOL (ORAS-PAT)				
Pretrial Items	Verified			
1. Age at first arrest 0 = 33 or older / 1 = Under 33	<input type="text"/>	<input type="text"/>		
2. Number of Failure-to-Appear Warrants Past 24 Months 0 = None / 1 = One Warrant for FTA / 2 = Two or More FTA Warrants	<input type="text"/>	<input type="text"/>		
3. Three or more Prior Jail Incarcerations 0 = No / 1 = Yes	<input type="text"/>	<input type="text"/>		
4. Employed at Time of Arrest 0 = Yes, Full-time / 1 = Yes, Part-time / 2 = Not Employed	<input type="text"/>	<input type="text"/>		
5. Residential Stability 0 = Lived at Current Residence Past Six Months 1 = Not Lived at Same Residence	<input type="text"/>	<input type="text"/>		
6. Illegal Drug Use During Past 6 Months 0 = No / 1 = Yes	<input type="text"/>	<input type="text"/>		
7. Severe Drug Use Problem 0 = No / 1 = Yes	<input type="text"/>	<input type="text"/>		
Total Score	<input type="text"/>	<input type="text"/>		

Score	Rating	Failures	Fail to Appear	New Arrest
0-2	Low	5%	5%	0%
3-5	Medium	18%	12%	7%
6+	High	29%	15%	17%

Center for Criminal Justice Research, University of Cincinnati, <http://www.occaonline.org/pdf/MembersOnly/committees/ORAS%20Complete%20Binder%202-7-10%5b1%5d.pdf>.

51 Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, ProPublica, *Machine Bias* (May 2016), available at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

52 See The Sentencing Project, *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (Aug. 2013), available at <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>; Joshua Rovner, The Sentencing Project, *Racial Disparities in Youth Commitments and Arrests* (April 2016) available at <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>.

Areas for Suggested Reform

Liberty is supposed to be the standard for charged arrestees, and detention is supposed to be the exception.⁵³ However, here in Hawai'i, in practice, the opposite is true. This section reviews areas in Hawaii's current pretrial system that contribute to the state's high number of pretrial detainees.

Methodology

In preparing this report, the ACLU of Hawai'i used a number of different tools. Primarily, the ACLU relied on the court filing system, eCourt Kokua, and all the information publicly available online. For each arrestee whose case was filed between January 2017 and June 2017 in Hawaii's four circuit courts, the ACLU tracked the following information on eCourt Kokua:⁵⁴

1. the arrestee's apparent and available demographic factors
2. whether an interpreter was requested
3. charged offenses
4. classification of the charged offenses
5. the arrest date
6. whether there was bail set on the arrest warrant and if so, the bail amount
7. the judge who presided over the initial bail hearing as well as any judge who presided over subsequent motions to reduce bail, motions for

- supervised release, and revocations of release
8. initial bail set date
9. bail amount set at the initial bail hearing
10. whether that initial bail amount, if financial, was posted
11. whether any bench warrants for failures to appear or failures to comply with conditions of release were issued
12. any other bail amounts set, including the bail amount set in the bench warrant, bail reductions, bail increases, or releases
13. whether the bail amount was posted
14. whether the judge granted any motions for supervised release, motions for bail reductions, or motions to set aside bail
15. any changes in pleas from not guilty to either no contest or guilty as well as any other case notes such as relevant information included in the Minutes.

In addition to the information posted on eCourt-Kokua, the ACLU spoke to public defenders and judges about their experiences and sat in on a number of bail hearings to witness the bail setting process at the circuit and district court levels.

Failure to Individualize the Bail Setting Process

Any pretrial restraint on liberty should be tailored to the specific risk an arrestee presents and should be the least restrictive means available to

⁵³ *Salerno*, 481 U.S. at 755, ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

⁵⁴ The ACLU of Hawai'i conducted its research on eCourt Kokua between June 2017 and September 2017. Bail-related information is constantly changing with arrestees posting bail or changing their plea, and judges granting motions for supervised release or bail reduction. The ACLU of Hawai'i recognizes that the information initially gathered could have changed since the completion of our research.

reasonably reduce that risk.⁵⁵ Yet, Hawaii's pre-trial practices lack individualized consideration for each arrestee. Our study revealed that the current pretrial system fails to adequately individualize the bail process in at least the following three ways:

(1) failing to seriously consider an arrestee's ability to pay; (2) relying on pre-determined recommended bail amounts based only on the charged crime; and (3) assigning inappropriate and burdensome non-financial conditions of release.

Ability to Pay

Because the bail setting process contemplates an arrestee's risk of flight or re-arrest, the process should be a highly individualized one. Even though Hawai'i law and due process require that at a minimum, ability to afford money bail be considered, our research shows that ability to pay is rarely, if ever, considered in determining the appropriate bail amount. Because Intake Services is not responsible for looking into the finances of arrestees, there is no indication of any other method or service that collects and verifies an arrestee's pecuniary circumstances.⁵⁶ Although determining an arrestee's ability to pay can be difficult, constitutional principles, state law, and basic fairness all require a meaningful determination of ability to pay on the part of the court. Unfortunately, all evidence

indicates that bail amounts are set using pre-determined charge based bail schedules.

Bail Schedules or Guidelines

Although seemingly helpful to a judge and the police from an administrative perspective, bail schedules violate the Fourteenth Amendment's protections of due process and equal protection. A bail schedule is an established financial amount for specific charges or classes of charges. Such a charge-based system is not based on the actual characteristics of individual offenders and prevents courts from considering important factors such as ability to pay, the need to care for a child, the threat of job loss, or actual flight risk. Bail schedules that allow for the pretrial release of only those who can pay without accounting for ability to pay do not provide for such adequate individualized determinations. Therefore, bail schedules unconstitutionally discriminate based on indigence and deny pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk, and even if alternative methods of assuring appearance like supervised release or court notifications could be imposed.⁵⁷

Moreover, by requiring or allowing courts to base the bail decision solely on the arrestee's charges, bail schedules—however formal or

⁵⁵ See *Stack*, 342 U.S. at 3.

⁵⁶ "The Oahu Intake Service Center's investigations do not include financial data collection or verification. As bail amounts appropriate to the defendant's circumstances cannot be determined without financial information, the Oahu Intake Service Center cannot make financial release recommendations." eCourt Kokua, Case ID 1CPC-17-150, "Letter to the Honorable Paul Wong From Frank Young," (April 3, 2017).

