

**Hawai`i State Bar Association
Committee on Judicial Administration**

2016 CRIMINAL LAW FORUM

Ali`iolani Hale
Supreme Court Building, Room 101

Wednesday, September 21, 2016

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2016 CRIMINAL LAW FORUM REPORT

INTRODUCTION

As described in the *Hawaii State Bar Association (“HSBA”)’s Board Policy Manual*, the Committee on Judicial Administration (“JAC”):¹

Maintains a close relationship with the judiciary on matters of mutual concern to the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinates activities of the HSBA relating to improvement of the judiciary and administration of justice.

Following a successful Bench-Bar Conference in 2013, the JAC decided to develop a Forum concept to focus on certain issues in the criminal areas² and civil areas³ separately. These Forums take place every other year, alternating with the Bench Bar Conferences.

OPENING REMARKS

Justice Simeon R. Acoba (ret.) welcomed and addressed the attendees and participants. He thanked the Judicial Administration Committee, the panelists, speakers, and attendees

¹ The HSBA Committee on Judicial Administration in 2016 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J. T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Hayley Y. C. Cheng; Dennis W. Chong Kee; Kahikino Noa Dettweiler-Pavia; Vladimir Devens; Don J. Gelber; William A. Harrison; James Kawashima; Edward C. Kemper; Carol K. Muranaka; Kyleigh F. K. Nakasone; Lester D. Oshiro; Audrey L. Stanley; and Kevin K. Takata.

² The Criminal Law Forum Committee members included Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Hawaii Supreme Court Associate Justice Richard W. Pollack; Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Hayley Y. C. Cheng; William A. Harrison; Brandon M. Kimura; Lester D. Oshiro; Audrey L. Stanley; and Kevin K. Takata. Audrey L. Stanley, Keani Alapa and Kyleigh F. K. Nakasone also served as Reporters.

³ The 2016 Civil Law Forum took place on Tuesday, September 20, 2016.

participating in this important event, and others who assisted in coordinating the forum. He mentioned that each year we have alternated between holding criminal forums and bench bar conferences. The Forum was organized with the intent of trying to cover important issues of present interest. This Forum concerned substantive law issues, pretrial detainment and reform, judicial proceedings, and the rights of the accused. Justice Acoba mentioned that the Conference of Chief Justices passed Resolution 3, “Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release,” which considers the presumptive use of nonfinancial conditions of release, that are consistent with evidence-based assessment of flight and threat to public safety. He was very grateful to guest speakers, panelists, probation, Department of Public Safety (“DPS”), Honolulu Police Department (“HPD”), prosecutors, public defenders, private defense attorneys and guests from mainland, and Carol Miyashiro. He thanked Dawn Nagatani, Martha Hamada, and others who helped with the setup of the room for the Forum.

Chief Justice Mark Recktenwald remarked that the genesis of this event was last year’s Bench- Bar Conference. The Bench-Bar conference was reinvigorated in 2012, and received a positive response from the bar. The judiciary seriously considers and studies the comments and issues raised at the conferences and forums. Action is undertaken, and these events have become an important part of how the judiciary operates.

What has been developed recently is that following a Bench-Bar Conference is a Forum, which focuses more deeply into particular issues. Chief Justice Recktenwald indicated that several issues would be discussed, with a focus on pretrial justice and possible reform in this area. He was honored to have the mainland guests attend the Forum. He noted that Arizona has been a leader in the area and welcomed Kathy Waters. He appreciated the attendance of Leland Moore and Carol Miyashiro, as well as the other panelists.

Chief Justice Recktenwald noted that it is an exciting time for those who work in the criminal justice system. In the national debate, there is considerable focus on criminal justice reform, many people coming together to find common ground, to develop initiatives all can support. One of those initiatives is justice reform. Hawai’i is one of 17 states that have undergone reform. When one looks at the Justice Reinvestment Initiative (“JRI”), one area of concern was the delay in the amount of time someone who comes into system and is unable to make bail and then ultimately can be released. The average period for the bail release is more than two months.

One of the recommendations from the JRI legislation is to have a quick risk assessment completed in a matter of days to move process along. Despite that, it seems that there are still delays in process. Chief Justice Recktenwald hopes that the discussion on this topic at the Forum would offer suggestions on reform.

Another important initiative is looking at the system of incarceration. The legislature adopted a resolution to study incarceration policies, improvements for the Hawai’i system and design, that is, what are the features of future facilities and what are the design objectives for such facilities. Justice Michael Wilson has been working on that matter, and Chief Justice Recktenwald appreciates his work on the questions of: how promptly the system operates and how quickly can we make decisions.

