

**Testimony of the Office of the Public Defender  
State of Hawaii  
to the House Committee on Judiciary**

February 22, 2011

H.B. No. 141: RELATING TO THE HAWAII PENAL CODE.

Chair Keith-Agaran and Members of the Committee:

The Office of the Public Defender supports passage of H.B. 141. It will rectify a situation that was created by the recalculation of concurrent and consecutive prison sentences by the Department of Public Safety.

Traditionally, when imposing a sentence of incarceration on a defendant who was already serving a term of imprisonment, judges would specify when the court intended that the second term be served consecutively to the first term. Unfortunately, what court and counsel neglected over the years was the wording of the statute that directed that terms of incarceration would run consecutively unless the Judgment specifically stated that sentences were to run concurrently.

This situation was corrected by the Legislature in 2008 for all Judgments issued "on or after" the effective date of Act 193, June 18, 2008. But it still leaves a significant number of defendants who were sentenced prior to that date in need of the same relief. This bill seeks to include that group of defendants in the category whose sentences will be treated as concurrent unless the court ordered a consecutive sentence.

It is not only fair but in keeping with our penal code that this anomaly be corrected for everyone. Other parts of our sentencing statutes call for specific proof through evidence or findings by the court in order to enhance a sentence of incarceration; in other words, in order to make the sentence longer than the standard period of incarceration provided for the offense committed. It doesn't make sense that when it comes to concurrent versus consecutive sentences, the default should be the harsher of the two. It is particularly disturbing for that to be the case when the Judgment included no statement of consecutive sentencing. A defendant is entitled to the sentencing document, i.e., the Judgment, stating clearly the sentence imposed and its relationship to any other sentences the defendant has. This would also serve the interests of all those in the penal system who have to make calculations and decisions based upon the Judgment.

For these reasons, we support passage of this bill. Thank you for the opportunity to comment on this legislation.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

ALII PLACE  
1060 RICHARDS STREET • HONOLULU, HAWAII 96813  
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO  
PROSECUTING ATTORNEY

ARMINA A. CHING  
FIRST DEPUTY PROSECUTING ATTORNEY



**THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR**  
**HOUSE COMMITTEE ON JUDICIARY**  
**Twenty-sixth State Legislature**  
**Regular Session of 2011**  
**State of Hawai'i**

February 22, 2011

**RE: H.B. 141; RELATING TO HAWAII PENAL CODE.**

Chair Keith-Agaran, Vice-Chair Rhoads and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony in opposition to House Bill 141.

The purpose of House Bill 141 is to amend Act 193, Session Laws of Hawaii 2008, to apply retroactively to all prison sentences imposed prior to June 18, 2008, and require the Department of Public Safety to recalculate all prison sentences, such that any multiple terms of imprisonment would run concurrently, unless the court orders or statutes mandate that the terms run consecutively. Because this bill appears to alter prison sentences previously handed down by the courts--to impose the opposite of the courts' judgment and intent--the Department believes that it would be highly inappropriate to pass this bill.

For over 20 years, Section 706-668.5, Hawaii Revised Statutes, mandated that multiple terms of imprisonment imposed at the same time run concurrently, and multiple terms of imprisonment imposed at different times run consecutively, unless specified by court order. In other words, if a defendant was already subject to a previously-imposed prison sentence, and a court wanted to impose a concurrent prison sentence, then that would have to be specified in the court order. However, if the court wanted to impose a consecutive prison sentence on top of the previously-imposed sentence, no special language was needed.

Based on these requirements, and prior to enactment of Act 193, it may be presumed that any prison sentence imposed on a defendant with previously-imposed prison sentences, in which the court order remained silent on the issue of serving concurrent or consecutive terms, was actually intended to be served consecutively. After Act 193 took effect on June 18, 2008, courts were

essentially required to craft their orders in the completely opposite fashion, for these types of cases. Now, if a court wants to impose a subsequent prison sentence to run concurrent, no special language is needed; but if a court wants to impose a subsequent prison sentence to run consecutive, this must be specified in the court order.

