HB1752

HD1

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Testimony of the Office of the Public Defender
State of Hawaii
to the Senate Committee on Judiciary and Government Operations

March 16, 2010

H.B. No. 1752, HD 1: RELATING TO REPEAT OFFENDERS

Senator Taniguchi and Members of the Committee:

We support H.B. No. 1752, HD 1 because we continue to believe that it is long past time to reexamine our severe repeat offender statute. We believe it is appropriate for judges to have the discretion to fashion a sentence that balances protection of the community with the most effective consequence for the individual defendant. We know how expensive it is to incarcerate an individual. It is much less costly to have that person in the community where they can work, pay taxes, pay restitution and court fees and participate in appropriate services. It is even much less costly to pay for residential drug treatment, when that is required, in the community than in a correctional facility.

We know from the success of such programs as HOPE Probation that intensive supervision programs can protect the community at the same time that a defendant is required to participate in effective services. Our current HOPE program has reduced revocations of probation and arrests for new crimes by two-thirds. 2009 statistics showed that positive drug tests among the participants had been reduced 86 percent. All this has been done at a cost to taxpayers significantly less than the costs of incarceration.

To illustrate the costs of incarceration versus the costs of supervision of the defendant in the community, we have three examples from our cases:

1) We had a 54 year old client who has mental health problems but functions well. He was convicted of class C drug charges in 2006. He was placed on probation and participated in the Queen's Hospital Day Treatment Program which treats dual diagnosis individuals (mental health and drug involvement). He did very well, kept all his appointments and earned a clinical discharge from the program. He subsequently accompanied a friend to Chinatown where he was caught smoking a crack pipe in 2007. We attempted to get him into Drug Court: they were not accepting repeat offenders. We attempted to get him into Mental Health Court: he was rejected as being too functional. He entered the Sand Island Residential Treatment Program where he did very well. His sentencing in the 2007 case was postponed to allow time to complete the Sand Island Program. While completing that program may help him secure an earlier release date from the Hawaii Paroling Authority (HPA), it won't change the fact that he MUST be sentenced to a five year prison term. The court had no discretion to consider probation.

2) Another client was convicted of possessing a class C amount of drugs in 2001. He was placed on 5 years probation, worked full-time, participated in drug treatment and did so well that his probation was terminated early. In 2006, our client's wife died of cancer and things got very bad financially with $75,000. in medical bills. Our client tried to use a bad check at Home Depot and was convicted of Forgery in the Second Degree and

Attempted Theft in the Second Degree. The Court had no choice but to sentence him to a five year prison term with a mandatory minimum term which the Court reduced. He spent almost one year in custody. When he came before them, the HPA set their minimum term to "time served" and this defendant, 47 years old, is now on parole. He came out of prison unemployed.

3) Another defendant had drug convictions in 2006 and 2008. He had been honorably discharged from the U.S. Army and had a history of schizophrenia. In the second case, the Court had no choice but to sentence him to a five year prison term with a mandatory minimum term which the Court reduced.

These examples illustrate the myriad cases in our office where defendants have received prison sentences but would otherwise have been likely candidates for probation if not for HRS § 706-606.5, our current repeat offender statute. This current law mandates the simplistic penal approach of locking up persons who break the law again with no consideration of the factors surrounding the criminal offense and no consideration of programming that would be less expensive to taxpayers and more effective in reducing recidivism. Our current law has often had the affect of causing the felony imprisonment of many homeless and mentally ill persons. It has resulted in overcrowding of our prisons to the point that we now house thousands of inmates on the mainland, away from their culture and family support systems that might be the positive influence that could improve their chance to have future law-abiding lives.

Regarding the changes proposed in HD 1 of this bill, we have no problem with the inclusion of class A, B and C sexual offenses, the other class A offenses added and some of the class B and C offenses that have been added. However, we urge this Committee to more closely examine the property offenses that are included in HD1. Specifically, we would support excluding the following class B offenses:

§708-830.5 Theft in the First Degree
§708-839.7 Identity Theft in the Second Degree
§708-891 Computer Fraud in the First Degree

We would also support excluding the following class C offenses:

§708-811 Burglary in the Second Degree
§708-839.8 Identity Theft in the Third Degree
§708-839.55 Unauthorized Possession of Confidential Personal Information
§708-892 Computer Fraud in the Second Degree

The offenses listed above are property crimes. While that does not lessen the injury that the victim feels, it does merit different consideration than serious violent offenses. Our prisons currently house persons who have been convicted of these offenses who do not need to be incarcerated for years, at significant taxpayer expense, but have to be so sentenced under our current law. We believe these offenses should not automatically trigger a prison term but should allow for the court to have discretion to impose an appropriate sentence.