The question is: How quickly can decisions be made if we have the right information and how can we have the system optimized to have decisions made in the shortest time possible. Nationally, there has been an effort to look at who is in the system, goals of the system, effective community safety, and requisite court appearances by defendants.

Chief Justice Recktenwald explained that there should be a system in place where high-risk, dangerous defendants are dealt with in an appropriate manner, but with the low-risk defendants, detention should not occur solely because they cannot afford to make bail.

Studies have shown that a three-day pre-release is too much. Someone with a job, a single parent who is incarcerated, who is a low-risk, who is likely to appear, that three days in jail can mean the start of a cascading series of negative effects – loss of jobs, breakup of family units, homelessness, and the like. If incarceration is not serving public safety, or ensuring that people appear, we need to address the situation more promptly. In our county, thousands of people are kept in jail. Nonetheless, most must stay in jail because, to be blunt, they cannot afford to pay for their freedom.

I. CURRENT BAIL PROCEDURES

(Moderator: Hayley Cheng; Panelists: Judge Ronald Ibarra; Judge Randal G.B. Valenciano; Judge Joseph Cardoza; Judge Barbara Richardson; Mark Yuen, Deputy Prosecuting Attorney; Major Susan Ballard, Commander, Central Receiving Division (“CRD”); Shelley Nobriga of Intake Service Center (“ISC”))

There is a growing national trend to reevaluate, update, and restructure bail and pretrial release procedures to balance the concerns for public safety and court obligations, while maintaining the constitutional presumption of innocence and the right to reasonable bail. Hawaii’s pretrial release procedures are not in concert with this national trend. The 2016 Criminal Law Forum sought to answer the question: Should Hawaii’s policies and procedures be reexamined to ensure that defendants are afforded the least restrictive release terms consistent with statutory considerations regarding flight risk and danger?

A. SETTING OF BAIL

Who sets bail? What is the role of the police, prosecutor, and the court? What is the current practice? Is there a bail schedule? What information is obtained and utilized and what criteria is used to set bail? Is a bail report normally prepared before the initial appearance? Why does it take so long to obtain a bail hearing? Why is there a large discrepancy between the Circuits in the fixing of bail amounts?

The panelists considered current bail procedures. Hayley Cheng opened the discussion with the question of who sets bail.

PROSECUTORS: Judges set bail. There are two type of cases – custody and non-custody. In *custody* cases, the prosecutors play no role. The HPD detective speaks with the court, offers a recommendation, and the court indicates the request is either high, low, or approves the bail request. In *non-custody* cases, a prosecutor makes a recommendation to the court, which decides whether the bail amount is appropriate or not. The amount of bail is based on the type of offense, record of defendant, and potential flight risk. If it is a non-custody case there is generally a State assessment and finding of “no flight risk,” otherwise the person would be considered a “custody defendant.”

HONOLULU POLICE DEPARTMENT: CRD sets bail for misdemeanors and petty misdemeanors. All bail in felony cases are handled by the assigned detective and the court. In the case of misdemeanors and petty misdemeanors, CRD considers factors such as whether: (1) the person is on probation or parole; (2) the person has pending felony matters; (3) the person is transient; (4) it is a first offense; (5) force or a weapon was used; (6) HPD has had prior contact with the individual; and (7) the detainee’s candor when questioned (did the person lie to the intake officer).

HPD utilizes the following standard bail schedule: (1) a minimum of \$50.00 to a maximum of \$1,000.00 for petty misdemeanors; and (2) a minimum \$100.00 to a maximum of \$2,000.00 for misdemeanors. If the matter occurred in a “Weed and Seed” (federally designated) area, minimum bail is \$1,000.00 to a maximum of \$2,000.00 for a misdemeanor.

The matters for which HPD sets standard bail include DUI, domestic abuse, TRO violations and prostitution. CRD’s geographical area includes the Weed and Seed designated areas: Honolulu, District 5 (Kalihi), and District 3 (Pearl City). Except for Weed and Seed cases, if the charge is disorderly conduct, harassment, prostitution, or petty drug possession, HPD sets bail at a minimum of \$500.00. Maximum bail is set at \$1,000.00 regardless of previous contact or history.

INTAKE SERVICE CENTER: All circuits have an Intake Service Center (“ISC”). ISC staff report to the police stations at 4:00 a.m. to interview individuals who did not post bail. In preparing the report, ISC staff highlight key issues and facts about job, living situation, and family. In formulating an initial bail report, staff collects information, which includes Criminal Justice Information Service (“CJIS”) and National Crime Information Center (“NCIC”) checks. The staff must undertake a quick fact specific review, highlighting key risk factor issues for court consideration.

