**LATE**
**Testimony**

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 JOHN M. MIZUNO, CHAIR**
**HOUSE COMMITTEE ON HUMAN SERVICES**
**Twenty-sixth State Legislature**
**Regular Session of 2011**
**State of Hawai`i**

February 10, 2011

**RE: H.B. 248; RELATING TO SENTENCING.**

Chair Mizuno, Vice-Chair Jordan and members of the House Committee on Human Services, the Department of the Prosecuting Attorney submits the following testimony in support of House Bill 248.

The purpose of House Bill 248 is to amend Hawaii Revised Statutes, Section 706-660.2, to provide enhanced penalties for those who target elder persons for *financial* crimes. Specifically, the bill seeks to extend the protections afforded by Section 706-660.2 to elderly victims of first and second-degree theft or identity theft.

Although the law currently provides enhanced penalties for felonies that cause death or serious bodily injury to an elderly person, there are no such penalties for targeting elderly persons for financial crimes. Nevertheless, financial crimes can be just as devastating as physical injuries, leaving victims in isolation, vulnerable and scared, at a time in their life when they are typically less capable and have less time to recover emotionally or rebuild their finances. Moreover, financial crimes against the elderly are not only committed by strangers--via internet, mail, investment schemes and other methods--but also by *relatives and caregivers*, who have more opportunity to take an elder's money, property, and valuables; deny companionship, services or medical care; or cash pension or social security checks without permission.

Financial crimes against the elderly have been a growing problem in Hawaii, where it is common to see several generations living under the same roof, and in May of 2006, the Honolulu Advertiser published a series of *nine* articles regarding the financial abuse of seniors, indicating that Adult Protective Services had received more than 1,800 reports of suspected incidents,

within two-years prior. It is our understanding that these numbers have continued and are expected to increase as our population grows grayer with the aging of baby boomers.

Criminals who knowingly target an elderly victim for first or second-degree theft, or identity theft, should face enhanced penalties as a result of their decision to victimize an elder person. House Bill 248 is consistent with the intent of current laws, which provide enhanced penalties for serious physical injury to an elder, and only apply when it is proven beyond a reasonable doubt that the defendant knew or reasonably should have known the victim was 60 years of age or older. The Department of the Prosecuting Attorney believes that House Bill 248 will provide greater protection for Hawaii's growing elderly population and present a greater deterrence to those who would contemplate targeting Hawaii's elderly for financial crimes.

For these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports this bill. Thank you for the opportunity to testify on this matter.

LATE
Testimony

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

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| Committee: | Committee on Human Services |
| Hearing Date/Time: | Thursday, February 10, 2011, 9:00 a.m. |
| Place: | Room 329 |
| Re: | *Testimony of the ACLU of Hawaii in Opposition to H.B. 248, Relating to Sentencing* |

Dear Chair Mizuno and Members of the Committee on Human Services:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 248, which seeks to establish mandatory minimum terms for certain offenses committed against persons 60 years of age or older.

Mandatory minimums should be abolished rather than instituted because 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 problem[7] 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]

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

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 circumstances[12] — 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 cases[16] 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 minimums and opposing this bill.

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

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[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 Statuses 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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F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

**From:** Emy Furusaki [maukalani78@hotmail.com]
**Sent:** Wednesday, February 09, 2011 3:37 PM
**To:** HUStestimony
**Subject:** FW: HB 248 - Mandatory Minimum for Crimes Against Elders

**LATE Testimony**

**COMMITTEE ON HUMAN SERVICES**
Rep. John Mizuno, Chair
Rep. Jo Jordan, Vice Chair
Thursday, February 10, 2011
9:00 AM
Room 329
**HB 248** – Mandatory Minimum for Crimes Against Elders
**STRONG OPPOSITION**

Dear Chair Mizuno, Vice Chair Jordan and Members of the Committee:

All I can say is that this bill, in my opinion, takes us back to the stone ages. I am over 60 years old and thank you for your consideration of the elderly, but every individual needs their day in court with fair representation before a judge who can consider the arguments and make a decision.

To categorize people for crimes committed is unfair. We are all individuals very different from the next person so please do not simplify sentencing by taking away the human rights of each individual.

Again, I thank you for your consideration.

E. Funakoshi
455-9136