

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Judiciary**

Hrg: Tuesday, Feb. 12, 2008, 2:05 p.m.
5 copies required

H.B. NO. 3041: RELATING TO CRIME

Chair Waters and Members of the Committee:

We have serious concerns and strongly oppose many of the amendments to the penal code proposed by this bill. Our concerns are as follows:

Obstruction of criminal investigations

On pages 1 and 2, the bill seeks to create a new offense of Obstruction of Criminal Operations and to make it a Class C felony. We oppose this change. The situation that this new law seeks to address is where one coerces or bribes another into not communicating information regarding the violation of the law to a law enforcement officer or prosecutor. There is an array of current offenses which already address the situations covered by this proposed offense: Obstruction of Public Administration (HRS § 710-1010), Compounding (HRS § 710-1013), Hindering Prosecution (HRS § 710-1028), Bribery of or by a Witness (HRS § 710-1070), Intimidating a Witness (HRS § 710-1071), Tampering with a Witness (HRS § 710-1072). Some of these offenses are misdemeanors or petty misdemeanors and some are felony offenses, depending upon the seriousness of the offense.

Allegations of witness coercion most often occur in domestic situations. However such situations are so volatile and fraught with witness inaccuracies based upon the emotion at the moment of the violation that it is difficult to base criminal prosecutions on the word of one witness. Under the current statutory structure, persons can be adequately held criminally liable when prosecutors have solid evidence of witness coercion.

Amendment to HRS § 338-18

On pages 3 and 4, the bill seeks an amendment to HRS § 338-18 governing the disclosure of Department of Health vital statistics such as birth and death certificates. The amendment would allow a law enforcement officer to obtain such records when needed in an investigation. Such a record can already be obtained through court order such as a subpoena. We feel that is sufficient disclosure to assist in criminal investigations while maintaining the integrity of those records.

Murder in the Second Degree

On page 8, the bill seeks an amendment to Murder in the Second Degree. We strongly oppose this portion of the bill. The proposal would essential dispense with the "intentional" or "knowing" state of mind for Murder. It states that if, intending to do serious bodily injury to another, you cause the death of someone or if you intentionally or knowingly perform acts that create a strong probability of death or serious bodily injury and cause the death of someone. This amendment lowers the required state of mind for Murder to something akin to "recklessness." Driving while intoxicated can be said to

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create a “strong probability” of death or serious injury. If someone dies in a drunk driving accident, the intoxicated driver is guilty of Murder under this amendment.

While an emotional reaction to the death might be such that the aggrieved family would be in favor of such criminal liability, common sense and due process under the law dictates that such a death should not be treated in the same class as someone who walks up to another and intentionally shoots that person in the head causing his/her death. This proposed amendment severely blurs the lines between Murder, Manslaughter and Negligent Homicide.

Raising of penalties for assorted offenses

The bill on pages 9 through 12 raises the penalties for various offenses related to public administration. This is said to strengthen the laws. We disagree. The raising of penalties does nothing to strengthen these statutes. There are very few prosecutions for offenses such as Tampering with a Government Record, False Swearing and Intimidating a Witness. Indeed, it is quite commonplace in criminal trials that witnesses for the state are caught in fabrications and exaggerations but there is a prevailing hesitance on the part of prosecutors to hold such persons accountable under the law. The prosecutors must be asked not whether the penalties are serious enough but why persons are not being prosecuted when caught in public administration misdeeds.

Addition of offenses to the prosecution via information statute

On pages 13 through 24, the bill seeks to add a number of offenses to HRS § 806-83, allowing those offenses to be prosecuted by written information. We oppose the addition of the public administration offenses – Obstruction of Criminal Investigations, Tampering with a Government Record, False Swearing in Official Matters, Tampering with a Witness, Tampering with Physical Evidence, Perjury, Intimidating a Witness, Retaliating against a Witness, and Retaliating against a Juror.

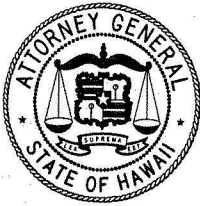
Oftentimes the fact situations surrounding such alleged offenses are complex and subject to the interpretation of words or physical gestures by people. Witnesses in such cases should have their credibilities considered by a preliminary hearing judge or grand jury.