THIRD CIRCUIT- KONA: Pursuant to Haw. Rev. Stat. § 804-5, bail setting authority is given to the court for misdemeanor and felony offenses. The chief of police also has authority to set bail. The Kona court has had a bail guideline order since 1994. It is specifically a guideline, not a standard. This is to allow individuals to make bail and provide police a guideline, pre-first court appearance. Standard bail for a class B felony is \$2,000.00, for a class C felony – \$1,000.00. Bail can be denied for murder, attempted murder, and class A felonies. The court considers risk of flight and danger to the community.

When ISC reviews someone at the police station and does not obtain sufficient information on the defendant at that time, the court will undertake an independent bail study when a defendant makes his/her first appearance at court. There are factors, sometimes not contained in the ISC report, which the court prefers to see, such as financial resources and ability to pay. The court considers the financial status of the defendant when setting release conditions. If there are issues concerning indigent status, the court seeks to obtain a consensus from the parties as to the amount of bail, if any, which should be set. If all parties fail to agree to a specific amount or condition, then a full hearing on the matter is set.

FIRST CIRCUIT- DISTRICT: Detectives call the court only if extraordinary bail is sought, i.e. higher than what is “normal.” For custody status cases- \$11,000.00 is normal on class C felony matters, for non-custody cases, \$2,000.00 is normal. The court must consider the circumstances of offense and danger to other people. It is a fact-based decision, with bail amounts starting at \$11,000.00 but can go as high as a million, considering the criminal history, propensity to flee, number of arrests, convictions, and type of case. Sometimes detectives will ask what will the court set, what will the court give us? A lot of it is based on the years of experience being a “duty judge.” Newer, less experienced judges will ask, what bail amount do you want and why?

SECOND CIRCUIT: The court operates similarly with the other circuits in many respects. The court considers an arrestee’s ability - in petty misdemeanor and misdemeanor cases – to make bail in the shortest amount of time. The Second Circuit Court seeks to obtain a bail study for the initial appearance, to allow for a bail hearing to occur within 48 hours of arrest. Factors that are considered include nature of offense, ties to community, flight risk, residence, employment, prior record, and the like. At bail hearings, the court will discuss financial resources, and other factors, as well as alternatives to cash bail, when those alternatives present themselves. If the State and defense agree to an alternative to cash bail or pretrial incarceration, the parties will be asked to provide the court with a stipulation, and the individual will usually be released.

FIFTH CIRCUIT: The court does not utilize bail schedules. The court has a good working relationship with ISC. When someone is arrested, bail is set by the police department, felony information by the district court, and indictments by a reviewing circuit judge. After bail is set, there is a referral to ISC. For preliminary hearings, the goal is to obtain a bail report within one to two days. The problem that often arises is the inability to verify all necessary information for the report. In other situations, the court endeavors to get a report prepared within five days. In that five-day period, ISC has sufficient opportunity to verify all information.

The Judiciary had ISC do a presentation for the attorneys on risk assessment, to explain how bail is set utilizing ISC’s point system. Motions to reduce bail are seriously considered and reviewed. The court generally attempts to set low bails. Bail is usually established to set and impose conditions to the bail. The lowest bail the court will set pending sentencing is \$1.00. Thereafter, if the defendant gets into trouble pending sentencing, it clearly hampers the defendant’s ability to later argue for probation.

B. QUESTIONS

1. What is ISC doing to speed preparation of reports?

The ISC supervisors have been working diligently with its staff to observe the 4:00 a.m. custody review. It appears ISC has a positive working relationship with all courts and staff. The ISC staff works diligently to make good decisions concerning release.

Statistics for the fiscal year 2016:

- (1) First Circuit - average length of stay for pretrial felons – 86 days, with median stay of 42 days;
- (2) Fifth Circuit- average length of stay for pretrial felons – 59 days, with median stay of 22 days;
- (3) Second Circuit - average length of stay for pretrial felons – 52 days, with median stay of 8 days;
- (4) Third Circuit - average length of stay for pretrial felons – 36 days, with median stay of 10 days.

There are varying reasons for the differences amongst the circuits. For instance, the First Circuit has supervised release issues concerning sponsorship conditions. The Second Circuit has supervised release issues in combination with concrete conditions. Each circuit has its own type of problems, but using proactive measures, ISC is working together to bring down these median numbers.

2. Is supervised release (“SR”) given at preliminary hearings in other circuits?

ISC: One problem with considering SR at preliminary hearings is that ISC does not have sufficient time, in the short period given, to verify all information.

