



TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:

H.B. NO. 1155, H.D. 1, RELATING TO REPEAT OFFENDERS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Thursday, April 7, 2011 TIME: 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

The purpose of the bill is to limit the application of the repeat offender law by specifying certain applicable offenses, and eliminating all other offenses from the law, including all drug offenses, some significant crimes against persons and property, and certain firearm offenses. This bill also eliminates felony convictions of other jurisdictions from the repeat offender law.

The repeat offender law set out in section 706-606.5, Hawaii Revised Statutes, 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 undermine the effectiveness of the repeat offender law.

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

FELONY	SECTION	OFFENSE
B/C	134-7(b)	Ownership or possession of firearms or ammunition by persons convicted of certain crimes
B/C	431:2-403(b)(1) and (2)	Insurance fraud
C	708-831	Theft 2
C	707-766	Extortion 2
C	708-835.5	Theft of livestock
C	708-836	Unauthorized control of propelled vehicle (Auto theft)
C	708-852	Forgery 2
-	-	All felony drug offenses, particularly those involving the distribution of dangerous drugs
-	-	Felony convictions from other jurisdictions

This list is not all-inclusive. There are other serious and important offenses that are currently covered under the repeat offender law, that should continue to be covered, but are excluded by this bill.

This bill would make the repeat offender law inapplicable to all felony drug offenses. The law is particularly important in combating the sale and distribution of dangerous drugs in our community.

By deleting the phrase, "or any felony conviction of another jurisdiction," on page 5, line 2, this bill would make the repeat offender law inapplicable to all felony convictions of other jurisdictions. This means that a career criminal or repeat offender 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. There is no reason to treat a repeat offender from another state differently and more leniently than a repeat offender from Hawaii.

This bill makes the repeat offender law inapplicable to the offense of ownership or possession of firearms or ammunition by persons convicted of certain crimes, in violation of section 134-7, Hawaii Revised Statutes. Section 134-7(b) prohibits a person convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug from owning, possessing, or controlling any firearm or ammunition therefor. The section makes the offense a class B felony when the offender, in possession of a firearm, had a prior felony conviction. Otherwise, the offense is a class C felony. In either case, this bill will make the repeat offender law inapplicable to these offenders.

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 made to address the problems. The following are 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 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 felony 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.

(Emphases added).

The class C felony offenses of theft in the second degree and forgery in the second degree are also important offenses in the repeat offender law. These offenses are frequently committed by persistent offenders against the visitors to our islands and our many local retail merchants.

This bill will reduce the potential punishment for repeat offenders and career criminals. It will reduce the deterrent impact of the law. And it may allow many of these criminals back into our 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.

We respectfully urge that this bill be held.



LATE TESTIMONY

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

STATE OF HAWAII

OFFICE OF THE DIRECTOR

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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TO THE SENATE COMMITTEE ON JUDICIARY & LABOR

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Thursday, April 7, 2011
9:30 a.m.

**TESTIMONY ON HOUSE BILL NO. 1155, H.D. 1 - RELATING TO REPEAT
OFFENDERS**

TO THE HONORABLE CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

My name is **Gordon I. Ito**, State Insurance Commissioner ("Commissioner"),
testifying on behalf of the Department of Commerce and Consumer Affairs
("Department").

The Department **does not support** this bill. This bill would eliminate insurance
fraud felony convictions from the repeat offender law in Hawaii Revised Statutes § 706-
605.5. The repeat offender law was amended in 2007 to include insurance fraud by Act
49, Session Laws of Hawaii 2007. The Legislature found that although insurance fraud
was a nonviolent crime, the repercussions of insurance fraud offenses stretched far
beyond the immediate insurance provider and into the pockets of everyone in the
community. This bill would undo years of legislative efforts that was designed
specifically to protect the best interests of the people of Hawaii.

We thank this Committee for the opportunity to present testimony on this matter
and respectfully request that this bill be held.

Ryan Shinsato

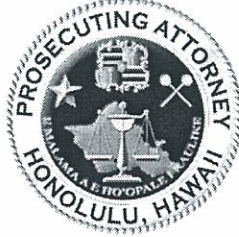
DEPARTMENT OF THE PROSECUTING ATTORNEY

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ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



Handwritten signature: Keith M. Kaneshiro

THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Sixth State Legislature
Regular Session of 2011
State of Hawai`i

April 7, 2011

RE: **H.B. 1155, H.D. 1**; RELATING TO REPEAT OFFENDERS.

Chair Hee, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following **comments** regarding House Bill 1155, H.D. 1, including a request for several amendments.

The purpose of H.B. 1155, H.D. 1 is to amend Section 706-606.5, Hawaii Revised Statutes ("HRS"), to identify specific Class A, B and C felonies that would carry mandatory minimum prison terms, under the repeat offender statute. As the original version of this bill listed only a very limited number of felonies to be retained under this sentencing structure, we appreciate the fact that the H.D. 1 version lists considerably more felony offenses, all of which are also extremely heinous but "non-violent" in nature.