In light of the foregoing, the Department believes that imposing Act 193 to all prison sentences handed down prior to June 18, 2008 would essentially undermine the courts' authority, by requiring the Department of Public Safety to carry out the opposite of that which was most likely intended by these court orders prior to June 18, 2008. For this reason, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes this bill.

Thank you for the opportunity to testify on this matter.



**HB 141**  
**RELATING TO THE HAWAII PENAL CODE**  
House Committee on Judiciary

February 22, 2011

2:00 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS WITH AMENDMENTS** HB 141. This bill authorizes retroactive application of the requirement that multiple terms of imprisonment run concurrently unless directed to run consecutively by law or court order.

OHA recognizes that Act 193 of 2008 revised HRS §706-668.5 to clarify and be consistent that if a defendant faces multiple terms, the sentences run concurrently unless explicitly court ordered or mandated by statute to be consecutive. Unfortunately, when it comes to implementing terms of sentencing, anecdotal reports indicate that the law is not being properly followed. HB 141 will help to clarify the intent and implementation of the law.

OHA's recent report, "The Disparate Treatment of Native Hawaiians in the Criminal Justice System," shows that the Native Hawaiians in the criminal justice system are more likely to have longer sentences than other groups. This bill will aid in reducing that disparity and correct the injustice that lead to Act 193.

This bill creates an administrative mechanism to allow the bill to be effective retroactively. The bill should be amended to require DPS to create rules under Chapter 91, HRS, to outline how the request for recalculation from inmates will be handled including reasonable deadlines for action by DPS.

OHA urges the committee to PASS HB 141, taking our comments into consideration. Mahalo for the opportunity to testify on this important measure.



the  
**Drug Policy  
Forum**  
of hawaii

February 22, 2011

To: Rep. Gilbert Keith-Agaran, Chair  
Rep. Karl Rhoads, Vice Chair and  
Members of the Committee on Judiciary

From: Jeanne Y. Ohta, Executive Director

RE: HB 141 Relating to the Hawaii Penal Code  
Hearing: Tuesday, February 22, 2011, 2:00 p.m., Room 302

Position: Strong Support

The Drug Policy Forum of Hawai'i writes in strong support of HB 141 Relating to the Hawaii Penal Code.

HB 141 retroactively requires that multiple terms of imprisonment run concurrently unless the court orders or the law mandates that the terms run consecutively beginning 01/01/2012 and directs the department of public safety to immediately recalculate the sentences of inmates.

It had been the practice among prosecutors and defense attorneys over the last three decades had been that when multiple charges are served concurrently unless the court orders that they be served consecutively, for some reason, the Department of Public Safety recalculated prison terms using a different understanding.

In 2008 (Act 193) Chapter 706-668.5, HRS law was amended to read:

*If multiple terms of imprisonment are imposed on a defendant, whether at the same time[,] or at different times, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment [imposed at the same time] run concurrently unless the court orders or the statute mandates that the terms run consecutively.*

However, this change was prospective and the Department has not changed their calculation of sentences occurring before Act 193. Longer sentences are expensive and are not necessarily more effective in reducing recidivism. This proposal makes clear that multiple charges are served concurrently unless the court deems otherwise.

We urge the committee to pass this measure. Thank you for this opportunity to provide testimony.

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P.O. Box 241042  
Honolulu, HI 96824-1042

Phone: (808)-988-4386  
Fax: (808) 373-7064

Email: [info@dpfhi.org](mailto:info@dpfhi.org)  
Website: [www.dpfhi.org](http://www.dpfhi.org)



Committee: Committee on Judiciary  
Hearing Date/Time: Tuesday, February 22, 2011, 2:00 p.m.  
Place: Conference Room 325  
Re: Testimony of the ACLU of Hawaii in Support of H.B. 141,  
Relating to the Hawaii Penal Code

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of H.B. 141, Relating to the Hawaii Penal Code, which seeks to make current sentencing law applicable to those sentenced prior to 2008.