Fifth Circuit: If the State does not object, the court will sign off on supervised release orders. If the State objects, the court denies supervised release. If a defendant wants to pursue supervised release, the defendant must file a motion. At the hearing on the motion, the court can weigh the facts and evidence and decide whether to grant SR or not.

Third Circuit - Kona: Every quarter, the court has a meeting with everyone to review the pretrial jail population at Hawaii Community Correctional Center (“HCCC”). Sixty percent of total pretrial population is incarcerated. At the last legislative session, the warden was given authority to release inmates to ease overcrowding. The court rarely observes district court judges permitting felony defendants supervised release at the preliminary hearing stage. 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/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 ISC's formal bail study. The court notes that bail is to ensure presence in court and not as a plea-bargaining tool. There is a need to educate all the parties in the system as to this fact.

Second Circuit: Whenever bail studies are prepared, typically if the bail study recommends supervised release, then that recommendation will be followed, and release will be subject to the standard terms and conditions.

First Circuit – District: The court reviews Judicial Determination of Probable Cause (“JDPC”) affidavits every morning, weekends, and holidays. The court not only reads JDPC's but confers with the detective if extraordinary bail is sought. Generally, the court does not have much information at the date of the preliminary hearing. The court is interested in learning more about the Third Circuit bench questionnaire. The court has reviewed the revised ISC reports recently and notes the system is working better.

II. THE PURPOSE AND HISTORY OF BAIL – IMPLICATIONS OF PRETRIAL BAIL REFORM

(Leland J. Moore, NIC Consultant)

Leland Moore appeared at the Forum on behalf of the National Institute of Corrections (NIC). NIC is a non-profit center of learning, innovation, and leadership that shapes and advances effective correctional practice and public policy. Their website is: www.nicic.gov/.

Moore reviewed the history and purpose of bail and the historical course that pretrial release has taken to get us to the present-day concept of bail and pretrial release. His power point presentation can be found here: <http://www.ncja.org/sites/default/files/documents/Moore-Purpose-and-History-of-Bail.pdf>.

Understanding fundamentals of bail and no bail is essential to understand the scope of change. Given research, and consensus, a cashless bail system can be a high functioning approach to pretrial release and detention. A good primer on the history of bail: www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf.

Bail is a process of pretrial release. The purpose of bail is release. The purpose of a determination of no bail is to detain. Bail is not money, money is a condition of bail or release, or a limitation on freedom with a different purpose.

Bail is, and should be a binary decision. In early America, a broad right to bail was constitutionally mandated. Bail was a personal surety with no indemnification. An unsecured bond, with a promise to pay later, was the norm. People resided in communities where everyone knew one another. In 1800-1899 with the increase of personal movement, community knowledge declined. This led to the demise of personal sureties. It became easier to abscond without personal

sureties, and an increase in detention began. In as late as 1898, there was a presumption of release and bail.

Reform movement: Many jurisdictions are initiating bail reform. The issue of money and how money is a hindrance to the system of bail is the topic of discussion. There are zealous advocates who are suing jurisdictions who use money as the primary basis for release.

In Colorado, even though a task force did research on what bail meant and understood what history and law told them, they still had to obtain consensus on reform.

It is important to understand the research and studies that have been published. A good resource is: “Fundamentals of Bail, Money and Criminal Justice,” and “Money as a Criminal Justice Stakeholder: A Judges Decision to Release or Detain a Defendant Pretrial” (www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf)

III. ESSENTIAL ELEMENTS OF A HIGH FUNCTIONING PRETRIAL JUSTICE SYSTEM

(Leland J. Moore, NIC Consultant)

“Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.” - Department of Justice, 2016.

Leland Moore discussed what stakeholders must look for in creating a highly functioning system. He covered the impact of moving to a pretrial justice system that relies on risk assessment to assist with pretrial release decision-making and demonstrated how risk management strategies can improve pretrial outcomes. These improvements are expected to increase the efficiency of the justice system while also providing a fairer, more just system for defendants and victims.

There are eight elements of an effective pretrial system:

1. Pretrial release and detention decisions are based on risk.
2. There is a statutory presumption of nonfinancial release, restrictions, or prohibition against the use of financial release, and detention without bail for only a limited and clearly defined type of defendant.
3. There is an array of release options available following or in lieu of arrest.
4. All defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute.
5. Experienced prosecutors screen criminal cases expeditiously before initial appearance.
6. Defense counsel is engaged at first appearance.
7. There is a collaborative group of stakeholders that employ evidence-based decision making to ensure an effective functioning system.

