

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

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2081, RELATING TO THE HAWAII PENAL CODE.

**BEFORE THE:**

SENATE COMMITTEE ON PUBLIC SAFETY

**DATE:** Tuesday, January 29, 2008 **TIME:** 2:45 PM

**LOCATION:** State Capitol, Room 225  
*Deliver to: Committee Clerk, Room 207, 1 copy*

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Darcy Kishida, Deputy Attorney General

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**LATL**

Chair Espero and Members of the Committee:

The Department of the Attorney General opposes this bill.

The bill makes three substantive changes to the way pardon applications are processed by: (1) requiring the Governor to refer all pardon applications to either the Hawaii Paroling Authority (HPA) or the Judiciary for "a recommendation as to the granting or refusing of the pardon"; (2) requiring the Judiciary, a separate branch of government, to process pardon applications and issue recommendations to the Governor; and (3) requiring the Governor to give public notice "of an intention to issue a pardon," including "the reason for the pardon."

The changes proposed in the bill violate article V, section 5 of the Hawaii Constitution by impermissibly limiting the Governor's pardon power. The relevant portion of the Constitution provides that "[t]he governor may grant . . . pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same." Under the Constitution, therefore, the Governor has the sole authority to process and consider pardon application for applicants "after conviction" with the Legislature limited to regulating only "the manner of applying" for pardons. In other words, the Legislature may regulate how one applies for a

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pardon, but may not further legislate what happens after the application is received by the Governor.

Requiring that all pardon applications be referred to the HPA or the Judiciary for recommendations is unconstitutional because it takes away the Governor's power to decide pardon applications on his or her own without such referrals. Although in practice the Governor commonly refers pardon applications to the HPA, in fact it is the Governor's prerogative to do so; referrals are not required. Section 353-72, Hawaii Revised Statutes (HRS), the statute currently in place that deals with pardons, recognizes the Governor's discretion in this area by making referrals discretionary, not mandatory. The bill's public notice requirement suffers the same constitutional infirmity because it impermissibly limits the Governor's authority to process and consider pardon applications in the way the Governor sees fit.

The bill's requirement that the Judiciary process certain pardon applications provides an additional constitutional concern. The Judiciary is a completely separate branch of government not constitutionally authorized to review or process pardon applications. Again, the current statutory scheme is constitutionally valid in this regard because Section 353-72, HRS, names only the Department of Public Safety (PSD) and the HPA as agencies that the Governor may refer pardon applications to. Both PSD and the HPA are in the executive branch, thereby avoiding any issues regarding constitutional separation of powers.

Accordingly, we respectfully request that this measure be held.

To: Committee on Public Safety  
Senator Will Espero, Chair  
January 29, 2008  
State Capitol Room 225  
2:45pm

LATE

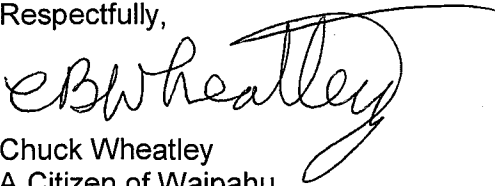
Dear Chair Espero and Members of the Committee,

I am writing to request your support for SB 2081. The members of our community have a right to know the people the Governor's office would deem appropriate for pardon. And the government has a responsibility to keep the public abreast of their decisions and reasoning. This will not only satisfy the public's desire for an open and transparent process, but put their minds' at ease.

Again, it is important that the public know in advance so they have sufficient time to respond with any concerns they may have and know that their concerns have been considered and are taken into account.

Thank you for the opportunity to submit testimony and I respectfully ask for your support in the passing of this worthy legislation.

Respectfully,

A handwritten signature in black ink that reads "CWheatley". The signature is written in a cursive style with a large, sweeping flourish at the end.

Chuck Wheatley  
A Citizen of Waipahu

January 29, 2008

Committee on Public Safety  
Senator Will Espero, Chair  
Senator Clarence Nishihara, Vice Chair  
State Capitol  
415 South Beretania Street  
Honolulu, HI 96813

**LATE**

Dear Chair Espero, Vice Chair Nishihara and Members of the Committee,

I am writing in support of Senate Bill 2081. I am a resident of Ewa Beach, born and raised on Oahu. My family has resided in Hawaii for generations and we are dismayed at the increase in crime of late. I was surprised to learn that the Governor was not already required to give public notice of intended pardons. By mandating that the Governor provide adequate public notice we would be putting into effect something that should have been done long ago. The citizens who live in the communities where these inmates are released have a right to know who is being released and the reasoning behind the decision.