Simply put, this bill could save the State of Hawaii millions of dollars annually without compromising public safety.

During Governor Lingle’s tenure, the Department of Public Safety took it upon itself to recalculate hundreds of inmates’ sentences. Many inmates who had been expecting to be released in the last few years received letters – usually just a few months before their expected release dates – explaining that they would be kept in prison for several more years. These extended sentences appear to have been inconsistent with the sentencing judges’ intentions and did not reflect the inmates’ danger to society; worse still, many of these recalculations were incorrect, and the State is now battling a class-action lawsuit seeking damages for these over-detentions.

H.B. 141 seeks to undo the Department of Public Safety’s unilateral sentence recalculations under the previous administrations and make pre-2008 sentences consistent with current law. This bill will allow the current Department to recalculate sentences and release those inmates who do not pose a threat to public safety – saving the State significant amounts of money while freeing up bed space to accommodate the Governor’s goal of bringing inmates back to Hawaii from the problematic for-profit mainland prison.

As the Legislature is aware, many of Hawaii’s prisons are overcrowded. The Legislature should take proactive steps to manage its prison population before the courts order the State to release inmates; H.B. 141 is one way to start working toward that goal.

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

American Civil Liberties Union of Hawaii  
P.O. Box 3410  
Honolulu, Hawaii 96801  
T: 808.522-5900  
F: 808.522-5909  
E: [office@acluhawaii.org](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)

Chair Keith-Agaran and Members of the Committee on  
Judiciary  
February 22, 2011  
Page 2 of 2

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 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple  
Staff Attorney  
ACLU of Hawaii

American Civil Liberties Union of Hawaii  
P.O. Box 3410  
Honolulu, Hawaii 96801  
T: 808.522-5900  
F: 808.522-5909  
E: [office@acluhawaii.org](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)

# COMMUNITY ALLIANCE ON PRISONS

76 North King Street, Suite 203, Honolulu, Hawai'i 96817

Phone/E-mail: (808) 533-3454/communityallianceonprisons@hotmail.com



## COMMITTEE ON JUDICIARY

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

Tuesday February 22, 2011

Room 325

2:00 p.m.

### **STRONG SUPPORT -HB141 - MULTIPLE TERMS OF IMPRISONMENT**

<http://www.capitol.hawaii.gov/emailtestimony>

Aloha Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working on justice issues in Hawai'i for more than a decade. We respectfully offer our testimony always being mindful that Hawai'i has some 6,000 people behind bars including approximately 1,800 individuals serving their sentences abroad, thousands of miles away from their loved ones and homes - the ancestral homes for a disproportionate Native Hawaiians.

HB 141 authorizes retroactive application of the requirement that multiple terms of imprisonment run concurrently unless directed to run consecutively by law or court order.

Community Alliance on Prisons stands in strong support of this measure. At the end of an individual's prison term, the facility from which the individual is released re-calculates the sentence to ensure that the person served the proper time and was not over-detained. The fine for over-detaining an individual is \$1,000/day.

After the state settled an over-detention suit at OCCC for millions of dollars, the Lingle-Aiona administration created the Office of Offender Management, offered a \$100,000/year contract to Tom Read, a former federal ACO and attorney, who is unlicensed in Hawai'i. Here is the description in the Department of Public Safety's 2008 Annual Report:

*The Offender Management Office was created in 2004 as a project to comply with the settlement agreement in the class action lawsuit, Tapaoan v. Cayetano, to assure the timely and accurate release of prisoners. The office oversees the departmental policy and practices on sentence computation, and continually trains department staff in this area. The office also coordinates with all courts and other law enforcement agencies, both state and federal, to ensure that all appropriate documentation is obtained to compute all inmate sentences accurately and in a timely manner. In an ongoing effort to review and correct all cases for those inmates currently*



*incarcerated in the department, it is estimated that the office staff reviewed and corrected over 1,200 old cases during fiscal year 2008.*

Sadly, this re-calculation has added much cost, confusion, and grief to incarcerated individuals and their families.

