

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



LATE TESTIMONY

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Committee on Judiciary

Committee on Consumer Protection & Commerce

HB2192, HD 1

**Testimony by Wes Lum
Director, Executive Office on Aging
Attached Agency to Department of Health**

Monday, February 13, 2012; Conference Room 325

2:00 p.m.

EOA's Position: Executive Office on Aging (EOA) supports the intent of this measure and defers to the specific Department of Human Services amendments.

Purpose and Justification: The purpose of HB2192, HD.1 is to create the crime of financial exploitation of an elder and provide for enhanced penalties; require financial institutions to report suspected financial abuse to the adult protective services and the appropriate county police department; and require two signatures of unrelated persons as witnesses to the execution of a power of attorney for health care.

Thank you for the opportunity to testify.

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LATE TESTIMONY

**THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
HOUSE COMMITTEE ON JUDICIARY**

**THE HONORABLE ROBERT N. HERKES, CHAIR
HOUSE COMMITTEE ON CONSUMER PROSECUTION & COMMERCE**

**Twenty-sixth State Legislature
Regular Session of 2012
State of Hawai'i**

February 13, 2012

RE: H.B. 2192, H.D. 1; RELATING TO THE ELDERLY.

Chair Keith-Agaran, Chair Herkes, Vice-Chair Rhoads, Vice-Chair Yamane, members of the House Committee on Judiciary and members of the House Committee on Consumer Protection & Commerce, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in support of House Bill 2192, House Draft 1.

The purpose of the bill is to create a new offense for financial exploitation of an elder. The Department agrees that financial crimes can take many different forms, and can be just as devastating as physical injuries, leaving victims isolated, vulnerable and scared, particularly older victims, who may be less able to defend against these offenses, and have less time to recover emotionally or rebuild their finances afterwards. Moreover, the number of financial crimes against the elderly has increased in recent years, and is only expected to increase further, as Hawaii's baby-boomers continue to age.

Anyone who would knowingly target elderly people as victims should face stricter penalties for such heinous actions; this would also serve as greater deterrent against such actions. We would suggest, however, that the word "and" be changed to "or," on page 1, line 11.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu supports H.B. 2192, H.D. 1, with the suggested amendment. Thank for you the opportunity to testify on this matter.

LATE TESTIMONY



Hawaii's Voice for a Better Future

COMMITTEE ON JUDICIARY

Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Rep. Robert N. Herkes, Chair
Rep. Ryan I. Yamane, Vice Chair

HB2192

JUD/CPC

Monday, February 13, 2012

2:00 p.m.

Room 325

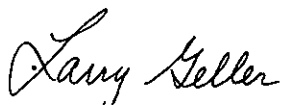
February 13, 2012

Re: HB2192 — Relating to the Elderly

In Support

Rep. Keith-Agaran, Rep. Rhoads, Rep. Herkes, Rep. Yamane and members of the Committees:

Kokua Council is in support of this bill.


Larry Geller

President, Kokua Council

The Kokua Council is one of Hawaii's oldest advocacy groups. Kokua Council seeks to empower seniors and other concerned citizens to be effective advocates in shaping the future and well-being of our community, with particular attention to those needing help in advocating for themselves. "We embrace diversity and extend a special invitation to any senior or intergenerational minded individual interested in advocating for these important issues in Hawaii."

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COMMITTEE ON JUDICIARY

Rep. Gil Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Rep. Robert Herkes, Chair

Rep. Ryan Yamane, Vice Chair

Monday, February 13, 2012

2:00 p.m.

Room 325

OPPOSITION TO SECTION 2 OF HB 2192 HD1 - RELATING TO THE ELDERLY

Aloha Chairs Keith-Agaran and Herkes and Members of the Committees!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered always mindful that 6,000 Hawai'i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 2192 HD1 creates the crime of financial exploitation of an elder and provides enhanced penalties. It also requires two signatures of unrelated persons as witnesses to the execution of a power of attorney for health care and requires financial institutions to report suspected financial abuse to the adult protective services of the Department of Human Services and the appropriate county police department. **Section 2 of the bill calls for mandatory minimum sentences in the course of committing or attempting to commit a felony on certain persons. Effective July 1, 2050.**

Community Alliance on Prisons is testifying in strong opposition to Section 2 of this bill that calls for mandatory minimum sentences for committing or attempting to commit a felony on certain persons and we respectfully ask the committee to strike this section from the bill.

Community Alliance on Prisons understands that this bill was introduced with compassion for those who might not be able to defend themselves, and we agree that these crimes are egregious. However, we also contend that Hawai'i has more than enough laws to address these terrible crimes. The Justice Reinvestment Initiative has recommended ways to enhance public safety and make our justice system more efficient. Proposals to increase mandatory minimum sentencing are counter to the research and findings of the analysts from the Justice Center who have been working here for the past six months as well as the plethora of research about mandatory minimums, which are being repealed by many jurisdictions.