Lowering of the state of mind for a violation of HRS § 844D-111

On pages 25 and 26, the state of mind for a violation of the offense of Refusal or Failure to Provide Specimen for Forensic Identification is lowered from “intentionally or knowingly” to “knowingly or negligently” and, at the same time, the penalty is raised to a Class C felony. Under this amendment, a person who innocently forgets about an appointment for the taking of a specimen would be subject to prosecution for a felony. Imprisoning someone for five years for missing an appointment is draconian.

Thank you for the opportunity to comment on this bill.

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**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

H.B. NO. 3041 ,

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 12 , 2008 TIME: 205 PM

LOCATION: State Capitol Room
Deliver to: ~~204~~, Room 302, 5 copies

TESTIFIER(S): Mark Bennett

Chair Waters and Members of the Committee:

The Attorney General strongly supports this bill.

The purpose of this bill is to:

- (1) Amend section 338-18(b), Hawaii Revised Statutes, in order to authorize the Department of Health to permit law enforcement officers to inspect public health statistics records and issue a certified copy of any such record or part thereof to law enforcement.
- (2) Amend section 707-701.5, Hawaii Revised Statutes, to include within the offense of murder in the second degree, acts committed with the intent to cause serious bodily injury to another person or create the strong probability of causing death or serious bodily injury to another person, which result in the death of another person.
- (3) Strengthen our laws related to public administration by creating a new offense that prohibits the obstruction of criminal investigations, and by upgrading the following public administration offenses to reflect the seriousness of the offenses and to deter very harmful and disruptive conduct directed against government operations and the justice system:
 - (a) Tampering with a government record (section 710-1017) is made a class C felony when the offense is committed with intent to mislead a public servant;
 - (b) Perjury (section 710-1060) is made a class B felony;

- (c) False swearing in official matters (section 710-1061) is made a class C felony;
 - (d) False swearing (section 710-1062) is made a misdemeanor;
 - (e) Intimidating a witness (section 710-1071) is made a class B felony;
 - (f) Tampering with a witness (section 710-1072) is made a class C felony;
 - (g) Retaliating against a witness (section 710-1072.2) is made a class B felony;
 - (h) Retaliating against a juror (section 710-1075.5) is made a class B felony; and
 - (i) Tampering with physical evidence (section 710-1076) is made a class C felony.
- (4) Clarify the requirement that courts advise pleading defendants of the possible consequences of the plea upon alien status, such that the focus is on the defendant's understanding of the possible consequences of the plea and not upon how the court reads the advisement.
- (5) Add the following offenses to those felonies that may be initiated by information charging:
- (a) Methamphetamine trafficking in the second degree (section 712-1240.8),
 - (b) Unauthorized entry in a dwelling (section 708-812.6),
 - (c) Unauthorized possession of confidential personal information (section 708-839.55),
 - (d) Obstruction of criminal investigations (section 710-___),
 - (e) Tampering with a government record (section 710-1017(4)),
 - (f) False swearing in official matters (section 710-1061),
 - (g) Intimidating a witness (section 710-1071),
 - (h) Tampering with a witness (section 710-1072),
 - (i) Retaliating against a witness (section 710-1072.2),

- (j) Retaliating against a juror (section 710-1075.5),
 - (k) Tampering with physical evidence (section 710-1076), and
 - (l) Refusal or failure to provide specimen for forensic identification (section 844D-111(b)).
- (6) Amend the wording of section 806-83, Hawaii Revised Statutes, to provide that all class C felony offenses for failure to comply with covered offender registration requirements may be initiated by information charging.
- (7) Clarify the state of mind requirements and grading for the offenses of refusing to provide a DNA buccal swab sample by making a knowing violation a class C felony and a negligent violation a misdemeanor.
- (8) Eliminate the twenty-working-day or five-calendar-day periods allowed for the collection of DNA buccal swab samples from felons subject to collection.