What is so sad about this mess is that the practice among prosecutors and defense attorneys over the last three decades had been that multiple terms are served concurrently unless the court orders that they be served consecutively. It was only when Mr. Read started his re-calculations that the system was thrown into turmoil.

In 2008 (Act 193) Chapter 706-668.5, HRS law was amended to read:

*If multiple terms of imprisonment are imposed on a defendant, whether at the same time[;] or at different times, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment ~~[imposed at the same time]~~ run concurrently unless the court orders or the statute mandates that the terms run consecutively.*

The 2008 'fix' to this statute was only prospective, so Mr. Read has continued his re-calculation and the lawsuits keep coming. In fact, the Ninth Circuit Court of Appeals is coming to Honolulu to hear pleadings on just such a suit involving several men who were over-detained in Arizona because of 'mistakes' made by Mr. Read's Office of Offender Management.

HB 141 fixes this expensive and unjust mess we are in. It makes clear that multiple charges are served concurrently unless the court deems otherwise.

*The purpose of this Act is to allow for retroactive application of the requirement that multiple terms of imprisonment run concurrently unless otherwise directed by law or court order.*

Please pass HB 141 and let's get start spending our resources where they will achieve the outcomes we all want - safe and healthy communities.

Mahalo for this opportunity to testify.

**National Association of Reformed Criminals  
Andy Botts & Franklin Jackson  
1765 Ala Moana Blvd. #1388  
Honolulu, Hawaii, 96815  
February 22, 2011**

**COMMITTEE ON THE JUDICIARY**

Rep. Gilbert S. C. Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

Tuesday February 22, 2011

2:00 PM

Room 325

**HB 141- RELATING TO THE HAWAII PENAL CODE**

**STRONG SUPPORT**

Hawaii didn't have any form of consecutive sentencing until 1986, when the Legislature revised the penal code to give sentencing judges the option of harsher sentences based on mitigating circumstances. It is rare for a judge to exercise that option and it's not mandatory. Never has been.

My understanding is that PSD erroneously recalculated over 1000 sentences to run consecutively, unless the sentencing judge ordered otherwise. This defies logic. If that was the Legislative intent in 1986 when it added that provision, then it would've also noted that all sentences shall run consecutive, unless ordered otherwise.

Presently, there have been numerous cases corrected by the courts, at the unnecessary expense of indigent defendants and their families, and our overburdened judiciary. The cost to correct this error comes from various angles, but the cost to PSD in manpower is minimal compared to the lawsuits that are piling, and the hundreds of years that has been illegally added to sentences.

Mahalo,

Andy Botts

**COMMITTEE ON THE JUDICIARY**

Honorable Representative Gilbert Keith-Agaran, Chairperson  
Honorable Representative Karl Rhoads, Vice Chairperson

Tuesday, February 22, 2011  
2:00 p.m.  
Room 325

**STRONG SUPPORT**

**HB 141 – MULTIPLE TERMS OF IMPRISONMENT**

Please vote yes to pass this measure directing the department of public safety (PSD) to retroactively require that multiple terms of imprisonment run concurrently unless the court orders or the law mandates that the prison terms run consecutively.

The legislature needs to ensure that PSD does not keep people in prison any longer than the sentencing judge orders or as required by statute.

PSD's current practice of recalculation of prison terms in effect allows its individual employees to determine sentences. Judges and the legislature, not subjective PSD employees, should be determining sentences for crimes. Sentencing should not be an individual "personality driven" process.

Hawai'i suffers from a lack of resources for known crime prevention strategies including schools, parks and recreational facilities, and health care programs. The legislature must reprioritize our scarce resources and divert much of PSD's \$250 million annual budget to other areas that can help keep our community safe and not endanger it. Research shows that imprisonment in our state prisons further criminalizes most people who are rearrested after their release.