⁵⁷ See *Bearden*, 461 U.S. at 661-62 (holding that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist" as such treatment would amount to "little more than punishing a person for his poverty."); *Tate v. Short*, 401 U.S. 395, 397-98 (1971) (holding that incarcerating an indigent individual convicted of fines-only offenses to "satisfy" his outstanding fines constituted unconstitutional discrimination because it "subjected [him] to imprisonment solely because of his indigency."); *Williams v. Illinois*, 399 U.S. 235, 244 (1970) (striking down a practice of incarcerating an indigent individual beyond the statutory maximum term because he could not pay the fine and court costs to which he has had been sentenced); *Griffin v. Illinois*, 351 U.S. 12, 18-20 (1956) (finding it unconstitutional to deny indigent criminal defendants appellate review by effectively requiring them to furnish appellate courts with a trial transcript, which cost money, before they could appeal their convictions.). Although these cases have arisen in the sentencing and post-conviction context, their holdings apply with equal, if not greater, force in the bail context, given the "strong interest in liberty" for individuals who have not yet been convicted of any crime. See *Salerno*, 481 U.S. at 750, 755.

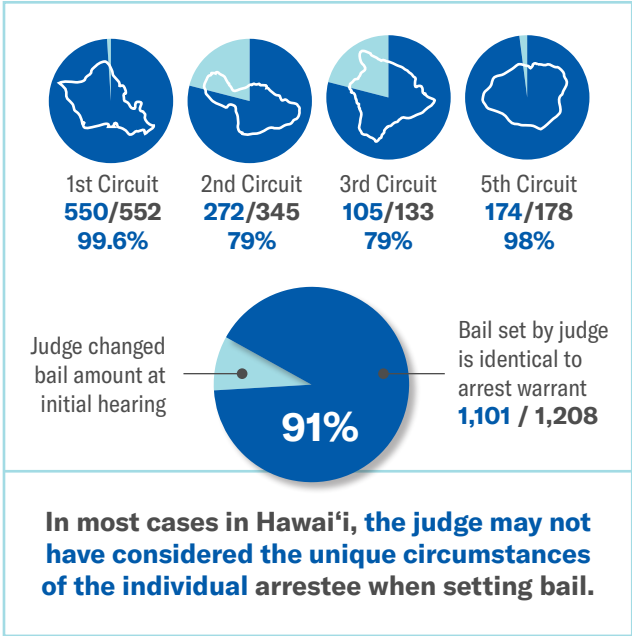
informal—constitute a troubling abdication of judicial discretion and authority. The Supreme Court of Hawai'i has found an abuse of discretion when a judge rigidly followed a bail schedule believing that such schedules are not only without legislative authority but also act as a substitute for the exercise of a trial court's discretion despite HRS section 804-9's mandate that bail be determined on an individualized basis.⁵⁸

Bail schedules unconstitutionally discriminate based on indigence and deny pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk.

Although not all judges in Hawai'i follow formal bail schedules, many admit to presumptively setting bail at a certain amount based solely on the type of offense.⁵⁹ For example, at the 2016 Criminal Law Forum hosted by the Hawai'i State Bar Association Committee on Judicial Administration, a representative from the Kona court in the Third Circuit admitted to having and using a bail guideline order since 1994. A representative from the First Circuit explained that when the police call to inquire about bail amounts after someone is arrested, they do so only if extraordinary bail is sought, i.e., higher than what is "normal" for the crime charged. "Normal" for a class C felony starts at \$11,000.

These bail "guidelines," which suggest a monetary range based on the crime classification, are sometimes created to aid police in setting bail at the arrest stage. While such a practice provides

an arrestee with an opportunity for a speedier release by allowing them to obtain release immediately after arrest, our research shows that the guidelines are then being relied on by courts when setting bail, ultimately offering little due process and eliminating any individualized consideration. The data collected on eCourt Kokua exemplifies the pervasiveness of the current judiciary practice of inappropriately deferring to the bail set at the arrest stage by the police using the charged-based guidelines:



In addition to matching the bail set before arrest 91 percent of the time, our research showed more patterns about how courts are using and relying on these *de facto* bail guidelines. By looking at the bail amounts set for charges of a single class C felony, we found that judges more often than not set bail at either one of two amounts or within two ranges, a "standard" range and a "high" range for the bail

58 *Pele kai*, 75 Haw. at 367 (“In striking down the sentencing guidelines [in *State v. Nunes*, 72 Haw. 521, 824 (1992)], we held that where the legislature vested the trial courts with discretion to impose a sentence, rigidly adhering to sentencing guidelines promulgated without legislative authority was an abuse of discretion. . . . Like the trial judge in *Nunes*, the trial judge in the instant case had the discretion to reset bail. . . . By rigidly following the Bail Schedule, the trial judge substituted the Bail Schedule for the discretion vested in her [in HRS § 804-5], and in doing so, abused her discretion.”).

59 See Hawai'i State Bar Ass'n Comm. on Judicial Admin., *supra* note 43 at 6-7.

guidelines.⁶⁰ In the First Circuit, not only are the amounts for a single class C felony offense unaffordable for most arrestees, judges set bail at either \$11,000 or \$15,000 for 125 arrestees out of 243. In 65 of the cases, judges set bail at either \$20,000 or \$25,000. In only 14 cases was bail set below \$10,000.

The other circuits' bail amounts for single class C felonies were more affordable than the First Circuit's bail amounts but similar patterns of setting bail amounts solely based on the offenses charged emerged. The Second Circuit imposed bail for a single class C felony at \$5,000 in 28 out of 57 cases. The Third Circuit, in 16 out of 20 cases, set bail for single class C felony offenses at either \$2,000 or \$10,000. The Fifth Circuit set bail at either \$1,000 or \$5,000 in 32 out of 45 cases.

The consistent setting of bail at specific amounts for specific offenses and the consistent inability of indigent individuals to post bail are no coincidence. The bail amount numbers not only suggest the existence of *de facto* bail schedules, but also show a constant reliance on the ranges and amounts provided in those schedules. A functioning and constitutional bail system must carefully consider the individual circumstances of the arrestee, including flight risk, dangerousness, and ability to pay. A system that relies on a predetermined bail amount based primarily on the type of charged offense does not satisfy due process and is arbitrary and capricious because it does not serve any of these purposes of bail.