Nevertheless, we do have some concerns about the current version of this bill, and suggest that further amendments be made. In particular, it appears that none of the Class A or B felony drug offenses are listed in H.D. 1. As drug offenses of this categorization tend to be organized operations dealing with large-scale or particularly hazardous substances--and in light of our ongoing battle against drug problems in Hawaii--our Department believes that felony drug offenses should be included in HRS §706-606.5.

With regards to Class C felonies, the Department also requests that certain other offenses be retained, as they are closely related to more violent acts, and/or pose an extraordinary risk to public safety and welfare. Specifically, we suggest that HRS Sections 846E-9 (failure to comply with covered offender registration requirements); 134-7 (felon in possession of firearms or

ammunition); 134-8 (ownership of prohibited weapons); and 134-9 (permits to carry concealed weapon) be retained in this Section.

Last but certainly not least, we believe that the language addressing "felony conviction[s] of another jurisdiction[s]" should be retained in some form, to the extent that this holds new(er) Hawaii residents to similar standards as those who have always lived here. If this provision is removed from HRS §706-606.5, it is likely that the repeat offender sentencing structure will no longer apply to those previously convicted of similarly egregious crimes in other states, and we strongly feel that such a result would have a negative impact on public safety and welfare.

We hope that you will find our comments both informative and helpful, and are open to questions on or further discussion of any of these issues. Thank you for the opportunity to testify on H.B. 1155, H.D. 1.



the
**Drug Policy
Forum**
of hawaii

LATE TESTIMONY

April 7, 2011

To: Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair and
Members of the Committee on Judiciary and Labor

From: Jeanne Y. Ohta, Executive Director

RE: **HB 1155 HD1** Relating to Repeat Offenders
Hearing: Thursday, April 7, 2011, 9:30 a.m., Room 016

Position: **Support**

The Drug Policy Forum of Hawai'i writes in support of HB 1155 HD1 Relating to Repeat Offenders.

DPFH believes that mandatory minimums should be eliminated because they add to our prison costs without increasing public safety nor do they reduce crime. Our prison budget is spiraling out of control. Hawai'i now spends in excess of \$60 million dollars on mainland private prisons.

Mandatory sentences also eliminate the discretion of judges to consider individual circumstances in determining the length of prison sentences.

Mandatory minimums places the balance of power in the hands of prosecutors who can use these mandatory sentences as bargaining tools or can determine the length of a sentence by what is charged.

DPFH strongly believes that the legislature should eliminate mandatory minimums that apply to drugs. Drug addiction is a health issue and is not effectively addressed in the criminal justice system. Drug treatment is less expensive than incarceration. Incarceration does not reduce recidivism and does not address addiction, but treatment provides long-term results.

Thank you for allowing me to provide testimony.

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LATE TESTIMONY

Committee: Committee on Judiciary and Labor
Hearing Date/Time: Thursday, April 7, 2011, 9:30 a.m.
Place: Room 016
Re: Testimony of the ACLU of Hawaii in Support of H.B. 1155, HD1, Relating to Repeat Offenders

Dear Chair Hee and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of H.B. 1155, HD1, because it deletes some mandatory minimum sentences for certain crimes.

Mandatory minimum sentences for all crimes should be abolished. They add to Hawaii’s drastic over-incarceration problem without increasing public safety or deterring crime by:

- 1) generating unnecessarily harsh sentences;
- 2) tying judges’ hands in considering individual circumstances;
- 3) creating racial disparities in sentencing; and
- 4) empowering prosecutors to force defendants to bargain away their constitutional rights.

Almost twenty years ago, the United States Sentencing Commission delivered a report to the U.S. Congress denouncing mandatory minimums for a series of flaws that have practically become common knowledge among policymakers, judges, and practitioners in the field of federal sentencing.¹ As the Commission explained in its 1991 report to Congress, mandatory minimums create sentencing disparities that correlate with race,² disparities among similarly-situated offenders,³ sentencing “cliffs” for drug offenses (that is, quantity thresholds at which sentences increase dramatically),⁴ formalism in sentencing based on charging decisions and not offense conduct,⁵ and inflexibility to consider an individual offender’s personal culpability.⁶ Mandatory minimums add to the United States’ drastic over-incarceration problem⁷ without increasing public safety or deterring crime.⁸

Mandatory minimums create excessive prosecutorial discretion, which is exercised in an arbitrary manner and used to coerce defendants into relinquishing their constitutional rights and punish defendants when they exercise those rights.⁹

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One other unfortunate by-product of mandatory minimums has become particularly salient in these troubled economic times: by requiring long prison sentences for individuals who would not otherwise receive them, the law commits precious state dollars to paying for years' worth of unnecessary incarceration.¹⁰