8. There is a dedicated Pretrial Services Agency.

Essential to a proper decision is the use of “Evidence-based Decision Making” Principles:

- Principle 1: The professional judgment of criminal justice system decision makers is enhanced when informed by evidence-based knowledge.
- Principle 2: Every interaction within the criminal justice system offers an opportunity to contribute to harm reduction.
- Principle 3: Systems achieve better outcomes when they operate collaboratively.
- Principle 4: The criminal justice system will continually learn and improve when professionals make decisions based on the collection, analysis, and use of data and information.

Moore also discussed how release options can be utilized in lieu of arrest such as the use of summons and citations. Furthermore, the options following arrest must be reviewed and implemented such as:

- Delegated release authority
- Diversion
- Release on Own Recognizance (“ROR”)
- ROR to pretrial services supervision

Lastly is consideration of the Prosecutor “to do” List for Pretrial Bail Decisions which include:

- Review affidavit / LE reports
- Review PTS report with risk assessment
- Deciding on appropriate charges
- Speaking with victim for pretrial input
- Making hold / release recommendations
- Deciding what conditions of bond to request to address court appearance and public safety
- Speaking with defense counsel to see if bail agreement can be reached and submitted to the judge.

An NIC PowerPoint discussing these essential elements can be found:
<http://nicic.gov/Library/files/032719.pdf>.

IV. BAIL ALTERNATIVES AND REFORM MEASURES

(Justice Michael D. Wilson; Carol M. Miyashiro, Chief U.S. Pretrial Services Officer – Hawai‘i;)

The federal pretrial system: requires the release of a defendant on “the least restrictive” “conditions, or combination of conditions” “that will reasonably assure the appearance of the

person” “and the safety of any other and the community.” 18 U.S.C. § 3142 et. seq. If the person is a flight risk or danger, he/she can be detained without bail. All other individuals are subject to release. The use of cash bail is very limited. The federal courts primarily use unsecured signature bonds and conditions as the basis for pretrial release.

A snapshot of the federal system of pretrial release shows: there are 93 federal judicial districts, which have Pretrial Services Offices (“PTS”). There are major differences in each PTS. The D.C. Pretrial Services Agency is like Hawaii’s PTS office. The initial appearance is usually held at 2:00 p.m. A Pretrial Services Officer (“PTSO”) usually interviews detainees between 12:00 and 2:00 p.m. The interview examines at community ties, background, citizenship, family members, resources, mental health issues, medical, prior treatment, prior probation, and the like. The PTSO runs record checks, verifies information, and prepares a report with recommendations the same day. By law, the government has a right to request a three-day continuance. If a person is detained, he/she is detained without bail.

History: The 1960 Bail Reform Act was a conduit of change. 6,000 people were released after the Act was established. Notwithstanding this mass release, the pretrial failure rate did not increase. The major impetus for reform: indigent defendants and people of color not being able to make bail. The Bail Reform Act required the federal pretrial services to look at other kinds of factors to determine whether to release defendants. Unfortunately, in 1984 with the adoption of the sentencing guidelines and the continued “War on Drugs,” pretrial release reform efforts were being eroded.

In 2009, the Alternatives to Detention (“ATD”) Study was developed. The study looked at one million federal defendants. The goal was to determine the “statistically significant and policy relevant predictors of pretrial failures (failure to appear and danger to community issues).” The result was the development of the “Pretrial Risk Assessment Tool” (“PTRA”).

The PTRA was developed as a standardized empirically-based risk assessment instrument for use by federal pretrial services. The use of a standardized instrument helped reduce the disparity in risk assessment practices and provided a foundation for evidence-based practices. It allowed for the development of policy that provided guidance to pretrial services agencies regarding release and detention recommendations, including the use of alternatives to detention.

The PTRA was developed by capturing data collected from all the persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 (approximately one million defendants) who were processed by federal pretrial services.

The PTRA is an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear (“FTA”), new criminal arrest (“NCA”), and revocations due to technical violations (“TV”) while on pretrial release. The PTRA comprises of 11 scored and 9 un-scored items that are divided into two categories: criminal history and other. The scored items are prior felony convictions, prior FTAs, pending cases, offense type, offense severity, age, residence status, employment, education, substance abuse, and citizenship status.

The PTRAs are actuarial instruments, which means they give the probability of failure for a given group of defendants and not any particular defendant. The PTRAs were validated using the data mentioned above, as well as a construction and validation sample. A panel of experts also reviewed the instrument. Concurrent validity was assessed based on its correlation with another known predictor of risk, the Risk Prediction Index (“RPI”). PTRAs were confirmed through review by an expert panel and officers in the federal pretrial services.