Inappropriate Conditions of Release

As discussed above, under HRS section 804-7.1, courts may order that an arrestee be released on his or her own recognizance, on supervised release, or money bail, as well as comply with a number of conditions. When a judge sets a bail amount or bail conditions, the order pertaining to bail may include conditions that the arrestee must adhere to or risk revocation of release.⁶¹ But when imposing conditions, courts should only set conditions that an arrestee can reasonably comply with and burdens the arrestee only as much as reasonably necessary to ensure appearance and reduce chances of re-offending.

A functioning and constitutional bail system must carefully consider the individual circumstances of the arrestee, including flight risk, dangerousness, and ability to pay.

The conditions set out in the order setting bail typically include a prohibition on firearms and drugs or alcohol, a requirement to submit to drug/alcohol testing as directed by Intake Services, a requirement to sign and comply with the Terms and Conditions of Supervised Release as directed by Intake Services, including any additional conditions deemed necessary by the department. Although the Terms and Conditions of Release imposed by Intake Services are not available on the public docket, the bail studies filed in the Second Circuit give us an

⁶⁰ See Appendix.

⁶¹ *Salerno*, 481 U.S. at 755, (citing *Stack*, 342 U.S. at 3) ("The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.").



idea of the conditions Intake Services might impose and the type of offenses involved. Sometimes included in the bail study are special conditions for supervised release recommended by Intake Services. The conditions that appear most often include: (1) prohibitions on weapons and alcohol or drugs, (2) a requirement to seek and maintain substance abuse treatment or testing at the arrestee's expense until clinically discharged at the discretion of Intake Services, and (3) a requirement to maintain employment, to seek employment if unemployed or attend an educational or vocational institution. These conditions are standard recommendations without regard to the individual's need for such conditions or the charged crime.

To illustrate, if an arrestee is charged with theft or joyriding they are sometimes ordered to abstain from otherwise legal alcohol use or to submit to random drug testing at the individual's expense. Such conditions are not only overly burdensome but

also disproportionate and unrelated to the crime charged and the individual circumstances of the arrestee. An arrestee charged with joyriding with no evidence of illicit drug and alcohol use should not be required to enter substance abuse treatment or submit to drug testing.

Moreover, reliance on drug testing as a condition of release sets the arrestee up for failure. No empirical studies suggest that drug testing is an effective pretrial condition of release.⁶² Again, courts could be more careful when imposing conditions so that they only burden the arrestee as much as reasonably necessary to serve the purposes of bail. More reasonable and less obtrusive options are available to judges such as court reminders, calling into Intake Services on a scheduled basis, setting a curfew, or issuing protective orders against communicating with alleged victims or visiting the location of the alleged crime.⁶³ We recommend that judges utilize these options before imposing conditions such as drug testing or substance abuse treatment.

Overreliance on Money Bail

Detention or release should not be conditioned on an individual's wealth or income. Reliance on money bail incarcerates people solely because of their poverty, ultimately creating devastating and reverberating consequences for arrestees, their families, and their communities. In all of Hawaii's judicial circuits, judges rely heavily on the use of money bail.

Detention or release should not be conditioned on an individual's wealth or income.

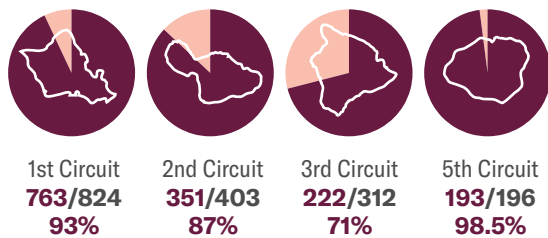
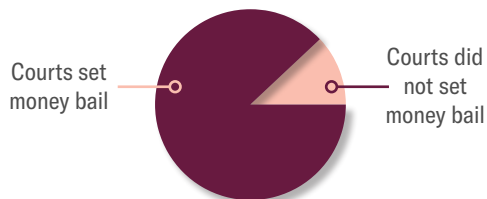
62 Harv. L. School Crim. Justice Pol'y Program, *Moving Beyond Money: A Primer on Bail Reform* 18 (Oct. 2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

63 Available research shows that court notifications, in particular, can greatly increase appearance rates. Phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%. *Stevenson*, *supra* note 48 at 11.

No one should be jailed only because they can't afford a fee or a fine. Period.

ACLU

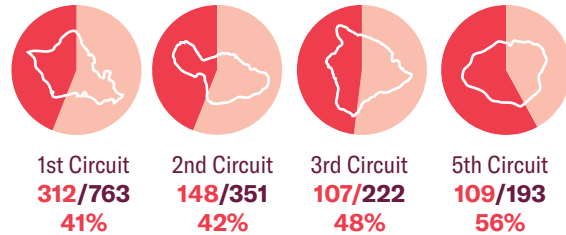
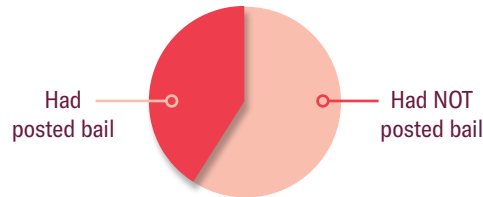
In 1,529 of 1,735 (88% of) cases in Hawai'i, circuit courts set money bail.



See Appendix, Table 2

As illustrated in this table, overall, circuit courts set money bail in 88 percent of cases. But when a bail system heavily relies on money but does not adequately address or inquire into the finances of the arrestees, it results in the pre-trial detention of arrestees for no other reason than their poverty. Over half of the arrestees in Hawai'i facing money bail at the time this study took place had not posted bail:

Of 1,529 arrestees facing money bail at the time of this study, only 676 (44%) had posted bail.



See Appendix, Table 3

In addition to the overuse of money bail, the First Circuit sets bail at amounts that are not affordable to the average person, let alone the typical arrestee. A 2015 study conducted by The Federal Reserve Board of Governors surveying adults in the U.S. found that 54% of people could not cover an unexpected \$400 expense without selling something or borrowing money.⁶⁴ As explained above, bail for a single class C felony is typically set at \$11,000 or higher. Most bail for all felony charges in the First Circuit is set in the \$11,000 to \$25,000 range, but is often set above that. Bail was as high as \$1 million in eight cases, and even \$2,000,000 in two cases.