If the evidence supports the pardon of a person then there should be no reason to not provide such proof to the public. If there are some areas of disputable logic, that is all the more reason for providing for public access and review. This would provide the public an opportunity to weigh in and offer a full range of thought on the pardon at hand. If clear that a pardon is warranted, the community could feel safe in a well reviewed and carefully weighed decision.

Again I strongly support this bill and ask for your support in taking this bill to the next step for the good of all citizens of our great State of Hawai'i. Thank you for the opportunity to submit testimony.

Sincerely,

Amanda Strauser  
Citizen of Ewa Beach, Oahu, Hawai'i

**Sen. Will Espero****LATE**

**From:** Tish [petdepot.tish@hawaiiantel.net]  
**Sent:** Friday, January 25, 2008 5:32 PM  
**To:** Sen. Will Espero  
**Subject:** RE: KEEPING HAWAII SAFE

Thank you Senator Espero,  
I see you are hard at work keeping our community safe. I think all the bills you propose are just. They are necessary and very called for. ✓✓  
Keep up the good work. I am a voice of one, and appreciate your efforts.  
As a small business owner I appreciated the updates as well!

Mahalo,

Tish Rothwell  
Owner  
The Pet Depot  
Ewa Beach Shopping Center

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**From:** Sen. Will Espero [mailto:senespero@Capitol.hawaii.gov]  
**Sent:** Friday, January 25, 2008 9:35 AM  
**To:** Sen. Will Espero  
**Subject:** KEEPING HAWAII SAFE



January 25, 2008

**KEEPING HAWAII SAFE**

As Chair of the Senate Public Safety Committee, I am working on many bills to increase public safety in our state. I will highlight several today for your input and comments.

The brutal murder of Karen Ertell in her own home by a 15 year old neighbor rocked our Ewa Beach community on the morning of May 25, 2007. As a juvenile in family court, the killer would have his murder trial closed to the public, and if convicted, be eligible for release by his 19<sup>th</sup> birthday. The charge of murder means the killer planned out taking the life of the victim before carrying out his deadly, violent act. I believe that when a 15 year old is charged with first or second degree murder, the trial should be held in the public arena, and not behind the closed doors of family court. My proposed legislation would require all 15 year olds accused of murder to be tried as adults, and if found guilty, serve time in juvenile detention, then be transferred to an adult prison upon reaching 18 years old.

Currently there is a 10 year statute of limitation on rape cases. With today's technology, cold cases can

1/29/2008

now be solved. I am introducing a bill to remove the statute of limitations on rape cases so we can catch and prosecute sexual offenders in our communities.

Related to this is a bill to adopt Katie's Law, based on a mainland criminal justice statute. Katie Sepich, a 22 year old university student, was brutally raped and murdered. The only evidence linking the killer to her was the DNA under her fingernails as she fought for her life. Only three months after killing Katie, the murder-rapist was caught with a knife breaking into the apartment of two young women who were home at the time. Katie's Law creates a forensic database of DNA samples of those arrested for serious crimes, so that law enforcement has this additional tool to solve and prosecute criminals.

Drunk driving is a terrible act being done too often on our roads. Anyone of us can be killed by an irresponsible drunk driver. This legislation would require convicted drunk drivers to pay for ignition lock devices on their vehicles that prevent them from driving when they are intoxicated.

Approximately 175 female Hawaii convicts are imprisoned on the mainland. I believe all prisoners should eventually be brought back to Hawaii. This bill would fund the return of all the women prisoners from the mainland. Data shows that being closer to their families helps both the inmate and the family members during this difficult time of incarceration. The children are a special concern, and would benefit by being able to keep in contact with their incarcerated mothers, to preserve the parent-child relationship.