Currently, the Department of Health is not authorized to permit inspection of public health statistics records by law enforcement officers or to issue a certified copy of those records to law enforcement officers. However, during the course of investigating or prosecuting a crime, law enforcement officers may need access to vital statistic records. For example, in a homicide investigation, access to a death certificate can be helpful when deciding what charge, if any, to bring against a suspect. Another example would be the need to access birth certificates in sexual assault cases when the age of the victim or the suspect needs to be ascertained by the investigator. Permitting law enforcement officers access to public health statistic records, provided that the officer submits a signed statement verifying, under penalty of criminal prosecution, that the vital statistics records are needed as evidence in a criminal investigation, would allow for more timely investigation of crimes when such records are needed, while protecting the privacy of those records.

The amendment to section 707-701.5, regarding the offense of murder in the second degree, is based on the Illinois murder law.

It is an approach that is also taken in other states. The amendment provides that individuals who act with the intent to cause serious bodily injury to another person or create the strong probability of causing death or serious bodily injury to another person, and whose act results in the death of another person, should be guilty of murder in the second degree because serious bodily injury includes bodily injury that creates a substantial risk of death. The amendment is intended to address cases that have occurred under the current law in which defendants who brutally beat and kill another person have been able to convince juries to reduce murder charges down to manslaughter with claims that they only intended to cause bodily injury to the person, and did not know they would kill them.

The current offenses against public administration are deficient and do not reflect the seriousness of the offenses nor do they provide adequate deterrence to such conduct. These offenses obstruct the performance of governmental functions and impair the justice system and its operations. Efforts to obstruct official investigations or proceedings, to offer false statements in official matters, to tamper with physical evidence, to coerce, intimidate or otherwise tamper with witnesses, or to retaliate against witnesses or jurors cannot be allowed. Such conduct completely undermines the integrity of government operations and the judicial process and destroys the confidence and trust that the public has in government and the justice system.

Section 802E-2, Hawaii Revised Statutes, requires courts to administer a specific advisement to defendants concerning their alien status. Some courts have interpreted this mandate to mean that courts must read the statutory advisement verbatim and that upon any deviation from that specific advisement, a court must vacate the judgment and allow the withdrawal of a defendant's plea. This bill makes the statutory language more consistent with Rule 11(c) of the Hawaii Rules of Penal Procedure, and makes it clear that the focus of the statute is not on verbatim advisement, but on

careful determination that the defendant understands the consequences of the plea upon the defendant's alien status. The purpose of the statute has always been to ensure a defendant's understanding of the possible consequences of pleading guilty or nolo contendere, and not to ensure that a court has read the advisement verbatim to defendant.

Act 62, Session Laws of Hawaii 2004, authorized criminal charges to be initiated by information charging for certain enumerated class C and B felonies, which were listed in section 806-83, including promoting a dangerous drug in the second degree, a class B felony. When Act 62 was passed, promoting a dangerous drug in the second degree covered the offense of distributing any dangerous drug in any amount, including methamphetamine.

However, in 2004, the Legislature also enacted Act 44, which targeted the particular dangerous drug methamphetamine and set it apart from the other dangerous drugs by creating the new crime of unlawful methamphetamine trafficking. Accordingly, Act 44 also amended the offense of promoting a dangerous drug in the second degree so that it did not cover the distribution of methamphetamine because the offense was specifically dealt with in the new statutory section.

Clearly, the intent of the Legislature through Acts 62 and 44 was to include class B felonies involving the distribution of any amount of a dangerous drug, including methamphetamine, as felonies that could be initiated by information charging. Unfortunately, the new methamphetamine offenses were not added to section 806-83, the information charging law. Inclusion of the class B felonies involving methamphetamine in section 806-83 would be consistent with the intent of Act 62 to allow class B felonies involving drugs, including methamphetamine, to be initiated by information charging.

Because there are numerous class B felony offenses of methamphetamine trafficking in the second degree charged under section 712-1240.8, the ability to use information charging for

these class B felonies would save significant judicial, prosecutorial, and police resources.

