

**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

S.B. NO. 0846, RELATING TO POST CONVICTION PROCEEDINGS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Friday, February 6, 2009 **TIME:** 9:00 AM

LOCATION: State Capitol, Room 16
Deliver to: Committee Clerk, Room 219, 1 Copy

TESTIFIER(S): Mark J. Bennett, Attorney General
or Diane K. Taira, Deputy Attorney General
or Lisa M. Itomura, Deputy Attorney General

The Attorney General strongly supports this bill.

This bill proposes to amend chapter 660, Hawaii Revised Statutes (HRS), to add a statute of limitations on the filing of habeas, post-conviction and other similar actions challenging convictions, criminal judgments, sentences, and other matters related to custody.

Pursuant to the proposed amendments, defendants will be free to file such actions within five years from the last of four separate dates: (1) the date on which a judgment became final by the conclusion of direct review or the expiration of time for seeking such review; (2) the date on which an impediment to filing an application created by unconstitutional government action was removed; (3) the date on which a newly created constitutional rule was recognized and made retroactively applicable; or (4) the date on which the factual predicate of the claim or claims presented could have been discovered through due diligence.

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules recently proposed to amend Rule 40 of the Hawaii Rules of Penal Procedure to add a statute of limitations as set forth in this bill. In rejecting the proposal, the Hawaii Supreme Court indicated that this was a matter for consideration by the Legislature.

Presently, defendants convicted in state courts may challenge judgments and custody in three ways: (1) by filing a direct appeal to

the Intermediate Court of Appeals and the Hawaii Supreme Court, (2) by filing a writ of habeas corpus with the United States District Court, or (3) by filing a petition for post-conviction relief pursuant to Rule 40 of the Hawaii Rules of Penal Procedure and chapter 660, HRS. The petition for post-conviction relief is the only one of the three that lacks a statute of limitations, and defendants have used this method to file challenges, sometimes multiple challenges, to their convictions and custody long after the events at issue. This makes it difficult to address the merits of such challenges, if any, and to hold retrials or new hearings, if necessary.

In comparison, the Prison Litigation Reform Act of 2000 imposes a one-year statute of limitations on the filing of a federal writ of habeas corpus, with numerous tolling periods for such things as the pendency of state appeals, etc. Other states also impose a one-year statute of limitations on the filing of post-conviction petitions.

This bill will help to ensure that review of convictions and custody issues can be done while the record and witnesses are more likely to be available. This bill promotes the finality of judgments and sentences and other custodial decisions, while allowing defendants a reasonable period in which to discover, contemplate, prepare, and file actions challenging judgments and custody.

This bill also adds a section that requires the dismissal of claims that could have been raised previously unless the defendant shows that they are raised pursuant to new case law or statute or the facts underlying the claims could not have been discovered through due diligence. Such language supports the intent of the bill to promote the finality of judgments while allowing defendants the opportunity to challenge their convictions or custody for good cause. The phrase "but for the constitutional error," on page 3, line 8, was unintentionally included in the bill, however, and we ask that that phrase be deleted.

We respectfully request passage of this measure as amended.

**Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on Judiciary
and Governmental Operations**

Hrg: Friday, Feb. 6, 2009, 9:00 a.m.