THE WEALTHY CAN POSE AS MUCH A RISK TO THE COMMUNITY AS ANYONE ELSE.

⁶⁴ The Federal Reserve Board of Governors, *Report on the Economic Well-Being of U.S. Households in 2015*, 22 (May 2016), available at <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

These large amounts indicate that money bail is inappropriately used not to ensure court appearance but to keep people in pretrial detainment based on the crime charged or the perceived danger posed by the individual. Money bail, however, has little bearing on appropriately managing anything but flight risk. After all, the wealthy can pose as much a risk to the community as anyone else, and in Hawai‘i, the bail amount is not relinquished for reoffending.⁶⁵

Use of Risk-Assessment Tools

Jurisdictions across the United States are moving away from a resource-based bail system to a risk-based one that relies on risk assessment tools. Along with Hawai‘i, New Jersey, Kentucky, New Mexico, Virginia, Ohio, and Washington D.C. are some of the states that use actuarial pretrial risk assessment tools for this purpose.⁶⁶

Risk assessment tools may seem like a way to objectively and accurately assess an arrestee’s risk, allowing judges to have a clearer understanding of what type of pre-trial status is appropriate for the arrestee. However, the reality is that our ability to predict and control for risk is still extraordinarily limited and often cannot control for racial disparities in risk ratings. Pretrial risk assessment tools often ascribe higher degrees of risk to individuals with criminal histories as well as to those with mental health concerns, residential instability, and challenges regarding substance abuse—even if their life circumstances have dramatically changed. For



example, ORAS-PAT uses age at first arrest as a data point even though such a factor has a very strong correlation with race, because policing in low income communities of color is different in kind and degree from policing in other communities.

Moreover, without adequate training on risk assessment tools and how they work, judges can easily misuse the tool, either being highly deferential or misunderstanding the recommendation completely. The latter was the case pre-2014 when state judges released more arrestees with a high risk level than they did those with a low risk level.⁶⁷ As a general matter, the ACLU of Hawai‘i cautions against relying on risk assessment tools for setting bail in court, and if employed at all, the role of risk assessment tools should be limited to using these tools to administratively *release* individuals after their arrest, before appearing in front of a judge.

⁶⁵ Haw. Rev. Stat. § 804-51.

⁶⁶ “In six states besides New Jersey — Arizona, Connecticut, Hawaii, Kentucky, Rhode Island, and Utah — all residents live in a county that uses a validated, evidenced-based pretrial assessment to inform decisions about pretrial release and detention; all of these states received a B. In three other states—Colorado, Nevada, and Virginia—85-89% of residents live in a county using such a tool.” Pretrial Justice Inst., *State of Pretrial Justice in America Report* 14 (Nov. 2017).

⁶⁷ Janet T. Davidson, *Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) On a Hawaii Pretrial Population* 16 (Aug. 2014).

That being said, if risk assessment tools are to be used by Hawai'i judges in setting bail, we strongly recommend that they 1) be locally validated, 2) have no impact on racial and other improper disparities, 3) be transparent to all parties, both as to data collection and scoring, and 4) not act as a substitute for an individualized determination of bail. Additionally, any risk assessment tool should have separate scores for failure to appear and new arrest, not a combined one, and should also narrowly define what risks it is assessing, since not all failures to appear are willful and not all arrests pose the same danger to the community.

Local Validation and Impact on Race

In 2014, the ORAS-PAT was locally validated for Hawai'i. The validation included a pretrial population of only the City & County of Honolulu, Hawai'i County, and Maui County, and the sample of 395 arrestees used for this validation were assessed between February 1, 2013 and March 28, 2013. The validation study reported that it does accurately predict failure to appear and new arrests, but does not accurately predict revocation of supervised release. The researcher recommended in her report that, while a longer follow up is not needed, a study that is randomly selected and includes all islands should be conducted.⁶⁸

ORAS-PAT was never modified to reflect Hawaii's unique geography and demographics. Risk of flight is less of a concern in an island state. Thus, it does not make sense to weigh the factors the same way in Hawai'i as in the mainland. Moreover, because of Hawaii's high rate of homelessness and the role residential stability plays in assessing risk in ORAS-PAT, the tool should be re-evaluated and reassessed periodically to see whether further adaptation is necessary. Finally, we strongly recommend

that the ORAS-PAT be replaced with a tool that does not rely on interviews but instead with data available to the state.

Transparency

Judges need to receive as much valid and reliable information as they can to make an individualized and appropriate determination of pretrial status. However, if judges are going to use a risk assessment tool and the Intake Services' recommendation in their assessment, without a copy of the completed ORAS-PAT, judges are missing important information. As explained earlier, the bail study only reveals a risk level rating of high, moderate, or low. Judges, prosecutors, and defense attorneys cannot see how that risk level was determined, what it means, or whether mistakes were made. All parties would benefit from reviewing the completed ORAS-PAT, contributing to a better understanding of the arrestee's circumstances and leading to a more individualized bail setting process. If judges and defense attorneys do not receive the information used to calculate the risk assessment score, basic due process requires that such non-transparent tools not be used.

The bail study only reveals a risk level rating of high, moderate, or low. Judges, prosecutors, and defense attorneys cannot see how that risk level was determined, what it means, or whether mistakes were made.

For example, during a recent hearing, the judge was considering an arrestee's motion for supervised

⁶⁸ *Id.* at 2, 5.



release. The arrestee's risk level had gone up between the time of the initial bail hearing and the hearing on this motion from moderate to high. The defense attorney happened to receive an explanation from Intake Services, a rare occurrence, on why the arrestee's risk level was raised. Intake Services explained that because of a temporary restraining order, the arrestee was now homeless, raising his residential stability score. Because the defense attorney was able to explain to the judge why the score was raised, the judge granted the motion for supervised release. But if the defense attorney had not known what caused the increase in the arrestee's risk assessment score, it would have been impossible for her to frame her arguments for release and would have left the court without important information for deciding the motion.