Current Federal Practice: Cash bond is limited in use and the individual is required to only post what cash he/she possesses. The federal system uses unsecured bonds, personal recognizance, signature bonds, agreements to forfeit, property bonds, collateral bonds, surety bonds, and cash bonds. Location monitoring (“RF,” “GPS,” “Soberlink” and “Voice verification”) tools are frequently used. PTS uses “Electronic report forms” for low-risk individuals, which requires an individual to send a report once a month.

Correctional Justice: Justice Wilson urged a systemic reform of the present system of incarceration of Hawaii’s inmates. It was noted that now is the time to make such changes, as the fiscal responsibility of building new prisons and the toll that it takes on the community, are issues that the society is now grappling with. The following statistics were enlightening:

- The new Oahu Community Correctional System (“OCCC”) is projected to have 600 beds. The cost of the facility will be \$600 million, which would equal \$1 million dollars per bed.
- Total inmate population of OCCC = 1,398
- Present pretrial population OCCC = 569
- The incarceration rates in the world compared to Hawai’i:
 - United States – 707 per 100,000
 - Russia – 471 per 100,000
 - Hawai’i – 405 per 100,000
 - China – 119 per 100,000
 - Norway – 72 per 100,000

Hawaii’s per capita inmate population is higher than that of many other countries, and the inmate population is predominately Hawaiian.!

A task force has been established to consider the staggering cost of incarceration. A Department of Justice brief set forth in detail, as courts have long recognized, incarcerating individuals based on poverty violates the Fourteenth Amendment. Bail reform needs to focus on flight risk and safety, and not upon financial ability. When individuals are arrested for failure to make payments they cannot afford, their rights are violated because of unlawful bail and bond practices.

An institutional review, via a task force, to bring about appropriate change was urged.

V. REFORM MEASURES IN ARIZONA

(Panel: Kathy Waters, Administrative Offices of the Courts -Arizona; Leland J. Moore J.D.)

In an August 16, 2016 report commissioned by Arizona Supreme Court Chief Justice Scott Bales, the state Task Force on Fair Justice for All made a series of sweeping recommendations to the Arizona Judicial Council including reforms to make the state's pretrial justice system more fair and effective. Among other reforms, the report calls for eliminating the use of cash bond as a means to secure a defendant's appearance for a future court date, and recommends the expanded use of the Arnold Foundation's risk assessment tool to determine pretrial release decisions.

The Arizona task force was charged with formulating best practices recommendations for making release decisions that protect the public but do not keep people in jail solely for the inability to pay a cash surety (bail). The courts, the Department of Justice, and many criminal justice stakeholder groups, and foundations throughout the United States are joining in pretrial justice reform efforts with the goal of eliminating a "money for freedom" system, often based on the individual charge — not on the risk the defendant poses—and replacing it with a risk-based release decision system. The goal is to keep the high-risk people in jail and release low- and medium-risk individuals, regardless of their access to money. Even short pretrial stays of 72 hours in jail have been shown in national and a local Arizona study to increase the likelihood of recidivism.

It was noted that pretrial incarceration can cause real harm, such as loss of employment, economic hardship, interruption of education or training, and impairment of health or injury because of neglected medical issues. Requiring a defendant to post money to get out of jail does not ensure that the person will be more likely to return to court nor does it protect public safety. Indeed, in analyzing more than 750,000 cases, a study financed by the Laura and John Arnold Foundation found that in two large jurisdictions, "nearly half of the highest-risk defendants were released pending trial." Some of the highest-risk individuals are likely to have access to money to post a cash surety. Communities are better served by assessing the risk defendants pose and their likelihood of appearing for their future court hearings.

Arizona courts already use a risk-based release system for juveniles. A juvenile may be held in detention if the juvenile will not be present at any hearing, or the juvenile is likely to commit an offense injurious to self or others. There is a "no money for freedom system" in the juvenile court. Kathy Waters seconded Leland Moore's essential elements of a pretrial justice system and recommended collaboration of the stakeholders early in the process.

Both Ms. Waters and Mr. Moore offered their continued assistance to Hawai'i as we consider and possibly develop our own evidence based pretrial release program.

Kathy Waters noted that the full report of the Arizona Task Force can be found at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>.

VI. BREAKOUT SESSIONS

Participants met in four small groups to discuss important questions concerning several common bail topics. Each group had a moderator who was tasked with reporting back to the entire Forum, following the individual sessions.

