

HB1752

HD1



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

H.B. NO. 1752, H.D. 1, RELATING TO REPEAT OFFENDERS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Tuesday, March 16, 2010 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

The purpose of this bill is to amend the repeat offender sentencing law, section 706-606.5, Hawaii Revised Statutes (HRS), to permit certain repeat offenders to be sentenced to alternative programs, instead of prison.

We strongly oppose this bill because we believe it is based on a mistaken belief that these repeat offenders have not had adequate opportunity for rehabilitation and treatment. Furthermore, this bill will significantly limit the application of the repeat offender law by specifying only certain applicable offenses, and eliminating all other offenses from the law, including some serious property crimes, all firearm and drug offenses, and all felony convictions from other jurisdictions. And it is also of great concern that this bill will reduce the potential punishment for many repeat offenders and career criminals and reduce the deterrent impact of the law. This bill will allow many of these criminals back into the community more quickly at the expense of residents and visitors, and at great cost to law enforcement, prosecutors, courts, and the rest of

the criminal justice system when these criminals commit new crimes.

1. Repeat offenders have already had many opportunities for rehabilitation and treatment.

During the course of their prior contacts with the criminal justice system, these repeat offenders have received lesser sanctions or sentences, and have had many opportunities for assessment, treatment, and rehabilitation. They have had the opportunity for a deferred plea under chapter 853, HRS, which could have resulted in the dismissal of the charge, no criminal conviction, and possible expungement of the criminal record. Those with no prior conviction for a drug offense could have had the opportunity to get a conditional discharge under section 712-1255, HRS, which could have also resulted in the dismissal of the charge, no criminal conviction, and possible expungement. Offenders who qualified for drug court had the opportunity to participate in that special program, which could have also resulted in the dismissal of the charge, no criminal conviction, and possible expungement.

All of the offenders who received deferred pleas, conditional discharges, or drug court admissions were placed under a form of probation supervision for extended periods of time. While under supervision, they were assessed and, as needed, placed in appropriate treatment programs. Probation officers monitored their performance and rehabilitation, and used an array of tools to assist them through their rehabilitation and treatment programs. Probation officers usually give the offenders numerous opportunities to succeed. If offenders commit significant violations or repeatedly fail to comply with conditions, probation officers must then refer the

matter back to court. At that point, when a court decides to set aside these alternative programs, the court may still place the offenders on probation to give them even more opportunities to work with probation officers in treatment and rehabilitation programs.

These same extensive opportunities for treatment and rehabilitation programs are also given to offenders who are sentenced to regular probation, instead of a deferred plea, conditional discharge, or drug court. And offenders on probation are given many opportunities by the probation officers and the courts. Those who violate probation may have their probation revoked, but on many occasions the courts resentence them to new terms of probation. It is not uncommon for courts to revoke probation and resentence offenders to probation three, four, five, or more times.

By the time offenders become eligible for repeat offender sentencing, they usually have had many opportunities for treatment and rehabilitation. The repeat offender law is triggered by prior convictions. But an offender could have had two or three prior offenses, and received a deferred plea, conditional discharge, and/or drug court for the prior offenses, before finally being convicted of an offense.

It is also important to note that even after these offenders become eligible for repeat offender sentencing, they may still be eligible for probation under section 706-622.5, Hawaii Revised Statutes, the "sentencing for first-time drug offenders" law, or section 706-622.9, the "sentencing for first-time property offenders" law, which allow certain first-time nonviolent drug or property crime offenders to be placed on probation, even though they may be repeat offenders under section 706-606.5.

2. This bill will significantly limit the application of the repeat offender law by specifying only certain applicable offenses, and eliminating all other offenses from the law, including some serious property crimes, all firearm and drug offenses, and all felony convictions from other jurisdictions.

This bill would undo years of legislative efforts of many people. The repeat offender law set out in section 706-606.5, HRS, was enacted in 1976 and has been in place for almost thirty-four years to address the serious problem of repeat and habitual offenders and career criminals who have no regard for the law or the legal system. It helps protect Hawaii's people and communities from the relatively small group of criminals who commit so many of the crimes that occur in Hawaii. These individuals can have a tremendous impact on our communities and the entire criminal justice system.

The Commentary on section 706-606.5, citing 1976 House Conference Committee Report No. 32 and Senate Conference Committee Report No. 33, states:

Finding a clear danger to the people of Hawaii in the high incidence of offenses being committed by repeat offenders, the legislature felt it necessary to provide for mandatory terms of imprisonment without the possibility of parole in cases of repeated offenses by prior offenders.

Since 1976, the Legislature has refined and enhanced the repeat offender law and, recognizing its value and importance, added more offenses to the list of offenses subject to repeat offender sentencing.