Overreliance on Risk Assessments and Intake Services' Recommendation

Even the most well-crafted risk assessment tool can cause serious problems if not properly or consistently implemented. A 2009 study showed that in 64% of jurisdictions with a pretrial program, judges consider a risk assessment score but combine it with their subjective judgment.⁶⁹ The 2014 ORAS-PAT validation study for Hawai'i recommended that a future study be directed at determining how judges utilize ORAS-PAT because the study explained that there is evidence that the judiciary might not be properly using the objective data it is given.⁷⁰ For example, the percentages of arrestees by risk level did not follow a pattern that might be expected based on risk level. Specifically, only 20 percent of the arrestees released in this study's sample were low risk, while 34.5 percent were high risk.⁷¹

The ACLU of Hawai'i is unsure what, if any, actions were taken to remedy this counterintuitive result, but the current data suggests that judges may have since responded by becoming too deferential to the recommendations made by Intake Services without regard to what the recommendation means. While our data is limited to only forty bail studies published for the Second Circuit on eCourt Kokua, judges deferred to the recommendation provided by Intake Services almost 100% of the time.⁷² Risk assessments must not act as a substitute for an individualized determination of release conditions, and blindly relying on a biased and flawed tool will inevitably lead to biased and flawed results.

69 Pretrial Justice Inst., *Pretrial Justice in America: A Survey of County Pretrial Release Policies* (2010).

70 *Id.* at 16.

71 *Id.* at 6.

72 Out of the forty bail studies available on eCourt Kokua, we found that in 39 of them the judge deferred to Intake Service's recommendation of release on recognizance, supervised release, or no release.

The ACLU is critical of using risk assessment tools for bail determinations when the result could lead to pretrial detention, especially because these tools are not only infused with racial bias but are also prone to inconsistent and improper usage by judges. A report by Illinois' Cook County sheriff's office found that Cook County judges diverged from the risk assessment tool's recommendation more than 80 percent of the time.⁷³ And in a Santa Cruz County, CA, study, judges departed from the release recommendations 53 percent of the time but only departed from detain recommendations 16 percent of the time.⁷⁴

Blindly relying on a biased and flawed tool will inevitably lead to biased and flawed results.

We recommend the Department of Public Safety's Intake Services consider using the tool for promptly releasing low risk individuals from its custody. But to the extent risk assessment tools are going to be used by the judiciary in making bail determinations, courts need to receive better training on risk assessment tools and should be careful to not solely rely on the tools' rating and Intake Service's recommendation. Other evidence proffered by the defense, such as whether the individual surrendered him or herself to the police, must be equally considered. Additionally, we recommend that bail hearings become more like evidentiary hearings where the government has the burden of establishing an individual's flight risk and risk of harm to others,

by clear and convincing evidence, and if money bail is specifically found to be necessary, ability to pay also be considered. Making the completed risk assessment report available will also aid in giving judges as much information as they can so that the score itself does not prejudice the bail determination. One way of ensuring that judges consider more than just the risk assessment score is to require them, either by statute or court rules, to document in a written order the reasons for setting bail in a specific manner for a specific individual.

Bail as a Means to Induce Guilty Pleas

Pre-trial status can affect case outcomes, including forcing individuals to waive their constitutional rights and accept guilty pleas, especially for low level crimes, even when they have valid defenses to the crimes charged. A 2012 study conducted by the New York City Criminal Justice Agency, found that among non-felony cases with no pretrial detention, half ended in conviction, compared to 92 percent among cases with an arrestee who was detained throughout.⁷⁵

There are a number of possible explanations for pre-trial proceedings impacting the outcome of a case. Pre-trial detention puts enormous pressure on arrestees to plead guilty just so they can get on with their lives out of jail. Given the effects pre-trial detention has on an arrestee's employment and family, and especially given the jail conditions in Hawai'i, arrestees unable to pay bail are practically coerced to plead guilty in order to be released. Moreover, pre-trial detention also puts a strain on an arrestee's ability to prepare an adequate

⁷³ Frank Main, *Cook County judges not following bail recommendations: study*, The Chicago Sun-Times (July 3, 2016), available at <http://chicago.suntimes.com/chicago-politics/cook-county-judges-not-following-bail-recommendations-study-find/>.

⁷⁴ Santa Cruz County Probation Dep't, *Alternatives to Custody Report 2* (2015).

⁷⁵ Mary T. Phillips, *A Decade of Bail Research in New York City*, New York City Criminal Justice Agency 116 (2012), available at <http://www.nycja.org/library.php#>.

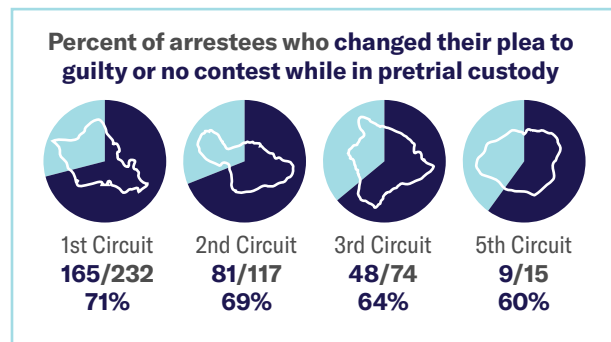
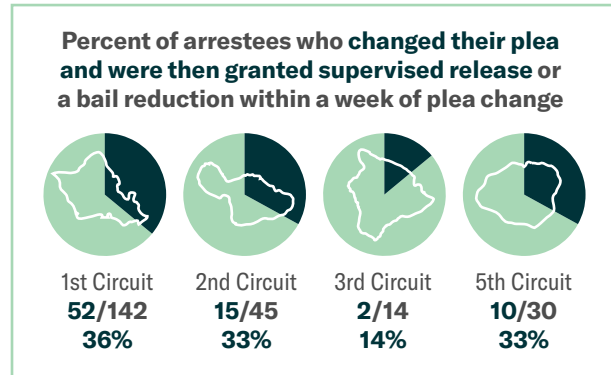
defense, and restricts the arrestee's ability to be fairly treated in negotiating plea agreements. Prosecutors, who are cognizant of arrestees' incentive to obtain release through plea agreements, can put additional pressure on individuals by arguing at the initial bail hearing that the arrestee should be denied bail or receive bail at an unaffordable amount, later promising support on motions for supervised release or bail reductions *after* the arrestee has changed their plea.

Given the effects pre-trial detention has on an arrestee's employment and family, and especially given the jail conditions in Hawai'i, arrestees unable to pay bail are practically coerced to plead guilty in order to be released.