Regarding section 846E-9, currently, the class C felony offense of failure to comply with covered offender requirements as specified in section 846E-9(a) may be initiated by information charging, as this section is subsumed in section 846E-9(b), the section referenced in section 806-83, the information charging statute. However, the class C felony offense of failure to comply with covered offender requirements in violation of section 846E-9(d), that is based on a second or subsequent offense, cannot be initiated by information charging due to the particular reference to section 846E-9(b) in section 806-83 and the omission of section 846E-9(d). There is no policy reason for this distinction, and the amendment to section 806-83 will remedy this and allow for all class C felony offenses for failure to comply with covered offender registration requirements to be initiated by information charging.

Regarding sections 708-812.6 and 708-839.55, Hawaii Revised Statutes, the class C felony offenses of unauthorized entry in a dwelling and unauthorized possession of confidential personal information, were not in existence when Act 62 was enacted in 2004. The offenses of burglary in the first and second degrees are included in the information charging provisions. Unauthorized entry in a dwelling is another form of burglary and for purposes of consistency and efficiency, should also be included. Unauthorized possession of confidential personal information is often charged along with forgery, theft, and identity theft offenses, all of which are included in the information charging provisions. Considering the number of civilian witnesses needed to present a forgery or theft type of case, the inclusion of the offense of unauthorized possession of confidential personal information would translate into a huge savings both in and out of the courtroom.

This bill also adds the newly upgraded felony offenses against public administration to the list of offenses that may be initiated

by information charging for purposes of efficiency and saving of resources.

The impact of information charging can be seen in the Final Report of the Department of the Prosecuting Attorney, City and County of Honolulu, on Information Charging, submitted to the Twenty-Fourth Legislature, 2008, pursuant to Act 62, Section 4, Session Laws of Hawaii 2004. In the report, the prosecutor reported the following statistics for the period from May 10, 2004 to and including November 30, 2007:

- (1) 2188 cases conferred/received for Information Charging;
- (2) 1995 cases were processed via Information Charging (sent to District Court for review);
- (3) Witnesses Saved by Information Charging:
 - (a) 3932 HPD officers would have been called to testify at grand jury or preliminary hearing;
 - (b) 998 HPD personnel (criminalists, fingerprint experts, etc) would have been called at grand jury or preliminary hearing;
 - (c) 2972 civilian victims/witnesses would have been called to testify at grand jury or preliminary hearing.

With the inclusion of the above offenses, information charging will become an even greater asset to the criminal justice system in Hawaii in the years to come. More victims and witnesses will be spared from coming to court to testify at probable cause hearings, more officers will be able to stay on the job protecting and serving the community, and the State will continue to enjoy a financial savings while still protecting and preserving a suspect's rights.

This bill provides for more efficient collection of DNA samples to fulfill the intent of chapter 844D to establish a comprehensive DNA database and databank identification program. All individuals convicted of a felony offense are required to submit a DNA buccal

swab sample for the purpose of establishing a DNA database that can be used to solve crimes, including cold cases, and exonerate the innocent. However, currently, if a felon refuses to comply with the law, the only mechanism to obtain compliance is the threat of a misdemeanor prosecution. For offenders who have already been convicted of felony offenses, an additional misdemeanor charge is not likely to deter their actions. The refusal to provide the DNA buccal swab sample should amount to a felony offense because the DNA database is critical for efficient and fair law enforcement and a felony level offense will more likely result in compliance by offenders.

This bill corrects the state of mind provisions in the classification of the crime of refusal to provide the DNA specimen and makes it consistent with the state of mind of this crime. A knowing violation is a class C felony and a negligent violation is a misdemeanor.

Sections 844D-35(b) and 844D-37(b), Hawaii Revised Statutes, currently require that the felon on probation, parole, or other supervised release and the felon accepted into Hawaii from other jurisdictions provide the required DNA sample within a specified number of days after notification of the DNA requirement. This notice period was likely intended to duplicate the notice period required for the collection of blood samples from sex offenders. This notice period was deemed necessary due to the invasive nature of the blood draw. The DNA buccal swab collection, however, is comparatively non-invasive as it only involves a cotton swabbing of the felon's mouth. This bill provides for the immediate collection of the buccal swab samples, without the notice period, and will ensure that those felons under the specified supervision will comply with the DNA collection requirement and will not have the opportunity to avoid providing the buccal swab sample upon notification.

We respectfully request passage of this measure.