Please pass this measure and stop the ridiculous number of people being kept in prison by individual PSD employees. Please help fund positive support for our community.

Please see my website [www.lorennwalker.com](http://www.lorennwalker.com) for background and experience in criminal justice interventions for agencies including courts, police, and prisons, including defending PSD in lawsuits, and prosecuting fraud cases, when I was a deputy attorney general.

Thank you for your time and efforts to further the public good.

PETER GELLATLY  
PO BOX 88377  
HONOLULU, HI 96830

February 19, 2011

COMMITTEE ON THE JUDICIARY

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

Tuesday, Feb 22, 2011

2:00 p.m., Room 325

STRONG SUPPORT – HB 141 – CONCURRENT TERMS OF IMPRISONMENT

Aloha Chair Keith-Agaran, Vice Chair Rhoads and members of the Committee,

My name is Peter Gellatly. I am a local businessman representing the Hawaii community on the state's Corrections Population Management Committee.

Our ability to equitably manage our prison system and its costs hinges largely on common sense. Our current practice of inflating prison terms flies in the face of such and should be halted immediately.

Common sense dictates that we responsibly scrutinize actions that cost great sums of money, especially in times of need, and any actions that hurt Hawaii residents, at all times. To my knowledge, the ongoing recalculation of prison terms is being done by rote, a cookie-cutter operation that has no worthwhile purpose. It is ugly, spiteful and expensive. There is no analysis of its benefits, perhaps because there are none. And if you total its costs, you will find better places to spend the taxpayers' money.

Please pass this bill.

Thank you and

aloha,

Peter Gellatly

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, February 20, 2011 8:59 AM  
**To:** JUDtestimony  
**Cc:** SapphoDD40@aol.com  
**Subject:** Testimony for HB141 on 2/22/2011 2:00:00 PM

Testimony for JUD 2/22/2011 2:00:00 PM HB141

Conference room: 325  
Testifier position: support  
Testifier will be present: No  
Submitted by: Carmael Kamealoha Stagner  
Organization: Individual  
Address:  
Phone:  
E-mail: [SapphoDD40@aol.com](mailto:SapphoDD40@aol.com)  
Submitted on: 2/20/2011

Comments:  
I support the intent of this bill HB 141.

**Robert K. Merce**  
2467 Aha Aina Place  
Honolulu, Hawai'i 96821  
January 25, 2011

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**COMMITTEE ON THE JUDICIARY**

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

Tuesday, February 22, 2011

2:00 p.m.

Room 325

**STRONG SUPPORT – HB 141 – MULTIPLE TERMS OF IMPRISONMENT**

I am a retired member of the Hawaii State Bar. Before retiring, my practice included the representation of prison inmates on a wide array of issues. This made me aware of the many ways in which our justice system is failing inmates and the community, and since retiring I have decided to try to do something about it.

HB 141 would bring clarity to situation that badly needs it, and does not violate the separation of powers. The bill is also needed to avoid costly litigation and to reduce prison cost.

I strongly urge you to pass HB 141.

Thank you.

Erin Welsh  
73-1142 Oluolu Street  
Kailua-Kona, Hawaii 96740  
(808) 325-5322

February 21, 2011

**COMMITTEE ON PUBLIC SAFETY & MILITARY AFFAIRS**

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

VIA: email

**STRONG SUPPORT for HB 141 - MULTIPLE TERMS OF IMPRISONMENT**

Good Morning Chair Keith-Agaran, Vice-Chair Rhoads and Committee Members:

I am in strong support of HB 141 regarding Multiple Terms of Imprisonment. We passed a law back in 2008 that said sentences would be served concurrently unless directed by the Court. Why are we not obeying the law? I believe it is just another scam by the private prisons to make more money on our people. Our prisoners cannot defend themselves against this miscarriage of justice. We have to do it for them. Please pass this bill. It is the right thing to do, and I believe it will save our state a lot of money.