Using pre-trial detention to coerce arrestees into guilty pleas is routine practice of prosecutors throughout the country. Human Rights Watch published a report on the way prosecutors in California often coerce guilty pleas, finding that prosecutors would argue for high bail citing dangerousness at the bail hearing, but then offer that same "dangerous" arrestee time-served in exchange for a guilty plea.⁷⁶

We are aware of concerns in the criminal justice community that a similar, related practice is happening in Hawai'i, where prosecutors will contact the police and ask for a high bail amount for particular arrestees knowing that they can then use the arrestee's inability to pay to later coerce a guilty plea. Given these concerns, we tracked how many times arrestees who were still detained pre-trial changed their plea from not guilty to guilty or no contest. We also tracked how many times judges

granted a motion for supervised release or bail reduction at the same time as or within a couple of days of the plea change.



See Appendix, Table 4

Studies have shown that arrestees who are in jail pre-trial are up to 30 percent more likely to plead guilty than similarly situated arrestees in order to obtain release.⁷⁷ The data shows that this is the case here in Hawai'i too, as most arrestees who changed their plea to guilty or no contest did so while detained pre-trial. The data also revealed a pattern of judges granting motions for supervised release or a bail reduction on the same day or immediately following plea change. This all suggests that arrestees in Hawai'i are using the opportunity to plead guilty to obtain release, and that judges are denying and prosecutors are not supporting release until arrestees no longer fight a charge. ■

⁷⁶ Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People" (2017), available at <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.

⁷⁷ Pretrial Justice Inst., *supra* note 4 at 4.

IV. Conclusion and Recommendations for Reform

An optimal pretrial system will serve all three purposes of bail by maximizing court appearance and public safety while respecting the arrestee's due process rights. With these objectives in mind, the ACLU of Hawai'i makes the following recommendations to help transform Hawaii's bail system into a fairer and more constitutional process.



Presumption of release for all arrestees.

Judges and other authorities tasked with setting bail should start with a presumption of release on recognizance that is up to the prosecution to rebut with specific clear and convincing evidence that the person poses a flight risk or danger to the community, even for those charged with more serious crimes. This presumption exists at the first bail setting hearing even if Intake Services has not completed the individual bail report.

Eliminate or greatly disfavor reliance on money bail.

The use of monetary bail disadvantages the poor as arrestees who do not have resources or access to

money are less likely to secure release, especially when bail amounts do not meaningfully account for an arrestee's ability to pay. Although implementing procedures to assess an arrestee's ability to pay may help in alleviating the disproportionate effects money bail has on the poor, such inquiries may be difficult to assess accurately. A better system would be one with minimal reliance from the judiciary on use of money bail using instead individualized non-financial bail to ensure appearance in court and minimize danger to the community.

The use of monetary bail
disadvantages the poor.

The District of Columbia offers a model for how to favor non-financial bail over money bail.

Nearly all arrestees, 85-90%, in D.C. are released on non-financial release. The rest are detained.⁷⁸ Coupled with effective pretrial services, D.C. has been able to keep its appearance rates at or above 87% for the last six years, and rearrests rates are at or below 12%, while still only spending about \$18 a day in supervising costs per individual arrestee.⁷⁹ This compares to \$146 spent per day to detain someone pretrial in Hawai'i. D.C.'s rates are also better than national averages.⁸⁰ Nationally, 16% of arrestees were rearrested and 17% missed a court date.

Eliminate bail guidelines.

Bail schedules undermine the individualized nature of the bail setting process and prevent judges from considering relevant circumstances of the arrestee, while also violating Equal Protection principles. Courts should eliminate all bail guidelines and instead have in place procedures for ensuring that judges make reasoned individualized decisions for every arrestee.

Ensure best practices when engaging with risk assessment tools and explain in writing all bail decisions that are not unconditional non-financial release.

Pretrial risk assessment tools are not substitutes for individualized determinations of release. If courts are going to use a risk assessment tool when determining pretrial status, they must be careful to use it in a consistent and unbiased manner. Proper training on how risk assessment tools work as well as using the score in conjunction with evidence proffered by the defense can help alleviate these concerns. We recommend that courts also justify in a written order all bail determinations that do not result in unconditional release to ensure that such decisions are consistent, unbiased, reasoned, and subject to adequate and prompt appellate review.

Reduce use of overly burdensome pretrial supervision.

Judges could be more careful about imposing blanket conditions of release that are necessary for individual arrestees. Drug testing is intrusive and fails to improve rates of appearance, while also raising significant Fourth Amendment concerns.⁸¹ Conditions of release should be determined based on specific risks in an individualized manner. Using less onerous conditions such as a curfew, automatic messages, or required check in by phone with Intake Services are less expensive and easier for the arrestee to comply with, thus, increasing the chances of appearing in court.

78 Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, Wash. Post (July 4, 2016), available at https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.44b73bc37565; Sara Dorn, *How D.C. court reforms save \$398 million*, (May 16, 2016), available at http://www.cleveland.com/metro/index.ssf/2016/05/how_dc_court_reforms_save_398.html.

79 Stevenson, *supra* note 48 at 7; Pretrial Justice Inst. *supra* note 4 at 6. See also Pretrial Services Agency for the District of Columbia, *Performance Measures*, available at https://www.psa.gov/?q=data/performance_measures, (noting that between October 1, 2014 and June 30, 2015, 91% of released defendants remained arrest free while their cases were being adjudicated [and] 98% of released defendants were not rearrested on a crime of violence while in the community pending trial. 90% of released defendants made all scheduled court appearances. 89% of released defendants remained on release at the conclusion of their pretrial status, without a pending request for removal or revocation due to noncompliance.).

80 Stevenson, *supra* note 48 at 7.

81 See *U.S. v. Scott*, 450 F.3d 863, 871-872 (9th Cir. 2006) (explaining that "pretrial releasees are ordinary people who have been accused of a crime but are presumed innocent" and that without a verdict, finding, or plea of guilty, people released pending trial "have suffered no judicial abridgment of their constitutional rights," and thus drug tests conducted pursuant to a condition of pretrial release are not reasonable under the special exception to the warrant requirement.).

Continuing education for judges and data-driven audits.

We recommend that judges and other officers of the court assigned with the responsibility of setting bail be routinely reminded of the purposes of bail and, if used, the proper usage and concerns of risk assessment tools through training and enforcement mechanisms to ensure best practices. The judiciary should also collect data on the bail setting process, particularly with respect to how risk assessment tools are being used, as well as adopt procedures for auditing and reassessment.