1 copy required

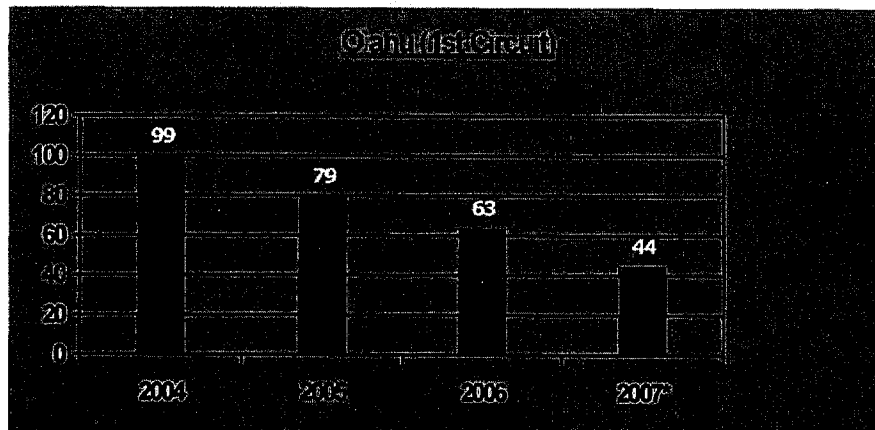
S.B. NO. 846: RELATING TO POST CONVICTION PROCEEDINGS

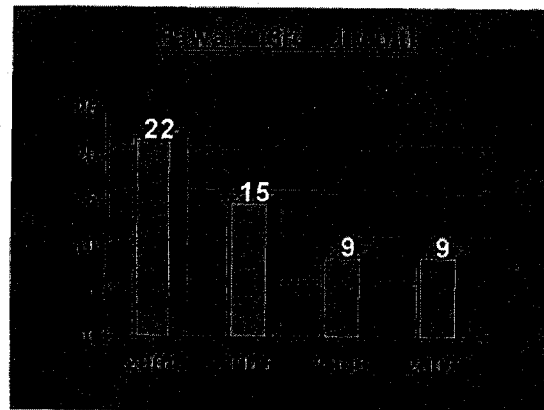
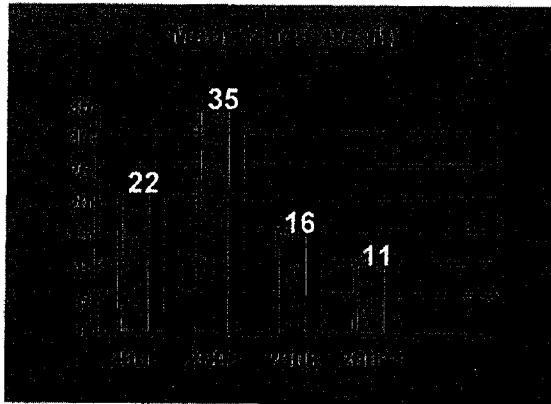
Chair Taniguchi and Members of the Committee:

We oppose S.B. No. 846 which seeks to impose a five-year limitation on the time in which a person who has been convicted of a crime is able to file a petition for post-conviction relief. The bill also severely limits the ability of a convicted person to file second or successive petitions. We believe that such a limitation on the ability to seek relief in the courts for a wrongful conviction is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control.

The purpose of this bill appears to be to limit the number of post-conviction petitions being filed by prisoners. However, statistics compiled from actual Judiciary files illustrate that such petitions have actually been on the decrease in recent years. [See tables below]

Number of Post-Conviction Petitions Filed





Thus, when you examine the actual caseload statistics, there is no demonstrated need for this legislation since petitions are already on the decline. Indeed, the imposition of a strict time limitation could very well have the opposite effect and increase petition filings since defendants will become concerned about the time lapse even if they are unsure about the grounds for their petitions.

The experience in the federal system portend the predicted increases in post-conviction proceedings if this measure should pass. The language in S.B. No. 846 is very similar to limitations imposed on federal habeas corpus petitions through the Antiterrorism and Effective Death Penalty Act of 1996. Federal Bureau of Justice Statistics show that, following the passage of that act, between 2004 and 2005, state prisoner petitions filed in federal court increased nearly 5% and federal prisoner petitions filed in federal court increased by more than 15%.

The proposed changes will also increase the workload of the circuit courts and the complexity of post-conviction proceedings. Currently, the circuit court routinely summarily denies a great number of post-conviction petitions as containing no colorable claim. However, the proposed changes contain a number of exceptions to the five-year limitation period. Because of the drastic nature of the five-year limitation and the accompanying ban against successive petitions, the circuit court will inevitably be forced to conduct full hearings and the parties will have to litigate the applicability of the exceptions to the time bar and successive petition bar. These proceedings will invoke the necessity for more court time and potentially lead to more cases on appeal.

The five-year limitation could also work grave injustices to wrongfully convicted prisoners. As an example, the DNA testing statute passed by this legislature in 2005 contains provisions for post-conviction DNA analysis of evidence upon the petition of a convicted defendant. See HRS §§844D-121 through 133. The DNA law has no time limitation. Under the change proposed by this bill, a discovery of DNA evidence which exonerates the defendant but occurs five years following the conviction would be barred from presentation to the court. There is an exception which tolls the running of the five-year period until “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. . . .” However, if the defendant was represented by counsel throughout the trial process and for the five years following the conviction, and counsel neglected to investigate the DNA evidence, such neglect could be imputed to defendant and the five-year limitation would thereby ban the filing of a petition.

