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No. ______________

TESTIMONY ON SENATE BILL 106 SD1
RELATING TO THE HAWAII PENAL CODE
by
Jodie F. Maesaka-Hirata, Director
Department of Public Safety

House Committee on Judiciary
Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair

Thursday, March 24, 2011, 2:00 PM
State Capitol, Conference Room 325

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

The Department of Public Safety (PSD) strongly opposes Senate Bill 106 SD1. This measure makes the Section 706-668.5 Hawaii Revised Statutes retroactive prior to June 18, 2008, the date it was amended and signed into law by the Governor.

Enacting this measure would violate the separation of powers by overriding a multitude of judicial determinations with a legislative measure after the fact. In addition, it would expose PSD and the State of Hawaii to extensive liability for the inmates that were detained pursuant to the law that was in effect at the time, but would have been released if this measure were passed. This measure states that this measure shall not impose any liability upon the State for sentencing errors. However, the State will still be open to liability in cases bought in federal courts.

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In addition to being violative of Constitutional law, it would take thousands of hours of unnecessary work in addition to the regular duties and obligations of PSD staff in order to implement this measure. The sentence computation reviews for felony cases take an average of two hours per case, with misdemeanor cases taking less time generally. There are over four thousand felony inmates currently incarcerated and thousands more misdemeanor inmates, however, since this measure would impact the period of supervision for inmates on parole, all their cases would have to be reviewed as well. At the current staffing levels within PSD, it would take years of staff time to complete all the reviews that would result if this measure is passed.

There have been a number of cases where inmates were informed their sentences were being correctly computed to run consecutive and the inmates have contacted their legal counsel to file a motion for an amended sentence. In many cases, the Courts have amended the sentences to run concurrent and PSD has immediately recalculated the sentences. However, there have been cases where the Courts indicated that the sentences were intended to run consecutively and denied the motions for amended sentences. This is an indicator that if this measure is enacted the intent of the courts will not be followed in all cases.

PSD strongly opposes this measure because it violates Constitutional law and principle and would place PSD and the State in a precarious situation in terms of liability, therefore we ask that this bill be held.

Thank you for this opportunity to testify.

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

March 24, 2011

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

Chair Keith-Agaran and Members of the Committee:

The Office of the Public Defender supports passage of S.B. 106, S.D. 1 with one change in the language which we propose below. Passage of this legislation will rectify a situation that was created by the recalculation of concurrent and consecutive prison sentences by the Department of Public Safety (DPS).

Previously, HRS 706-668.5 provided that terms of incarceration would run consecutively unless the court ordered that the sentences were to run concurrently. However, in practice, judges traditionally would specify in the Judgment when the court intended that one term be served consecutively to another term. In other words, the common practice was to specify when consecutive sentencing was ordered but often not to note in the Judgment when sentences were to be concurrent.

There were situations where the court, at sentencing, denied the State's motion for consecutive sentencing, but did not specify concurrent sentencing in the Judgment. There were times when the court would state on the record that concurrent sentencing was intended, but not specify that in the Judgment. Sometimes, the court's intention would be reflected in the court minutes of the proceeding, sometimes only in a complete transcript of the proceedings.

Unfortunately, DPS took it upon itself to interpret HRS 706-608.5 to mean that **unless the Judgment specified concurrent sentencing**, the defendant was subject to consecutive sentencing. So, without checking the court minutes which are easily accessible on the Judiciary's website, or giving the parties a chance to inform DPS that all parties understood the sentence to be concurrent and the transcript would reflect that, DPS recalculated sentences to be consecutive instead of concurrent.

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 make calculations and decisions based upon the Judgment.

We note one concern with the proposed language in (3) (a) at page 1, lines 14-16:

> (3) Any resentencing pursuant to this section of defendants who were sentenced prior to June 18, 2008, shall not:
>
> (a) Be considered as a reopening of a final judgment; or

We are concerned with the language "not be considered as a reopening of a final judgment". We have sought relief in these cases by filing Motions to Correct or Amend the Judgment pursuant to Rule 40 of the Hawaii Rules of Penal Procedure. We would not want to be precluded from seeking such relief, if it were necessary, by the wording proposed in this bill.

However, we understand the desire that this legislation should not be used as vehicle for a defendant to seek a reconsideration of his or her sentence unrelated to the issue of concurrent or consecutive sentencing. Therefore, we would propose the following language to address that concern:

> (3) [Any] Resentencing pursuant to this section of defendants who were sentenced prior to June 18, 2008, shall [not]:
>
> (a) [Be considered as a reopening of a final judgment] only consider the issue of concurrent or consecutive sentencing; [or] and
>
> (b) <u>shall not</u> impose any liability upon the State for sentencing errors.