Harry Kim
Mayor



Lawrence K. Mahuna
Police Chief

Harry S. Kubojiri
Deputy Police Chief

County of Hawaii

POLICE DEPARTMENT

349 Kapiolani Street • Hilo, Hawaii 96720-3998
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February 9, 2008

Representative Tommy Waters
Chairperson and Members
Committee on Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Representative Waters and Members:

Re: House Bill 3041, Relating to Crime


The Hawai'i Police Department supports the passage of House Bill 3041, Relating to Crime, which seeks to strengthen laws relating to obstruction of justice; revises Hawaii's murder statute to better protect the public; and makes other criminal law changes.

The changes in this measure recognizes that those who kill another, but contend that they were only trying to seriously injure them, should not be able to avoid murder convictions. We believe that if there is intent to cause serious injury, or if an individual's assaultive acts create a strong probability of death and death results, then a murder conviction should result. This measure also seeks to create new offenses and increases the penalties for certain other public administration offenses, which obstruct the performance and undermine the integrity of government functions and the justice system.

Another area in which this proposed amendment will be beneficial to the public interest is that it will allow crimes where vital statistical records are needed as evidence to be investigated with fewer delays, thereby more efficiently. Law enforcement officers at times need to access vital statistical records during the course of conducting an investigation, such as in homicide cases (immediate access to death certificate), or in sexual assault cases (access to birth certificates to confirm age of victim and/or suspect).

For these reasons, we urge this committee to support this legislation. Thank you for allowing the Hawai'i Police Department to testify on House Bill 3041.

Sincerely,


LAWRENCE K. MAHUNA
POLICE CHIEF

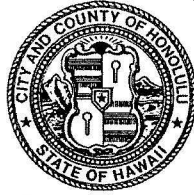
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POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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MAYOR



BOISSE P. CORREA
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MICHAEL D. TUCKER
DEPUTY CHIEFS

OUR REFERENCE RR-NTK

February 12, 2008

The Honorable Tommy Waters, Chair
and Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members:

Subject: House Bill No. 3041, Relating to Crime

I am Richard C. Robinson, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu

The Honolulu Police Department supports House Bill No. 3041, Relating to Crime.

This bill proposes to amend Chapter 710, Hawaii Revised Statutes. Often during the preliminary stages of an investigation, people will threaten potential witnesses or victims in criminal cases. Because the investigation is in the preliminary stages and the potential victims and witnesses may or may not have been called to testify in a court proceeding, they do not fit the definition of a "witness" needed for prosecution under the Bribery of a Witness, Intimidating a Witness, or Tampering With a Witness sections of the Hawaii Revised Statutes.

The proposed amendments to section 707-701.5, Murder in the second degree, Hawaii Revised Statutes, would provide greater clarity to the law and provide greater protection to the people of Hawaii.


The Honolulu Police Department urges you to support House Bill No. 3041, Relating to Crime.

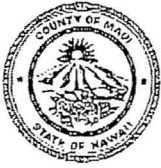
Thank you for the opportunity to testify.

Sincerely,


RICHARD C. ROBINSON, Captain
Criminal Investigation Division

APPROVED:


for BOISSE P. CORREA
Chief of Police



POLICE DEPARTMENT
COUNTY OF MAUI



CHARMAINE TAVARES
MAYOR

55 MAHALANI STREET
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THOMAS M. PHILLIPS
CHIEF OF POLICE

GARY A. YABUTA
DEPUTY CHIEF OF POLICE

OUR REFERENCE
YOUR REFERENCE

February 11, 2008

The Honorable Tommy Waters, Chair
And Members of the
Committee on Judiciary
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members of the Committee:

SUBJECT: House Bill No. 3041, Relating to Crime.

I am Thomas M. Phillips, Chief of Police of the Maui County Police Department and a member of the Hawaii Law Enforcement Coalition. We are supporting House Bill No. 3041, Relating to Crime.

The purpose of this bill is to clarify and strengthen several laws relating to crime, i.e., obstruction of justice, revision of Hawaii's murder statute, and other criminal law amendments.