This bill would cause significant harm to the repeat offender law, disregarding the years of legislation, experience, and practice that have led to the development of this important law. The current law helps to protect the safety and security of the people and property in our community by providing a clear deterrent to potential offenders and requiring the removal of

those persistent, habitual and career criminals from our communities. Judges and attorneys use this law to warn defendants of the consequences of further criminal conduct as part of their efforts to deter defendants and change their behavior.

The following is a list of some of the serious offenses that would be eliminated from the repeat offender law by this bill:

FELONY	SECTION	OFFENSE
C	708-821	Criminal Property Damage 2
C	708-831	Theft 2
C	708-836	Unauthorized Control of a Propelled Vehicle
C	708-852	Forgery in the Second Degree
C	708-875	Trademark Counterfeiting
B	708-892	Computer Damage 1
Offense is one class or grade of offense greater than the offense facilitated.	708-893	Use of a Computer in the Commission of a Separate Crime
C	712-1221	Promoting Gambling 1
C	846E-9	Failure to Comply with Covered Offender Registration Requirements

This bill would also make the repeat offender law inapplicable to all drug, firearm, and insurance fraud offenses.

This bill would also eliminate felony convictions of other jurisdictions from the repeat offender law. This means that a career criminal from California could come to Hawaii with a record of multiple convictions for violent felony crimes, commit a violent felony here, and not be subject to repeat offender sentencing.

Over the years, the Legislature has amended the repeat offender law to address crimes that had become serious problems in our communities. This bill ignores the concerns that prompted the changes in the law and undermines the efforts to address the problems. The following are just a few of the numerous examples of these efforts. The Commentary on section 706-606.5, citing legislative committee reports, includes the following excerpts:

Act 87, Session Laws 1996, added the crime of unauthorized control of propelled vehicle to the class C felonies subject to repeat offender sentencing. The legislature found that vehicle thefts and property taken from the vehicles was a serious problem in this State, and that this kind of theft affected a significant number of visitors and residents.

Act 277, Session Laws of 1997, amended this section by including the offense of trademark counterfeiting in the list of offenses for repeat offenders. The legislature found that trademark counterfeiting was a recurring problem in Hawaii for retail boutiques and trademark products of the University of Hawaii, and that tourists are often the target for the scams.

Act 49, Session Laws 2007, amended this section to deter insurance fraud by including felony insurance fraud relating to worker's compensation, accident and health or sickness, and motor vehicle insurance, and insurance provided by mutual benefit societies and health maintenance organizations, among the offenses subject to repeat offender sentencing. The legislature found that while insurance [fraud] is often perceived as a nonviolent and victimless crime, the ramifications of insurance fraud affect everyone through higher insurance premiums.

Criminal Property Damage in the Second Degree may be a class C felony offense, but it includes intentionally damaging the property of another by the use of widely dangerous means, including explosion, poison gas, radioactive material, or means capable of causing potential widespread injury of damage.

Theft in the Second Degree, the Unauthorized Control of Propelled Vehicle, and Forgery in the Second Degree are all class C felonies, but they involve conduct that is often committed by habitual and persistent offenders. And they involve conduct that is frequently very costly, aggravating, and upsetting to the many victims.

Computer Damage in the First Degree includes the knowing damage to computers, computer systems, or computer networks, and could involve damage that threatened public health or safety or impaired the administration of justice.

Promoting Gambling in the First Degree is often associated with organized crime and the commission of other criminal activity.

All of these offenses have been included in our repeated offender law for good reason.

An error is noted on page 4 of the bill, at lines 4-5. The offense of computer fraud in the second degree is under section 708-891.5, not 708-892.

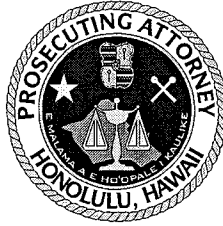
Hawaii's current laws provide offenders more than adequate opportunities for rehabilitation and treatment. This bill will allow many habitual offenders and career criminals back into our communities more quickly at the expense of residents and visitors, and at great cost to law enforcement, prosecutors, courts and the rest of the criminal justice system when these criminals commit new crimes.

We respectfully urge that this bill be held.

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THE HONORABLE BRIAN TANIGUCHI, CHAIR
SENATE JUDICIARY AND GOVERNMENT OPERATIONS COMMITTEE
Twenty-fifth State Legislature
Regular Session of 2010
State of Hawai`i

March 16, 2010

RE: H.B. 1752, H.D. 1; RELATING TO REPEAT OFFENDERS.

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, the Department of the Prosecuting Attorney submits the following testimony in strong opposition to H.B. 1752, H.D. 1.

The purpose of this bill is to amend Hawaii Revised Statutes section 706-606.5 regarding repeat offenders to delete numerous class A, B and C felonies from the list of felonies that are eligible for repeat offender sentencing. Under H.B. 1752 H.D. 1 all felony drug, firearm, gambling and insurance fraud offenses have been deleted as offenses which qualify for repeat offender sentencing, as well as many other felony offense which include the offenses of Criminal Property Damage in the Second Degree, Arson in the Third Degree, Theft in the Second Degree, Unauthorized Control of a Propelled Vehicle, Failure to Comply with Covered Offender Registration. Furthermore, this bill also deletes the current provision of the repeat offender sentencing statute which permits the use of felonies from other jurisdictions.