The separate groups discussed following questions:

- (1) Does our system of pretrial release need reform?
- (2) What are the goals regarding pretrial release/detention?
Are they to: (a) maximize release? (b) maximize court appearance? (c) maximize public safety? or (d) are they all important?
- (3) Should cash bail (i.e. posting money, bond, or property) be used as a condition of release?
- (4) What alternative conditions of release do you think should be utilized?
- (5) Should we form a task force to review the concerns raised regarding our present pretrial release/detention system?

There was uniformity in response to the first question. All participants believed that we need reform. The second question was not nearly as uniform. There seemed to be more consensus on maximization of court appearances and public safety, but a divergence when it came to “maximizing release” with law enforcement and defense seemingly in opposite camps. Development of better risk assessment tools were advocated. The level of offense and the nature of the crime weighed into the discussion.

There was spirited discussion on the question whether cash bail should be used as a condition of release. Many participants believed that money should be in the release equation.

All participants believed that alternative conditions of release should be considered and utilized. Home intoxicilizers, ankle bracelets, automated phone systems, and signature bonds were offered as potential alternatives to incarceration.

A. RECOMMENDATION

The current pretrial release procedures appear to be inadequate due to the lack of timely bail studies and reports, lack of alternate release conditions for those who cannot afford monetary bail, and lengthy pretrial incarceration for those who have not been provided hearings. The consensus of the breakout session participants was that the formation of a task force to review pretrial release procedures would be appropriate.

VII. CUSTODY DEFENDANTS

(Moderator: Audrey Stanley; Panelists: Renee Sonobe Hong, Director DPS, Shelley Nobriga of Intake Service Center; Judge Shirley M. Kawamura;).

The articulated concern was that criminal practitioners generally maintain tight court schedules and there is “down time in court” due to custody defendants not being brought to court in a timely manner. This contributes to inefficiency and counter productivity, which then leads to frustration. Eliminating down time in any form, assists the court, the parties, and the Department of Public Safety. The attorneys believe that trying to find a common ground between the courts and counsel as to the setting of hearings on busy days involving custody defendants should be explored i.e., setting afternoon versus morning hearings.

The panelists indicated that generally there were no issues concerning the movement of custody defendants. DPS, Intake, and the court all believed that, for the most part, custody defendants were being brought to court in a timely manner with very few glitches. The panelists welcomed any future problems regarding this issue to be brought to their attention.

VIII. PROBATION

(Moderator: Hayley Cheng; Panelists: Gerald H. Oyasato, Supervisor District Court Probation; Judge Barbra Richardson)

Attorneys have indicated that the First Circuit District Court has a common practice of placing all convicted and deferred defendants on formal probation for petty misdemeanor and misdemeanor offenses -- even when offenses do not involve aggravating circumstances or programing issues such as: thefts/ shoplifting offenses; trespass (“Stairway to Heaven,” closed park, Waikiki beach parks, and the like); open container offenses; sales of liquor to minor offenses; and nuisance cases. It is believed that this practice places an unnecessary and unwarranted burden on the Probation Division. Accordingly, a review of this practice may be appropriate with the courts considering possible alternatives to formal probation such as unsupervised probation or straight fines.

The Probation Division believes that probationers in petty and misdemeanor cases are simply monitored for new offenses, which are reported to the court. Of the monitored misdemeanor cases, most common ones are assault in the third degree, prohibitions, and theft in the third degree. The Probation Division is finding that judges are not sentencing people to probation for the relatively minor offenses. Most of the cases that are placed on probation are administratively supervised. Probation meets with the defendants, explains what they need to take care of, and contacts them before court if there are problems. If the defendants commit new offenses, then Probation would meet with them to address the issues.

For those granted a deferral for a petty misdemeanor or misdemeanor, how many times, on average is a defendant to check in? Probation Division responded that petty misdemeanants, check-in once. After that, future check-in is by phone. There is generally no difference in supervision between a deferral and probation. Any difference in supervision would be based upon a specific risk level.

First Circuit District Court: Judges have met and discussed the shortening of probationary periods and deferral periods. In the First Circuit, shortening deferral or probation periods are the norm if an individual has complied before the probation period ends.

Third Circuit -Kona: A deferral defendant's risk level is generally lower on average than risk levels for those persons placed on probation. Therefore, monitoring of deferrals would naturally be less intensive than with those on regular probation.

IX. PROOF OF COMPLIANCE ISSUES

(Moderator: Audrey Stanley; Panelists: Judge Joseph E. Cardoza; Wendy A. Hudson, Maui P.D. Supervisor).