We also support excluding these additional offenses:

§707-711	Assault in the Second Degree (class C)
§707-713	Reckless Endangering in the First Degree (class C)
§707-716	Terroristic Threatening in the First Degree (class C)
§708-820	Criminal Property Damage in the First Degree (class B)
§708-841	Robbery in the Second Degree (class B)
§708-811	Burglary in the Second Degree (class C)

Some of these offenses are commonly charged in situations that would otherwise be classified as misdemeanors. Rather than have the crime trigger mandatory prison, we think that judges should have the discretion to sentence to prison where appropriate, but also, to impose probation, even on a repeat offender, where appropriate.

We have myriad cases of Robbery 2 in our office that consist of someone shoplifting a misdemeanor amount of merchandise (sometimes even food from Safeway, for example, or items from Walmart, Sears, etc. that are valued less than $300.) but is accused of shoving a security guard or loss prevention officer when confronted outside the store; the offense becomes the class B crime of Robbery in the Second Degree. If the Defendant has a prior conviction, such as Prom. Dang. Drugs in the 3rd Degree (i.e. possession of a pipe with meth. residue inside), he or she will mandatorily go to prison for a maximum of 10 years and a minimum term to be determined by Hawai`i Paroling Authority (HPA), that cannot be less than the mandatory minimum set by the Court, pursuant to § 706-606.5.

Keep in mind that for Robbery 2, the complainant need only claim the use of force or the threat of the use of force - a guard can say "I was shoved" - there doesn't need to be any actual injury, corroborating evidence (redness, bruise, etc.). The claim that force was used is enough to elevate misdemeanor shoplifting to a class B felony.

Criminal Property Damage 1 (CPD 1) and Terroristic Threatening 1 (TT1) are often charged out of what would otherwise be misdemeanor spouse abuse cases. For example, throwing a vase against the wall which shatters and cuts, or could have cut, the complainant - subsection (1)(a) only requires that the person act "recklessly" and place another person in danger of "bodily injury", defined in 707-700 as "physical pain, illness or any impairment of physical condition" - which means that the complainant just has to claim "I was in the vicinity of the thrown object and could have suffered pain (cuts, etc)" and they can, and do, charge CPD 1.

Likewise, TT1 often shows up in cases where misdemeanor abuse is alleged, thereby raising the crime to a felony. TT1 only requires that the complainant allege that the other person threatened, by words or conduct, to cause "bodily injury" to another person, or seriously damage the property of another "with the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person". The complainant alleges that the defendant said or did something and the complainant felt threatened. Again, we trust that judges will imprison when appropriate, but should have the discretion, even when the defendant has a prior conviction for a felony, to sentence to terms of probation, where appropriate.

One of the frustrating factors about the offenses currently listed in our repeat offender statute, 706-606.5, is that the Prosecutor will sometimes agree NOT to seek repeat offender sentencing as part of a plea agreement. In other words, in select cases, even the State agrees that the person does not require a mandatory sentence of imprisonment. The prosecutors like it this way because they have all the power. Sometimes, such deals are offered in cases where a defendant has a valid defense and wants to go to trial but is persuaded to take a deal, instead, in order to avoid the possibility of conviction when it would carry mandatory imprisonment.

The power of sentencing to prison or probation in these cases should be left where it is intended, with the judges. It should not be a bargaining tool for the State. Ironically, the bulk of judicial appointments by Governor Lingle have been lawyers with a background as prosecutors (state and federal). Yet, §706-606.5 doesn't trust judges to impose appropriate sentences or HPA to impose appropriate minimum terms for those who are incarcerated. We urge that discretion be returned to the Judiciary and HPA in these cases.

Frankly, our office would prefer a change in the law that would allow judicial discretion in sentencing for virtually all repeat offenses. H.B. 1752, HD1 does not do that but we support reasonable proposals to reduce unnecessary incarcerations where more appropriate and less costly alternatives are available.

For these reasons, we support this bill. As noted, we would prefer the suggested changes contained in this testimony.

Thank for the opportunity to comment on this measure.