Last session we passed Act 8/SB932 to fund programs that increase ex-offenders' chances of staying straight after serving time. The Administration said the Act did not require the state to return mainland inmates on the last year of their sentence to Hawaii to participate in these programs to prepare them for re-entering the community. My follow-up bill will clarify the mandatory nature of Act 8. Reintegration programs help offenders turn their lives around, thereby reducing repeat offenses and alleviating prison overcrowding.

Part-Hawaiians account for approximately 40% of our inmate population, a sad commentary considering that Hawaiians make up about 22% of the state's population. My bill would create a task force to study why the rate of incarceration for Hawaiians is so high, and what kind of actions we should take to reverse this statistic.

Another of my bills would require the governor to give 45 days public notice prior to pardoning an individual. This would allow public input to the governor before any pardon is completed.

The Hawaii Supreme Court last year overturned a lower court's decision regarding a parent's use of his fists to discipline his child. I believe the Hawaii Supreme Court was wrong, and feel any use of one's fists to discipline a child should be illegal. One proposed bill would make it a crime for a parent or guardian to discipline children with their fists.

Another bill would create a violent offender registry similar to the sexual offender registry which the state currently mandates. Registries allow the public to know where violent offenders live. Violent offenders who are released would be required to register for five years after their release. If they keep clean during the entire five years, their name would be removed from the registry. Opponents feel the registry stigmatizes inmates who have already served their time in prison. I feel this is part of the price one pays for being a violent offender.

A final measure I am looking into is the disappearance of Peter Boy Kema, a young boy who was allegedly given to an auntie over 10 years ago. To date, the auntie was never found or identified even

though the parents say Peter Boy was given to her on Oahu. I am working on a bill that would never allow this lame excuse to be used by a parent or guardian. This case appears to have allowed parents to get away with murder by saying the child was sent away to live with another person. I am saddened and shocked that the parents have not been tried for the disappearance of Peter Boy Kema.

These are some of the bills I will be introducing in the 2008 session. I believe passage of these measures would make Hawaii a safer place for our families and communities.

Sen. Will Espero

**From:** Sylvia Hayashi [sylviah@gentryhawaii.com]  
**Sent:** Friday, January 25, 2008 3:00 PM  
**To:** Sen. Will Espero  
**Subject:** FW: KEEPING HAWAII SAFE

**LATE**

-----Original Message-----

**From:** Debbie Luning  
**Sent:** Friday, January 25, 2008 2:05 PM  
**To:** Everyone-Gentry  
**Subject:** FW: KEEPING HAWAII SAFE

-----Original Message-----

**From:** Sen. Will Espero [mailto:senespero@Capitol.hawaii.gov]  
**Sent:** Friday, January 25, 2008 9:35 AM  
**To:** Sen. Will Espero  
**Subject:** KEEPING HAWAII SAFE



January 25, 2008

### KEEPING HAWAII SAFE

As Chair of the Senate Public Safety Committee, I am working on many bills to increase public safety in our state. I will highlight several today for your input and comments. Please see below.

The brutal murder of Karen Ertell in her own home by a 15 year old neighbor rocked our Ewa Beach community on the morning of May 25, 2007. As a juvenile in family court, the killer would have his murder trial closed to the public, and if convicted, be eligible for release by his 19<sup>th</sup> birthday. The charge of murder means the killer planned out taking the life of the victim before carrying out his deadly, violent act. I believe that when a 15 year old is charged with first or second degree murder, the trial should be held in the public arena, and not behind the closed doors of family court. My proposed legislation would require all 15 year olds accused of murder to be tried as adults, and if found guilty, serve time in juvenile detention, then be transferred to an adult prison upon reaching 18 years old. EXCELLENT.

Currently there is a 10 year statute of limitation on rape cases. With today's technology, cold cases can now be solved. I am introducing a bill to remove the statute of limitations on rape cases so we can catch and prosecute sexual offenders in our communities. Yes.

Related to this is a bill to adopt Katie's Law, based on a mainland criminal justice statute. Katie Sepich, a 22 year old university student, was brutally raped and murdered. The only evidence linking the killer to her was the DNA under her fingernails as she fought for her life. Only three months after killing Katie, the murder-rapist was caught with a knife breaking into the apartment of two young women who were home at the time. Katie's Law creates a forensic database of DNA samples of those arrested for serious crimes, so that law enforcement has this additional tool to solve and prosecute criminals. This is much needed.