Clearly provide for a presumption of unconditional release for all arrestees and place the burden on the state to prove by clear and convincing evidence that an arrestee is exceptional.

Amend HRS section 804-4, to include a presumption of *unconditional* release for *all* arrestees regardless of crime.⁸² Additionally, the burden should be on the state to prove with clear and convincing evidence that unconditional release is not appropriate, and if financial release is recommended by the state that there is no set of non-financial conditions that would allow for release while ensuring return to court and protecting public safety.

Any deviation from the presumption should be documented by the deciding authority in a written order explaining reasons for setting bail in a specific manner.

Determine offenses for which release on recognizance is required.

Not all offenses pose the same risk to public safety. The legislature should create a list of offenses—such as petty misdemeanors, misdemeanors, and drug possession offenses—for which release on recognizance after arrest is required.

Require that bail hearings take place promptly after arrest.

The average lengths of stay for those ultimately released on non-financial conditions in Hawai‘i are unconscionably long and a major driver in overcrowding. To cut the length of detention in jail, meaningful initial bail hearings should take place within 48 to 72 hours after arrest.

Conditions of release should be free to the arrestee and the least restrictive conditions necessary to manage the specific risks posed.

HRS section 804-7.1 should be amended to ensure all conditions of release, such as mental health and substance abuse treatment, are free to the arrestee; thus ensuring supervised release is available to anyone without regard to ability to pay. Additionally, the statute should be amended to require that any such conditions be the least restrictive conditions necessary to manage the specific risks posed by the arrestee.

⁸² Many states and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless the courts make an individual determination that the defendant poses a risk that requires more restrictive conditions or detention. *See* 18 U.S.C. § 3142(c)(1)(B) (2008); D.C. Code § 23-1321(b)-(c)(1)(B) (2016); 11 Del. Code § 2105 (2013); Iowa Code Ann. § 811.2 (2013); Ky. Rev. Stat. Ann. § 431.520 (2014); Mass. Gen. Laws Ann. Ch. 276 § 58 (2010); Me. Rev. Stat. Ann. tit. 15 § 1026 (2-A) (2016); Neb. Rev. Stat. § 29-901(1) (2017); N.C. Gen. Stat. § 15A-534(b) (2016); Or. Rev. Stat. Ann. § 135.245(3) (2009); S.C. Code Ann. § 17-15-10 (2015); SDCL § 23A-42-2 (1982); Wis. Stat. § 969.01(1) (2010). Some other states have adopted this presumption by court rule. *See* Ariz. R. Crim. P. 7.2(a)(2) (2018); Minn. R. Crim. P. 6.01 (2010); Wy. R. Crim. P. 46.1(b) (2017).

The legislature should create a list of offenses—such as petty misdemeanors, misdemeanors, and drug possession offenses—for which release on recognizance after arrest is required.

Allow for greater due process in bail setting process.

Although Hawai‘i provides counsel to indigent arrestees at the bail hearing, such representation can be ineffective when the bail hearings themselves are just a few minutes long. Allowing for sufficient and effective evaluation of the risk to appear, risk of serious crime, which conditions of release are necessary, and ability to pay can significantly improve the courts’ ability to set bail. Such inquiries can be implemented through a number of procedures including a right to discovery, right to testify, right to proffer evidence, or right to examination of witnesses. A longer, more comprehensive and in-depth hearing than the one Hawai‘i currently practices should have positive effects on the process while also ensuring greater due process for arrestees whose liberty is at stake.



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Consider other risk assessment tools and introduce a more transparent risk assessment process and locally validate tool every few years.

As discussed above, the ACLU is opposed to the introduction of an algorithmic risk assessment tool at hearings to determine an arrestee’s release or detention. Such tools are better suited to identify groups of people for whom release may be mandated prior to being booked, and without having to wait for a hearing. However, if Hawai‘i continues using a risk assessment tools in a judicial setting, the following improved practices should be adopted.

The ORAS-PAT is one of the more problematic risk assessment tools on the market due to, among other things, its use of age at first arrest, a close proxy for race, the ability to override based on disabilities, and the need for interviewing the defendant and validating the responses. If risk assessment tools are to be employed by the judiciary, the legislature should consider adopting another tool that is less problematic and a better fit for Hawai‘i.

Regardless of the tool used, however, at a minimum, the identity and weighting of risk factors, and the statistical forecasting of the tool’s outputs (e.g. “X percent chance of Y outcome over Z period of time”) should be made public and the arrestee’s completed assessment report provided to all parties, including the judge and the defense team so that the judge can accurately assess how the risk

level was determined and the defense team can review and respond accordingly.

Finally, given Hawaii's unique geographical circumstances, ORAS-PAT, or any other risk assessment tool, should be re-validated every few years to ensure that it remains locally appropriate and properly used by judges. Without audits and local validation, any risk-assessment tool should not be used.

Improve data collection processes.

All data related to bail, including court appearance and re-arrest rates should be collected and released to the public on an annual basis.

Use with other methods of ensuring court appearances such as court notifications.

Other jurisdictions, such as D.C., have shown that with adequate pretrial services, appearance rates can increase even with a decrease in the use of money bail. Other methods of increasing appearance rates that have worked in other jurisdictions have been as simple and as inexpensive as court reminders.⁸³ For example, in Multnomah County, Oregon, failure to appear rates decreased by 41% just by using automated phone call reminders. Other available research shows that phone-call reminders can increase appearance rates by as much as 42% and mail reminders can increase appearance rates by as much as 33%.⁸⁴

Alternatives to supervision, which require little to no verification time, such as court notifications can also help to expedite the bail report preparation process.



Look out for progressive bail reform legislation and let your legislators know they have your support.

Educate your fellow community members on the purposes of bail and the ways in which Hawai'i can reform its current system.

In addition to the above recommendations, the ACLU of Hawai'i suggests researching the best practices of other jurisdictions across the nation that have introduced bail reform. The Pretrial Justice Institute routinely publishes a report every few months summarizing where bail reform initiatives are taking place.⁸⁵ Learning from other jurisdictions about where they succeeded or where they failed will aid in discussions on how best to improve Hawaii's bail practices. ■

⁸³ Harv. L. School Crim. Justice Pol'y Program, *supra* note 62 at 16.