The policy of the U.S. Attorney's Office for the Northern District of California illustrates how mandatory minimums can be used to compromise constitutional rights and dramatically intensify sentences. In that district, until recently, prosecutors as a matter of policy threatened to file informations under 21 U.S.C. § 851 against defendants with prior convictions; the effect of such an information is to double the mandatory minimum or require a mandatory life sentence. Then prosecutors used that threat to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury — all as the price for not being exposed to the higher minimum.¹¹

Prosecutors' use of mandatory minimums as coercive bargaining tools is at odds with the purpose that the U.S. Congress expressed in creating the guideline system. Congress sought to create a uniform baseline for sentencing that reflects all relevant factors, including offense conduct, actual social harms of the offense, and offender role and circumstances¹² — not to make prosecutors' jobs easier and facilitate the abrogation of defendants' rights.

All of these flaws with mandatory minimums are well known and well documented. It is unsurprising, therefore, that a majority of Americans oppose mandatory minimums.¹³

Many in the judiciary, too, have come to see mandatory minimums as antithetical to fair sentencing. Judges across the country and across the ideological spectrum have decried determinate sentencing schemes like mandatory minimums that tie judges' hands and force them to impose harsher-than-necessary sentences.¹⁴ The United States Supreme Court in *United States v. Booker*¹⁵ and subsequent cases¹⁶ has emphasized the importance of judicial discretion in sentencing — the very opposite of the approach required under a mandatory minimum. Today, in the wake of *Booker*, mandatory minimums are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.

We urge the Committee to send a strong and unequivocal condemnation of mandatory minimums. The abolition or reform of mandatory minimums would become the most significant step that this Legislature could take to reduce unfairness, racial disparities, and the abridgement of constitutional rights in sentencing. This Committee should urge the Legislature to eliminate mandatory minimum sentences entirely. This Committee should also recommend a series of corrective measures that, in the event the Legislature cannot muster the political will for abolition, would produce substantial and positive change; these measures include lowering mandatory minimum terms, eliminating the subset of

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mandatory minimums that apply to drugs, expanding the applicability of the “safety valve” exception for non-violent drug offenders, and replacing drug quantity-based criteria for mandatory minimums with role-based and harm-based criteria.

It is the ACLU’s fervent hope that this Committee will take steps to reduce excessive incarceration and create a sentencing system that is both fair and effective. The necessary first step toward this goal is reforming or abolishing mandatory minimum sentences.

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 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
ACLU of Hawaii

¹ See U.S. Sentencing Comm’n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991) [hereinafter “USSC 1991 Report”].

² *Id.* at 51, 52.

³ One of the fundamental objectives of the Guidelines was to reduce disparity in sentences given to similarly-situated defendants. See *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007); USSC 1991 Report 16.

⁴ USSC 1991 Report 1.

⁵ *Id.* at 25-26, 53.

⁶ *Id.* at 26.

⁷ U.S. Sentencing Comm’n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 48 (Nov. 2004) [hereinafter “USSC Fifteen Year Review”]; U.S. Sentencing Comm’n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 68-70 (June 18, 1987).

⁸ All of the empirical evidence shows that mandatory minimums do not deter criminal conduct. See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65, 102 (2009). In fact, increased sentence length in general has no deterrent effect. See generally Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 23, 28 (2006); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995).

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⁹ See, e.g., *United States v. Hungerford*, 465 F.3d 1113, 1118-22 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) (“Hungerford’s case is a textbook example of how [18 U.S.C.] § 924(c) permits a prosecutor, but never a judge, to determine the appropriate sentence.”); *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009); *United States v. Redondo-Lemos*, 754 F. Supp. 1401, 1406 (D. Ariz. 1990).

¹⁰ See, e.g., Justice Anthony M. Kennedy, Speech at the American Bar Ass’n Annual Meeting, at 2 (Aug. 9, 2003) (“Our resources are misspent, our punishments too severe, our sentences too long.”); Statement of Stephen R. Sady, *Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons Should Fully Implement Ameliorative Statutes To Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration* 1 (July 21, 2009), at <http://judiciary.house.gov/hearings/pdf/Sady090721.pdf>.

¹¹ See, e.g., *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009).

¹² See 18 U.S.C. § 3553(a); 28 U.S.C. § 994(c)(1)-(7).

¹³ See Amanda Paulson, *Poll: 60 Percent of Americans Oppose Mandatory Minimum Sentences*, C.S. Monitor, Sep. 25, 2008, at <http://www.csmonitor.com/USA/Justice/2008/0925/p02s01-usju.html>.

¹⁴ See, e.g., *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment); Remarks of Chief Justice William H. Rehnquist, Nat’l Symposium on Drugs and Violence in America 9-11 (June 18, 1993); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

¹⁵ 543 U.S. 220 (2005).

¹⁶ See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

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