Drunk driving is a terrible act being done too often on our roads. Anyone of us can be killed by an irresponsible drunk driver. This legislation would require convicted drunk drivers to pay for ignition lock devices on their vehicles that prevent them from driving when they are intoxicated. It's a start.

Approximately 175 female Hawaii convicts are imprisoned on the mainland. I believe all prisoners should eventually be brought back to Hawaii. This bill would fund the return of all the women prisoners from the mainland. Data shows that being closer to their families helps both the inmate and the family members during this difficult time of incarceration. The children are a special concern, and would benefit by being able to keep in contact with their incarcerated mothers, to preserve the parent-child relationship. Sorry, do not agree with this one. There must be consequences for one's actions.

Last session we passed Act 8/SB932 to fund programs that increase ex-offenders' chances of staying straight after serving time. The Administration said the Act did not require the state to return mainland inmates on the last year of their sentence to Hawaii to participate in these programs to prepare them for re-entering the community. My follow-up bill will clarify the mandatory nature of Act 8. Reintegration programs help offenders turn their lives around, thereby reducing repeat offenses and alleviating prison overcrowding. Worth a try.

Part-Hawaiians account for approximately 40% of our inmate population, a sad commentary considering that Hawaiians make up about 22% of the state's population. My bill would create a task force to study why the rate of incarceration for Hawaiians is so high, and what kind of actions we should take to reverse this statistic. A task force is needed for this? I think it's a waste of money.

Another of my bills would require the governor to give 45 days public notice prior to pardoning an individual. This would allow public input to the governor before any pardon is completed. Agree.

The Hawaii Supreme Court last year overturned a lower court's decision regarding a parent's use of his fists to discipline his child. I believe the Hawaii Supreme Court was wrong, and feel any use of one's fists to discipline a child should be illegal. One proposed bill would make it a crime for a parent or guardian to discipline children with their fists. Agree.

Another bill would create a violent offender registry similar to the sexual offender registry which the state currently mandates. Registries allow the public to know where violent offenders live. Violent offenders who are released would be required to register for five years after their release. If they keep clean during the entire five years, their name would be removed from the registry. Opponents feel the registry stigmatizes inmates who have already served their time in prison. I feel this is part of the price one pays for being a violent offender. Totally agree with you on this one.

A final measure I am looking into is the disappearance of Peter Boy Kema, a young boy who was allegedly given to an auntie over 10 years ago. To date, the auntie was



1/29/2008



never found or identified even though the parents say Peter Boy was given to her on Oahu. I am working on a bill that would never allow this lame excuse to be used by a parent or guardian. This case appears to have allowed parents to get away with murder by saying the child was sent away to live with another person. I am saddened and shocked that the parents have not been tried for the disappearance of Peter Boy Kema. Agree; there should be a way to punish the parents, who certain appear to be guilty of his murder.

These are some of the bills I will be introducing in the 2008 session. I believe passage of these measures would make Hawaii a safer place for our families and communities.

Thank you, Senator Espero. It's a start. We need fewer liberal judges on the bench, and we should also follow Arizona's lead on no-frills prisons, and they should be privatized.

Aloha,

Sylvia Hayashi, registered voter

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**Sen. Will Espero**

**From:** Rich [cyclone97@earthlink.net]  
**Sent:** Friday, January 25, 2008 10:05 AM  
**To:** Sen. Will Espero  
**Subject:** Re: KEEPING HAWAII SAFE  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed

**LATE**

WOW! I couldn't agree with your below positions more. Be careful, as a Democrat you have very conservative leanings! Good job! As for the high rate of Hawaiian or part-Hawaiian incarcerations, I think you probably already know the causes. Take a look at the plight of the American Indian or un-educated blacks in America and I think you'll find your answer.



-----Original Message-----

From: "Sen. Will Espero"  
 Sent: Jan 25, 2008 9:34 AM  
 To: "Sen. Will Espero"  
 Subject: KEEPING HAWAII SAFE

Right-click here to download pictures. To help protect your privacy, Outlook prevented automatic download of this picture from the Internet (Metafile)

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Richard Ashley  
cyclone97@earthlink.net