There are ongoing concerns with the court's practice of setting multiple periodic Proof of Compliance ("POC") review hearings where there appears to be no necessity for the hearings. This includes the setting of POCs every three months, even after a "Free Standing Order" has been filed regarding the restitution as well as the monitoring of court fines, which may have already been sent to collections. The criminal bar welcomed discussion and review of this practice.

The Second Circuit Court does have periodic review hearings regarding proof of compliance issues. It is generally the only way to nudge individuals along to completion. The court does not believe the reviews are onerous and finds that the hearing helps to resolve issues. The Drug Court and HOPE models work and the Hope/Drug Court examples of sanctions. The review hearings are doing a service to those individuals being reviewed.

The Public Defender's Office believes that there are far too many POC reviews. The office believes that review hearings should not be utilized to bully individuals. Such hearings should be initiated solely by Probation and not the court since Probation is monitoring and supervising the individual. The Public Defender's Office noted that there is no empirical data that suggests that these periodic reviews work and they find the reviews onerous, difficult to staff, and sets defendants up for failure, and ultimately the issuance of bench warrants.

X. CONCLUSION

The majority of the conference centered on Hawai'i's pretrial justice system and whether the system needed review, reassessment and possible reform. The speakers on this topic were knowledgeable and well received. The participants were asked to consider several questions concerning pretrial release, as noted above, in a break-out session. The response to those questions made clear the need to consider possible review and reform of Hawai'i's pretrial justice system.

The formal recommendation of the committee was to convene a Task Force to review Hawai'i's Pretrial System and prepare a report to the judiciary and legislature for review and possible action.

The overall response to the forum was extremely positive. The participants at the 2016 Criminal Law Forum gave the forum high marks. Here is a sampling of the comments for the Forum:

- *I greatly enjoyed the opportunity to discuss these issues with all the parties relevant to the practice of criminal law. I feel that these forums give us an opportunity to have candid discussions in an informal setting. Thank you for the opportunity to participate.*
- *A great conference again; worth every penny I spent getting there!*
- *Thank you for hosting this topic. It is in the national arena, and our community needs information and education to learn how we can best use our resources to improve public safety for our citizens.*
- *Today's conference highlighted the fact reform of our current pretrial processes is needed. As a pretrial practitioner, it is so refreshingly hopeful to see the judiciary taking interest in this topic. I look forward to more discussion, collaboration, and planning relating to pretrial reform. Mahalo for the invite.*
- *Knowing the direction and focus of our jurisdiction is important. With that information, the ability to make appropriate bail decisions and arguments is improved. In the long term, knowing each stakeholder will be included in formulating our new approach is reassuring.*
- *When meeting to discuss issues and ideas for improvement, it may be beneficial for each circuit to meet as a group, as well as for us all to meet in mixed groups. The circuits are so diverse that meeting only in mixed groups doesn't allow each circuit to work on solutions which may be implemented in the short term while the larger framework is constructed. Meeting in mixed groups helps share ideas and bring awareness to other issues, so it is also beneficial, but circuit-focused groups may encourage more immediate action. Thank you for the opportunity to participate. It was very informative. Also, it is reassuring to see movement is being made to address bail and its host of issues and concerns.*

LIST OF 2016 CRIMINAL LAW FORUM PARTICIPANTS**JUDGES**

Judge R. Mark Browning	First Circuit Court, Family Court
Judge Joseph Cardoza	Second Circuit Court
Judge Jeffrey Crabtree	First Circuit Court
Judge William Domingo	District Court, First Circuit Court
Judge Lisa M. Ginoza	Intermediate Court of Appeals
Judge Ronald Ibarra	Committee member
Judge Shirley M. Kawamura	Committee member (First Circuit)
Judge Edward Kubo	First Circuit Court
Judge Christine Kuriyama	First Circuit Court
Judge Lono Lee	District Court, First Circuit Court
Judge Katherine Leonard	Intermediate Court of Appeals
Justice Sabrina McKenna	Hawaii Supreme Court
Chief Judge Craig Nakamura	Intermediate Court of Appeals
Justice Richard W. Pollack	Committee member (Hawaii Supreme Court)
Chief Justice Mark E. Recktenwald	Hawaii Supreme Court
Judge Catherine H. Remigio	Committee member (District Family Court)
Judge Barbara Richardson	District Court, First Circuit Court
Judge Randal G. Valenciano	Committee member (Fifth Circuit)
Justice Michael Wilson	Hawaii Supreme Court

COURT ADMINISTRATORS

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David Lam	CCA, Fifth Circuit
Cheryl Marlow	DCCA, First Circuit Court
Lester D. Oshiro	Committee member (CCA, Third Circuit)
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Cheryl Salmo	DCCA, Third Circuit
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