This bill amends the offense of Murder in the Second Degree to include acts committed with the intent to cause serious bodily injury to another person or create the strong probability of causing death or serious bodily injury to another person, when those acts result in death. Murder defendants can presently claim that they were only trying to seriously injure the victim in their defense against murder. This bill strengthens the murder statute adding that if it was the intent to cause serious injury, or assaultive acts that create a strong probability of death, and death results, a murder conviction should result.

This bill creates new offenses and increases the penalties for other public administration offenses, including obstructing of official investigations, making a false statement in official matters, tampering with physical evidence, tampering with a witness, and retaliating against a witness or juror.

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The Honorable Tommy Waters, Chair
And Members of the
Committee on Judiciary
February 11, 2008
Page 2

This bill raises the offense classification from misdemeanor to felony for individuals convicted of a felony offense who refusal to provide a DNA buccal swab sample for the statewide DNA data bank. And also provides law enforcement officers access to vital statistic records during the course of investigating or prosecuting a crime. Current law does not permit the Department of Health to provide law enforcement officers access to vital statistics records. This bill provides a narrow exception for law enforcement, but only in relation to enforcement duties and with a request signed under penalty of criminal prosecution for misuse.

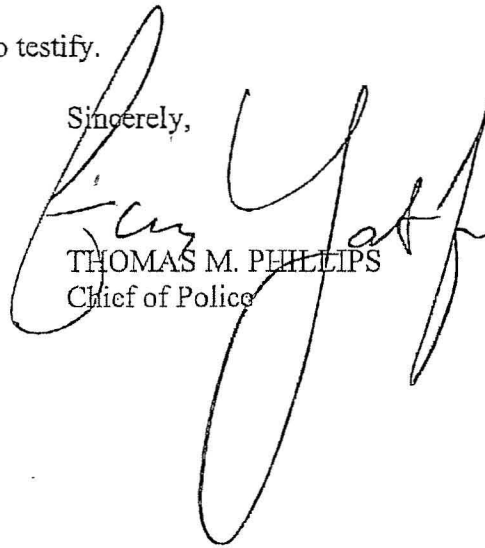
This bill provides that Methamphetamine Trafficking in the second degree, Unauthorized Entry in a Dwelling, Unauthorized Possession of Confidential Personal Information, and all class "C" felonies for failure to comply with sex offender registration requirements may be initiated by Information Charging.

Lastly, this bill clarifies that courts must determine that defendants who plead guilty or no contest understand the possible effects of the plea on their alien status, but that courts need not read the language of the advisement statute verbatim.

The Maui County Police Department respectfully urges you to support the passage of House Bill No. 3041, Relating to Crime.

Thank you for the opportunity to testify.

Sincerely,



THOMAS M. PHILLIPS
Chief of Police

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JUDtestimony

From: Jeannine Johnson [jeannine@hawaii.rr.com]
Sent: Sunday, February 10, 2008 6:16 PM
To: JUDtestimony
Cc: Rep. Barbara Marumoto; Rep. Lyla B. Berg; Rep. Gene Ward; Sen. Fred Hemmings; Sen. Sam Slom; Dana.Viola@hawaii.gov
Subject: Testimony in Strong Support of HB3040 (sex offenders), HB3041 (murderers), HB2558,HD1 (child abuse/neglect) and HB2999 (gun safety devices)

COMMITTEE ON JUDICIARY

Rep. Tommy Waters, Chair
Rep. Blake K. Oshiro, Vice Chair

HB 3040 RELATING TO PUBLIC SAFETY
HB 3041 RELATING TO CRIME
HB 2558, HD1 RELATING TO CHILD PROTECTION
HB 2999 RELATING TO FIREARMS

DATE: Tuesday, February 12th, 2008
TIME: 2:05pm
PLACE: Conference Room 325

Aloha Chair Waters and Vice Chair Oshiro,

Mahalo for providing a hearing on these vital bills.

I wholly support each of the above-stated bills which strengthen our criminal laws and protect our most precious treasures, our keiki.

Mahalo for your support of each of these excellent bills.

Jeannine

Jeannine Johnson
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Email: jeannine@hawaii.rr.com
"PUPUKAHI I HOLOMUA"
(Unite in Order to Progress)

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