We do not take a position on subsection (b) as it deals with civil liability which is not within the kuleana of our office.

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

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

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

March 24, 2011

RE: S.B. 106, S.D. 1; RELATING TO HAWAII PENAL CODE.

Chair Keith-Agaran, Vice-Chair Rhoades and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to Senate Bill 106, S.D. 1.

The purpose of Senate Bill 106, S.D. 1 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' original 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, that had 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 should be presumed that any prison sentence imposed on a defendant with previously-imposed prison sentences was intended to be served consecutively, if the court order remained silent on the matter of concurrent or consecutive terms.

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 situations. 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. Given this drastic change in the law, and the possibility that the law could change again in the future, it is our understanding that some judges now make it a practice to specify "concurrent" or "consecutive" for all defendants with previously-imposed prison sentences, to avoid any possible confusion. Nevertheless, those sentences handed down prior to Act 193 had no reason to contemplate such changes, and likely did not specify when a consecutive prison sentence was intended.

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 usurp the courts' authority, by requiring the Department of Public Safety to carry out the opposite of that which was most likely intended by court orders issued prior to June 18, 2008. If prison inmates now serving consecutive sentences wish to have their sentences reviewed, for potential conversion to concurrent sentences, there are already means for them to do so.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes S.B. 106, S.D. 1. Thank you for the opportunity to testify on this matter.

Legislative Testimony

SB106 SD1
RELATING TO THE HAWAII PENAL CODE
House Committee on Judiciary

March 24, 2011 2:00 p.m. Room 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS WITH AMENDMENTS** SB106 SD1. This bill retroactively requires that multiple terms of imprisonment run concurrently unless the court orders or the law mandates that the terms run consecutively. Further, the bill would direct the Department of Public Safety (DPS) to recalculate the sentences of inmates who submit written requests and, if warranted by the recalculation, release the inmates.

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.

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 SB106 SD1, taking our comments into consideration. Mahalo for the opportunity to testify on this important measure.

Committee: Committee on Judiciary
Hearing Date/Time: Thursday, March 24, 2011, 2:00 p.m.
Place: Conference Room 325
Re: *Testimony of the ACLU of Hawaii in Support of S.B. 106, SD1, Relating to the Hawaii Penal Code*

Dear Chair Espero and Members of the Committee on Public Safety, Government Operations, and Military Affairs:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of S.B. 106, SD1, 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 against inmates seeking damages for these over-detentions.

S.B. 106, SD1, 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; S.B. 106, SD1, 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,

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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 45 years.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

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COMMITTEE ON JUDICIARY
Rep. Gil Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Thursday March 24, 2011
Room 325
2:00 p.m.
SB 106 SD1 - STRONG SUPPORT - Multiple Terms of Imprisonment
http://www.capitol.hawaii.gov/emailtestimony

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

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working to create safer and healthier communities for more than a decade in Hawai`i through the enactment of smart justice policies. We respectfully offer our testimony always being mindful that Hawai`i has 6,000 people behind bars with almost 1,800 of those individuals serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, their ancestral lands.

SB 106 SD1 retroactively requires that beginning 01/01/2012 multiple terms of imprisonment run concurrently unless the court orders or the law mandates that the terms run consecutively. Effective immediately, directs department of public safety to recalculate the sentences of inmates who submit written requests and, if warranted by the recalculation, release the inmates. Clarifies that resentencing of defendants whose sentence was imposed prior to effective date of Act 193 shall not be considered as a reopening of a final judgment or impose any liability upon State for sentencing errors.

Community Alliance prefers HB 141 HD1 bill which, in our view, is clearer. Making the effective date reasonable would also be preferable. We got into this expensive mess when PSD's Office of Offender Management, in the person of Tom Read an attorney unlicensed in Hawai`i and on a $100,000/year contract, took it upon himself to recalculate the sentences of Hawai`i inmates, even though this is done at the facility from which the individual is released.

The objections to this measure center around three main issues:

1. Separation of Powers Doctrine
2. Constitutionality
3. Workload Impact

We will briefly explain why these objections hold no weight.

1. **Separation of Powers Doctrine:**

This bill does not violate the Separation of Powers Doctrine (SOP); it rectifies the Department of Public Safety's (PSD) own violation of the separation of powers.