Hawaii's repeat offender sentencing law which provides for mandatory minimum sentences has been in effect since 1976. It was passed due to the legislative recognition that repeated offenses by previously convicted persons presents a clear danger to citizens. This is a common sense reflection of the fact that a small percentage of persons commit a

disproportionately large percentage of crimes. It currently permits the judge to sentence the offender to any lesser mandatory minimum when he or she finds strong mitigating circumstances.

We suspect this bill is being proposed in large part by a belief that by eliminating mandatory minimums for repeat non-violent offenders, correctional costs will be reduced thus saving tax-payers money. However, we think this belief is overly simplistic and does not take into account the economic cost of property offenses to victims and the community when a repeat property offender commits new offenses because he or she was not incapacitated by incarceration or deterred by a possible mandatory minimum. Property offenses do have victims and they suffer economic losses which affect them and the community. These offenses must be investigated by the police and cost time and resources to investigate and prosecute. Insurance rates for vehicles and homes will increase to cover the losses. So any thought of cost savings created by this bill do not take into account the total impact repeat property offenses have on victims and the community.

We cannot stress how often we have heard dismay from crime victims who have been burglarized or had a car broken into or stolen, when informed that the offender is repeat offender who has multiple offenses and convictions on his or her record. They are often appalled that the repeat offender isn't incarcerated and is free to victimize the community. We believe that if this bill is passed, it will erode both the ability of the criminal justice system to keep the community safe and the confidence the public has in the system.

The offenders who have committed the "non-violent" offenses being deleted from the repeat offender statute by this bill have been given numerous and multiple opportunities to reform through deferred pleas or conditional discharges which do not result in a conviction and diversion to specialty courts such as drug court which is intended to divert defendants from terms of imprisonment. Furthermore, while on probation, these defendants are always given multiple resentencings back to probation rather than a term of imprisonment despite numerous violations. For this reason, we believe that the mandatory minimum term of imprisonment provided under the repeat offender sentencing statute is necessary for all the eliminated offenses; it represents the message to the offender that if one continues to violate the law to the detriment of the community, they must reform or a mandatory term of imprisonment will be imposed.

We would also note that elimination of the provision that permits the use of felonies from other jurisdictions would permit career criminals from other jurisdictions to commit felonies in Hawaii without a threat of a mandatory minimum term of imprisonment as their prior felony convictions would not be considered repeat offender offenses.

Thank you for this opportunity to testify.

The National Association of Reformed Criminals
Andy Botts, author of Nightmare In Bangkok
1920 Ala Moana Blvd #1104
Honolulu, Hawaii, 96815
Tuesday March 16, 2010

COMMITTEE ON JUDICIARY AND GOVERNMENT AFFAIRS

Senator Brian T Taniguchi, Chair
Senator Dwight D. Takamine, Vice Chair

Tuesday, March 16, 2010
9:30 A.M.
Conference Room 016
State Capitol, Hawaii
SUPPORT - HB1752, HB1

I support the intent of this bill in part, with amendments. The National Association of Reformed Criminals, known as NARC, is made up of former repeat-offenders who have turned their lives around and are living productive lives. Our support is for the non-violent offender who commits crimes as a result of their addiction to drugs and/or alcohol.

In 1976, the repeat offender statute was enacted. Since then, the prison population has skyrocketed from an average of 500 prisoners statewide for the entire 20th century to about 6000 prisoners today. According to statistics, this has not made us safer, nor has it been productive, at a price that we no longer can afford.

As a repeat non-violent offender, I spent 6 years in Oahu Prison and OCCC in the early 1980's and was unconditionally discharged in 1986. I have been married for about 15 years (1st marriage), am working a full-time job, pay taxes, wrote a best-selling book, and am an advocate for the reintegration of offenders exiting the prison system. However, should I fall off the wagon and get dragged back into the cycle of crime and drug addiction, or set-up and falsely accused of a crime as examples, then I am subject to the present laws regarding repeat non-violent offender as I was convicted of multiple theft offenses from 1977 to 1981.

I support the repealing of the statute that targets the non-violent offenders, especially those who have turned their lives around. As a suggestion, if nothing else, it would be wise to insert a provision to set a time limit on the application of this statute. For instance, the Federal Sentencing Guidelines calculates an offender's sentence based on prior convictions within ten years of an instant offense. This would exempt the aging baby-boomers like myself who are now out of the cycle of drugs abuse and crime, but are susceptible to relapse and recidivism for the rest of their lives.

Mahalo,

Andy Botts