In summary, this bill ignores the fact that it is fairly commonplace these days for persons who were convicted by a court of law to be exonerated far more than five years following their convictions. Many have spent decades in state and federal prisons – even on death row. This measure could unfairly deny an innocent person the means to challenge his/her conviction by imposing an arbitrary time limitation on the filing of a habeas corpus petition and an arbitrary prohibition against the filing of a second or successive petition. The bill seeks to do this in the face of statistical evidence demonstrating that the current system is not being abused or is in need of an overhaul.

Thank you for the opportunity to comment on this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE BRIAN TANIGUCHI, CHAIR
SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS
Twenty-fifth State Legislature
Regular Session of 2009
State of Hawai'i

February 6, 2009

RE: S.B. 846; RELATING TO POST CONVICTION PROCEEDINGS.

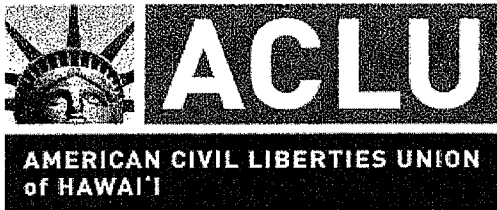
Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, the Department of the Prosecuting Attorney submits the following testimony in support of Senate Bill 846.

The purpose of this bill is to create two new statutory sections which would limit the filing of post-conviction proceeding pursuant to chapter 660, Hawaii Revised Statutes (HRS) and Rule 40 of the Hawaii Rules of Penal Procedure (HRPP). Such filings would be required to be filed within five years of: 1) final judgment; 2) the date an impediment to filing, created by governmental action, was removed; 3) the date of a newly created constitutional rule was recognized and given retroactive application to cases on collateral review; or 4) the date on which factual predicates of the claim(s) could have been discovered through due diligence and where the newly discovered evidence would be sufficient to establish by a preponderance that no reasonable fact finder would have found the applicant guilty of the offense. In addition this bill provides for the dismissal of claims where the claim could have been included in a prior complaint but was not.

We support this bill as we believe it provides an appropriate balance between the public interest in the finality of judgments and the individual's right to challenge judgments and custody. Currently, a defendant has the option of contesting a judgment or his or her custody by filing: 1) a direct appeal with the state appellate courts; 2) a writ of habeas corpus with the federal court; and 3) filing a petition for post-conviction relief pursuant to HRPP Rule 40 and HRS chapter 660. The first two methods of challenging judgments and custody have time limits

while the third method does not. Since there is no time limit, defendants sometimes file challenges to their convictions and custody long after their conviction. Addressing challenges made long after conviction is sometimes extremely difficult since records, evidence and witnesses may no longer be available. We believe the time limits proposed in this bill are reasonable, particularly in light of the exemptions which recognize situations where a defendant could not have reasonably had grounds to file the claim.

For this reason, we respectfully request your favorable consideration of SB 846 and thank you for this opportunity to testify.



BY EMAIL: JGOTestimony@capitol.hawaii.gov

Committee: Committee on Judiciary and Government Operations
Hearing Date/Time: Friday, February 6, 2008, 9:00 a.m.
Place: Room 016
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 846, Relating to Post Conviction Proceedings

Dear Chair Taniguchi and Members of the Committee on Judiciary and Government Operations:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to S.B. 846, which seeks to establish a time limitation for filing habeas corpus complaints and post-conviction judicial proceedings and limits successive complaints.

This bill puts insurmountable barriers in place for those inmates who have plainly meritorious claims and are seeking redress of fundamental rights. Over the past year, the media has exposed serious constitutional and other problems with Hawaii’s prisons — problems that resurfaced only a few years after the dissolution of the Spear Consent Decree. This bill seems to be a thinly-veiled attempt to block meritorious cases from court, all while the State remains under close scrutiny by the United States Department of Justice and others.

Hawaii law already provides the court with a remedy to declare an individual a vexatious litigant, *see* H.R.S. § 634J-7, and the judiciary is already equipped with ample tools to deal with these cases. For example, courts are permitted to dismiss *in forma pauperis* cases if they obviously lack an arguable basis in law or fact. In addition, prisoners who repeatedly abuse the judicial system can be ordered to cease their abuses, and the orders are enforceable with sanctions.

Finally, an individual should not be subject to special obstacles to the civil justice system based solely on his or her status as a detainee or an inmate without any showing of an attempt to abuse the judicial system.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its

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Hon. Sen. Taniguchi, Chair, JGO Committee
and Members Thereof
February 6, 2009
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services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years. Thank you for this opportunity to testify.

Sincerely,
Laurie A. Temple
Staff Attorney

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