⁸⁴ Tim R. Schnacke, Michael R. Jones, and Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 Court Review 86, 89 (2012) (telephone live-caller experiment); Brian H. Bornstein et al., *Reducing Courts' Failure to Appear Rate By Written Reminders*, 19 Psych., Pub. Policy & L. 70 (2013).

⁸⁵ Pretrial Justice Inst., *supra* note 8.

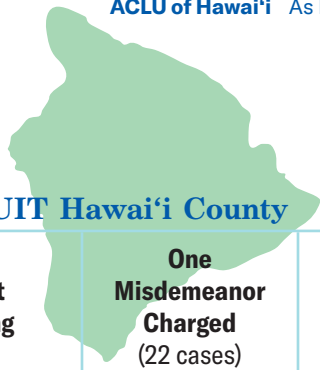
APPENDIX

FIRST CIRCUIT City & County of Honolulu

Initial Bail Amount Imposed at Hearing	One Misdemeanor Charged (71 cases)	One Class C Felony Charged (243 cases)	Two Class C Felonies Charged (119 cases)	One Class B Felony Charged (63 cases)	One Class A Felony Charged (21 cases)	One Felony Murder Charged (10 cases)
Release on Recognizance/ Supervised Release	32	0	1	0	1	0
\$1-\$999	32	1	0	0	0	0
\$1,000-\$9,999	4	14	7	3	0	0
\$10,000-\$19,999	1	126	50	29	1	0
\$20,000-\$29,999	1	65	40	10	3	0
\$30,000-\$49,999	1	12	10	3	0	0
\$50,000-\$74,999	0	14	9	12	7	1
\$75,000-\$99,999	0	2	1	2	2	0
\$100,000-\$499,999	0	2	1	4	4	2
\$500,000-\$999,999	0	0	0	0	0	2
\$1,000,000-\$2,000,000	0	0	0	0	0	5
Average	\$1,347	\$20,169	\$20,896	\$30,082	\$119,167	\$725,000

SECOND CIRCUIT Maui County

Initial Bail Amount Imposed at Hearing	One Misdemeanor Charged (13 cases)	One Class C Felony Charged (57 cases)	Two Class C Felonies Charged (43 cases)	One Class B Felony Charged (8 cases)	One Class A Felony Charged (3 cases)	One Felony Murder Charged (1 cases)
Release on Recognizance/ Supervised Release	4	7	4	1	1	0
\$1-\$999	1	0	0	0	0	0
\$1,000-\$4,999	0	1	7	0	0	0
\$5,000-\$9,999	4	28	8	0	0	0
\$10,000-\$19,999	1	9	19	1	0	0
\$20,000-\$29,999	0	7	3	4	0	0
\$30,000-\$49,999	1	3	0	0	0	0
\$50,000-\$99,999	2	2	1	0	0	0
\$100,000 +	0	0	1	1	2	1
Average	\$13,092	\$11,351	\$10,802	\$36,250	\$116,667	\$250,000



THIRD CIRCUIT Hawai'i County

Initial Bail Amount Imposed at Hearing	One Misdemeanor Charged (22 cases)	One Class C Felony Charged (25 cases)	Two Class C Felonies Charged (16 cases)	One Class B Felony Charged (11 cases)	One Class A Felony Charged (2 cases)
Release on Recognizance/ Supervised Release	11	4	6	2	2
\$1-\$999	9	1	0	0	0
\$1,000-\$4,999	2	12	4	0	0
\$5,000-\$9,999	0	2	2	6	0
\$10,000-\$19,999	0	6	0	2	0
\$20,000-\$29,999	0	0	4	0	0
\$30,000-\$49,999	0	0	0	1	0
\$50,000-\$99,999	0	0	0	0	0
\$100,000 +	0	0	0	0	0
Average	\$344	\$3,764	\$6,500	\$7,909	\$0



FIFTH CIRCUIT Kaua'i County

Initial Bail Amount Imposed at Hearing	One Misdemeanor Charged (12 cases)	One Class C Felony Charged (45 cases)	Two Class C Felonies Charged (23 cases)	One Class B Felony Charged (1 case)	One Class A Felony Charged (1 case)
Release on Recognizance/ Supervised Release	1	1	0	0	0
\$1-\$999	3	1	1	0	0
\$1,000-\$4,999	2	16	7	0	0
\$5,000-\$9,999	3	19	8	0	0
\$10,000-\$19,999	2	4	4	0	0
\$20,000-\$29,999	1	1	1	0	1
\$30,000-\$49,999	0	1	0	0	0
\$50,000-\$99,999	0	2	1	1	0
\$100,000 +	0	0	1	0	0
Average	\$5,208	\$7,113	\$11,530	\$50,000	\$20,000

APPENDIX

Table 1

Circuit	1st	2nd	3rd	5th	Total
# of cases where bail was set on the arrestee's arrest warrant	552	345	133	178	1,208
# of cases where bail set by the judge at the initial bail hearing matched that set on the arrest warrant	550	272	105	174	1,101
% of cases where bail set by the judge at the initial bail hearing matched that set on the arrest warrant	99.6%	79%	79%	98%	91%

Table 2

Circuit	1st	2nd	3rd	5th	Total
# of cases where we know the pretrial status of the arrestee	824	403	312	196	1,735
# of cases where money bail set at initial hearing	763	351	222	193	1,529
% of cases where money bail set	93%	87%	71%	98.5%	88%

Table 3

Circuit	1st	2nd	3rd	5th	Total
# of arrestees who were assigned money bail	763	351	222	193	1,529
# of arrestees who posted bail at the time this study took place	312	148	107	109	676
% of arrestees who had posted bail at the time this study took place	41%	42%	48%	56%	44%

Table 4

Circuit	1st	2nd	3rd	5th
# of cases where the arrestee changed to a no contest or guilty plea and we know the arrestee's bail status	232	117	74	15
# of arrestees who changed their plea to guilty or no contest while in pretrial custody	165 (71%)	81 (69%)	48 (64%)	9 (60%)
# of cases where a judge decided on a motion for supervised release or bail reduction	142	45	14	30
# of arrestees who changed their plea and were then granted supervised release or a bail reduction within a week of plea change	52 (36%)	15 (33%)	2 (14%)	10 (33%)