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OFFICE OF THE PROSECUTING ATTORNEY

Testimony in Opposition to HB 1752, HD1
Relating to Repeat Offenders

Hearing before Senate Committee on Judiciary and Government Operations
Tuesday, March 16, 2010
9:30 a.m.
State Capitol, Room 016

Submitted by Jay T. Kimura, Prosecuting Attorney

TO: Chair Taniguchi and Committee Members:

We oppose HB 1752, HD1.

We concur with the testimony of Honolulu Prosecutor's Office. However, we would also like to point out that deterrence is an important factor in keeping the crime rate down. Theft is an intentional crime. A person wants property that belongs to another so he/she takes it. Stealing has always been considered a crime in ancient societies. If our society did not prosecute people for stealing, do you think the crime rate would go up or down? If we do not punish people for stealing do you think the crime rate would go up or down? Without any graduated consequences such as Hawaii's repeat offender laws, more and more people steal to get what they want. This is human nature.

We believe in giving a person a chance if appropriate, especially for the first time offender. Most people who commit felony offenses for the first time get probation and are allowed to get a dismissal of the charges. All the offenders who admit that the criminal behavior was drug-driven will be ordered to treatment and given lenient treatment for crimes eligible for probation.

We spend millions of dollars investigating the crimes, prosecuting the crimes, and providing defendants with counsel. After they are sentenced, we send them to treatment and rehabilitative programs to address their problems and provide them with probation officers who supervise them, again costing many millions of dollars. They are

counseled and informed of the seriousness of their actions and what might happen if they continue committing crimes. What message is being sent out if a person commits another felony while on probation and he gets another chance to be placed on probation? The clear message is that you get two free bites at the apple before you will be punished you.

We need the repeat offender statute as it is currently written. We need to send the correct message that if you commit this crime again you will be punished to the full extent of the law. Additionally, during this fiscally challenging times, policy makers should recognize that the criminal justice system must work in-tandem with prevention, intervention and treatment, rehabilitation and punishment to work effectively.

There is a small group of criminals who repeatedly do most of the property crimes, and these repeat offenders will repeatedly do crime regardless of the intense supervision and treatment programs. The repeat offender laws are effective to protect the innocent public from these known repeat offenders.

Our current laws give the Judge the authority to reduce the length of the mandatory term of imprisonment upon making certain findings, including no harm to the community safety. These offenders who demonstrate to the judge that they can still be rehabilitated safely can get treatment earlier and re-enter the community earlier.

Moreover, federal and state monies are available to the Department of Public Safety to adopt in-mate services programs to help those offenders that need the institutional structure to stay sober, get treatment, rehabilitation and cognitive therapies while in institutional settings. Offenders within the institution could get help while awaiting sentence or their reduced mandatory sentences through "second chance" and re-entry community initiatives. With the chaos during the past funding cycle and State furloughs, these funding sources available through the federal government may need application and implementation time. Until then, our current repeat offender laws should stay in-tact to protect the public first, then rehabilitate second.

Thank you for your consideration of our comments.

POLICE DEPARTMENT

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OUR REFERENCE RR-NTK

March 16, 2010

The Honorable Brian T. Taniguchi, Chair
and Members
Committee on Judiciary
and Government Operations
The Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chair Taniguchi and Members:

Subject: House Bill No. 1752, H.D. 1, Relating to Repeat Offenders

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 opposes House Bill No. 1752, H.D. 1, Relating to Repeat Offenders. The majority of serious crime in Honolulu is committed by a small number of career criminals whose only means of support is their criminal actions. These repeat offenders complete their prison sentences and shortly after their release return to their criminal activity. In December 2008, there were 108 adults arrested for non-drug felony offenses in Honolulu. Of those, 56 were previously convicted felons and half of those had more than three felony convictions. The continued decrease in crime in Honolulu is due in part to more of these career criminals being in custody and not on the streets preying on the citizens of Honolulu.

The notion that there is some type of division between violent offenders or property crimes offenders or drug offenders is a fallacy. A "property crime" offender can become a vicious violent offender with just one chance encounter with a property owner. A "drug offender" can become an armed robber if the cravings for the drugs are strong enough. All of these offenders have severely violated the norms of our community. To excuse their past bad behaviors and not impose increasingly more severe penalties for their continued criminal actions will only embolden them.

The Honolulu Police Department urges you to oppose House Bill No. 1752, H.D. 1, Relating to Repeat Offenders.

Thank you for the opportunity to testify.

Sincerely,

RICHARD C. ROBINSON, Captain
Criminal Investigation Division

APPROVED:

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FOR LOUIS M. KEALOHA
Chief of Police