



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

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ON THE FOLLOWING MEASURE:

S.B. NO. 106, S.D. 1, RELATING TO THE HAWAII PENAL CODE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, March 24, 2011 TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or  
Lisa M. Itomura, Deputy Attorney General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General opposes this bill in its present form.

This bill requires the unfettered retroactive application of section 706-668.5, Hawaii Revised Statutes, and would, arguably, change the interpretation of all multiple criminal sentences so that they run concurrently, unless the sentencing order specifies that sentences are to be served consecutively or the law requires consecutive sentencing. This bill also requires the Department of Public Safety ("PSD"), upon written request by an inmate, to recalculate an inmate's previously imposed sentences of multiple terms of imprisonment to run concurrently unless the court specifically orders or the law mandates that the terms run consecutively.

The changes in sentencing resulting from this measure affect all sentences regardless of whether:

- (1) Defendants are still in custody; or
- (2) The circumstances of the crimes and the defendant's history merit consecutive sentencing and the judge intended for the sentences to be served consecutively.

To address the first concern, we suggest that the applicability of these provisions be limited to those who are still in the custody of the State.

To address the second concern, the change of a defendant's sentences from consecutive to concurrent should not be automatic, and not left to PSD's nonjudicial determination. The bill in its present form is ambiguous and arguably conflicting as to whether a resentencing hearing is anticipated as part of the process to implement its provisions. While this bill refers to resentencing in the amendments proposed on page 1, line 14 of the bill, it does not require a judge's action or resentencing hearing. This reference to a resentencing conflicts with the separate requirement that PSD recalculate terms of imprisonment, without requiring a resentencing order, found in section 3 of the bill. If the Legislature intends for a judge's action to trigger the changes required by this bill, a position this department supports, the requirement for a hearing should be specifically included in the bill.

Without the changes suggested above, persons with sentences for heinous crimes, purposely sentenced to consecutive terms, but whose sentences do not mention the word "consecutive" might, without judicial review, have their sentences reduced drastically. This would reverse the well-established common law that required just the opposite--interpretation of sentencing to be consecutive, unless stated otherwise.

Lastly, while this bill presumes to protect the State from liability due to "sentencing errors" occasioned by this bill, it does not protect the State from liability for claims of prolonged incarceration or custody that would be expected from the implementation of this legislation. The bill should therefore include a provision clearly stating that the State is

not liable for any claims for custody beyond any resentenced term.