Mandatory minimum sentencing laws eliminate judicial discretion. These laws are problematic because they tie the courts' hands and mandate longer prison sentences, regardless of whether the Court believes the punishment is appropriate, based on the facts of the case. Repealing mandatory minimum sentences would restore judicial discretion and further the cause of justice.

Another huge issue with mandatory minimums is that decisions that should be made by the court, are turned over to the prosecutor. Prosecutorial discretion is essentially conducted behind closed doors, whereas that of a sentencing judge is conducted in an open courtroom. Thus, by shifting the locus of the use of discretion, mandatory sentencing not only fails to eliminate the use of discretion, but also subjects it to less public scrutiny.

There are numerous studies, data and research on the subject of mandatory minimum sentencing – here is a sampling of a few, including the recent guidelines passed by the U.S. Sentencing Commission:

FAMILIES AGAINST MANDATORY MINIMUMS Poll ¹

- More than three-quarters of Americans feel that the court is the best qualified to determine sentences for crimes (78%).
- Both Democrats and Republicans feel that Courts, not Congress, should decide sentencing (81% vs. 78% respectively).

A Blue-Ribbon Indictment ²

Editorial

"A 645-page report from the United States Sentencing Commission found that federal mandatory minimum sentences are often "excessively severe," not "narrowly tailored to apply only to those offenders who warrant such punishment," and not "applied consistently.""

**MANDATORY MINIMUM SENTENCES:
EXEMPLIFYING THE LAW OF UNINTENDED CONSEQUENCES
CHRISTOPHER MASCHARKA, J.D.
Florida State University College of Law**

"There has long been a plethora of experts declaring opposition to mandatory minimums. The Sentencing Commission, the Judicial Conference of the United States, the Federal Courts Study Commission, the Federal Judicial Center, the ABA, and an overwhelming majority of judges oppose mandatory minimums.(331)³

Even three current Supreme Court Justices have publicly spoken out against these penalties.(332)⁴

¹ FAMM Poll Fielded July 31 – August 3, 2008, Margin of error = ±3.1% in 95 out of 100 cases

² NY Times Editorial, Published: November 13, 2011, http://www.nytimes.com/2011/11/14/opinion/a-blue-ribbon-indictment.html?_r=1&partner=rssnyt&emc=rss

³ (331) See Beale, *supra* note 77, at 27; cf. Breyer *supra* note 40, at 184 ("The Commission, from the beginning, has strongly opposed mandatory minimums.").

⁴ (332) See Breyer, *supra* note 40, at 184. Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer have all publicly spoken out against mandatory minimums. See *Id.*

Even among prosecutors, who are currently empowered with wide discretion under mandatory minimums, only half viewed these provisions in a favorable light.(333)⁵

Additionally, some argue that certain areas of governmental policy should not be overly guided by public opinion.(334)⁶

Public attitudes on risk can be highly skewed from reality. Justice Breyer has compellingly contended that in certain fields, cognitive errors create a public perception on risk so fundamentally flawed it should not be the basis for public policy.(335)⁷

Crime, and the resulting criminal justice decisions, are an area fueling highly emotional, and arguably irrational, public reactions. Considering that policy determinations affect the liberty interests of defendants, basing criminal justice policy on empirical research seems favorable to public-driven and politically motivated measures.(336)⁸

In sum, mandatory minimum sentencing does not eliminate sentencing disparities; instead it shifts decision-making authority from judges to prosecutors, who operate without accountability. Nor does mandatory sentencing deter crime.

Hawai'i's Penal Code has enough penalties for these crimes and we respectfully ask that the committee review the research (and we can supply much more) and rely on our existing statutes to address the crimes in this measure. **We respectfully ask that the committee delete Section 2 of this measure.**

Mahalo nui for this opportunity to testify.

⁵ (333) See Schulhofer, *supra* note 63, at 216-17 (noting that not all prosecutors disfavored them solely on the harshness of the sentence).

⁶ (334) For a comprehensive accounting of the public's opinions regarding crime and punishment, see Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *CRIME & JUST.* 1 (2000), which summarizes numerous public opinion studies on crime and punishment.

⁷ (335) See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-81 (1993) (arguing primarily in the context of environmental risk); see also Beale, *supra* note 77, at 65 (paraphrasing Justice Breyer's sentiments on the issue). But see Beale, *supra* note 77, at 65 n.157 (stating that some would consider Justice Breyer's opinions "elitist").

⁸ (336) See Cullen et al., *supra* note 334, at 3. The authors expressed the following concern: One immediate concern is whether public opinion should be the arbiter of sentencing and correctional policies. Public sentiments on policy issues must be accorded some weight in a democratic society, but justifying policies on the basis of what citizens want confronts a dismaying reality: *mu Id.* However, there are those who believe that the appropriate source of criminal justice policy lies with our elected politicians.

Relegating criminal justice decisions to experts may raise complaints that it is undemocratic and elitist. See Beale, *supra* note 77, at 65 n.157. It may also be argued that in a democracy—given certain constitutional limitations—a society has a "moral right to punish" in accordance with the values and opinions of the law abiding majority. E.g., Ronald J., Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 *TUL. L. REV.* 299, 337-38 (1990).