Sincerely,

Erin Welsh

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 21, 2011 11:41 AM  
**To:** JUDtestimony  
**Cc:** clampton@hawaii.edu  
**Subject:** Testimony for HB141 on 2/22/2011 2:00:00 PM

Testimony for JUD 2/22/2011 2:00:00 PM HB141

Conference room: 325  
Testifier position: support  
Testifier will be present: No  
Submitted by: Catherine Lampton  
Organization: Individual  
Address:  
Phone:  
E-mail: [clampton@hawaii.edu](mailto:clampton@hawaii.edu)  
Submitted on: 2/21/2011

**Comments:**

I strongly support this bill correcting Tom Read's attempt to pad CCA's pockets. It's wrong; we need to bring our people home!

&#183; PSD's incorrect recalculation of sentences has cost taxpayers and families dearly. Instead of working on reentry, the former administration and Tom Read is a hold-over - put their efforts on keeping individuals incarcerated despite their rhetoric on seeking evidence-based solutions.

&#183; Jurisdictions around the U.S. are reducing their incarcerated populations, awakening to the fact that they can no longer sustain current practices and employing real evidence-based strategies including community based treatment, reentry programs, and day reporting centers.

&#183; The majority of Hawai'i's incarcerated population is nonviolent (84% women, 63% men) and 48% of the women and 23% of the men currently imprisoned are community custody. Community custody is defined by the department as: Individuals who are eligible to participate in community release programs such as work furlough, extended furlough or residential transitional living facilities.

&#183; The director testified that more than 30% of the individuals in Arizona are community custody. These individuals should be back in Hawai'i, complying with Act 8 of 2007, and transitioning back to the community.

&#183; Money is being wasted on incarceration that would be more effectively used on community-based alternatives. Studies have shown that reinvesting incarceration dollars to community-based treatment programs can save anywhere from \$10 to \$18 for every dollar spent.

Mahalo, Catherine Lampton





CARRIE ANN SHIROTA  
ATTORNEY AT LAW  
1839 Wells Street  
Wailuku, Hawaii 96793  
Phone: 808-269-3858

**COMMITTEE ON THE JUDICIARY**

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

Tuesday, February 22, 2011

2:00 p.m. in Room 325

<http://www.capitol.hawaii.gov/emailtestimony>

**STRONG SUPPORT – HB 141 – MULTIPLE TERMS OF IMPRISONMENT**

Aloha Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

I am writing in strong support of HB 141 that authorizes retroactive application of the requirement that multiple terms of imprisonment run concurrently unless directed to run consecutively by law or court order.

I speak from my experience as a former Deputy Public Defender and Director of MEO's Being Empowered and Safe Together (BEST) Reintegration Program, and as a member of Community Alliance on Prisons. During the past ten years, I have advocated for alternatives to mass incarceration policies and Smart Justice policies that have proven effective in reducing crime, and building safer communities.

**In my opinion, this is one of the most important bills to promote "Smart Justice" policies in Hawai'i this legislative session. I ask for your support of this bill for the following reasons:**

- Hawai'i has fallen prey to the same "mass incarceration policies" that triggered an implosion in the federal and state prisoner population. In *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, criminologists Todd Clear and James Austin point out that beginning in the 1970s and spanning over three decades, "state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences." Over the past three decades, Hawai'i's increasing reliance on incarceration as a response to crime resulted in more people being sent to prison for longer periods of time.
- Numerous studies confirm that longer sentences are a costly and ineffective response to crime, particularly for persons convicted of drug related charges. This bill would require the Department of Public Safety to immediately recalculate the sentences of inmates under this statute, and in some instances, warrant sentence reductions and release. Given that our state spends approximately \$40,000 to incarcerate an adult person annually, this bill will ultimately save precious taxpayer dollars.

Thank you for the opportunity to submit testimony in support of this bill.

Sincerely,

*Carrie Ann Shiota*