PSD violated SOP when it adopted 1/1/05 COR.05.05 (Read's Recalculation policy), with its own unilateral, executive-branch re-interpretations of judicial intent. The recalculation policy overrode the longstanding, universally known and accepted judicial practice of a silent judgment being interpreted as imposing concurrent sentences, rather than consecutive. These executive-branch reinterpretations, occurring long-after-the-fact, (occurring five, ten, or twenty years after the court's judgment was issued), and interpreting judicial intent as the exact opposite of what PSD itself knew was the prevailing practice, violates the respect and deference the executive branch owed to the judicial branch.

PSD's knowledge of the prevailing practice, and their deliberate decision to infer that silent judgments imposed the harsher consecutive sentence, rather than checking whether there were other court orders, was noted in a January 14, 2010 federal decision by the late Judge Samuel P. King,[1] Judge King wrote that PSD "knew the prior practice differed" and that PSD "changed it"; that PSD "could have inferred that prior judgments would reflect that prior practice and could be worded incompletely."

PSD never bothered to look beyond the judgment. Had they accessed the court records, they would have seen copies of proceedings showing that many sentences were deemed concurrent by the court.

2. **Constitutionality**

It is not this measure that violates constitutional law and principle; it is PSD's recalculation policy, COR.05.05, which is itself unconstitutional.

Because of COR.05.05, PSD and the State are already in a precarious situation practically and in terms of liability, see Alston v. Read, supra, and this bill is a step toward rectifying the due process violations identified by the federal judge - violations which Judge King found, were strong enough to survive the State of Hawai`i's lawyers motions to dismiss those claims.[2] **This bill rectifies the constitutional law violations that currently exist.**

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[1] In a current pending federal lawsuit against PSD alleging federal civil rights violations based on this exact policy at issue herein, COR.05.05, an inmate plaintiff prevailed against the State of Hawai`i's summary judgment motion. Alston v. Read, 678 F.Supp. 1061 (U.S.D.C. D. Hawai`i 2010). Judge King stated pertinently as follows:

. . . there are genuine issues of material fact. There is evidence, construed in the light most favorable to Alston, that Defendants were "deliberately indifferent." In particular, in making this determination a trier-of-fact could look to what Simmons and Read knew when they wrote their letters to Alston . . . .

Defendants have argued that there was no "mistake," given the information they had before them when they changed Alston's "max-out" date. They argue they had no reason to know that the November 20, 1997 Judgment was inconsistent with other court orders. The answer, however, centers around what duty if any Defendants had to investigate. It depends on what they knew and when they knew it. It might reasonably be believed *generally*, as Defendant Read stated during his deposition, that "there's no duty for us to go down [to the state court] *for every case in the entire state of Hawaii* and search through the clerk's files for court documents that the court doesn't send us[.]" [Read depo. at 36 (emphasis added)]. But such a belief might not be reasonable where, among other things:

(1) The November 20, 1997 Judgment being relied upon was written under a different regime (i.e., when the DPS had a known "practice" of treating sentences imposed at different times to be concurrent unless specifically stated otherwise-albeit in apparent contradiction to the then-current language of Haw.Rev.Stat. § 706-668.5). Defendants knew the prior practice differed. They changed it. They could have inferred that prior judgments would reflect that prior practice and could be worded incompletely . . .

. . . .

Id. at 1078-79.

[2] In Alston v. Read, the federal district court found that, "There are genuine issues of material fact as to (1) whether Defendants violated Alston's due process rights under the Fourteenth Amendment to the U.S. Constitution, and (2) whether Defendants were 'deliberately indifferent' to Alston's rights under the Eighth Amendment to the U.S. Constitution." Id. at 1079. The federal court rejected granting DPS officials Read and Simmons immunity from suit,

3. **Workload Impact**

PSD's implementation of this policy was done in a manner where it can easily be undone.

Each inmate whose sentence was recalculated received a letter from Read toward the end of the inmate's original prison term, informing them of the "error", and their new recalculated max-out date, which usually tacked on another couple, five, or ten years to an inmate's sentence. None of the parties involved in the original court proceeding (the sentencing hearing) received copies of these letters. The letters, which were notice of PSD's "error" and "recalculation," were sent directly to the inmate and were not certified; hence there is no guarantee that the inmate ever received the letter.

Thus, PSD is the only entity that has possession of all of the letters, and recalculations. PSD can easily retrieve all of the letters which it generated itself, and undo the recalculations. If PSD is uncertain of the trial court's intent on any given case, PSD should check computerized court minutes and other court orders, which will quickly clarify what the trial judge's intent was, whether to impose the sentences concurrently or consecutively.

In terms of cost, it is far less expensive to spend a finite number of hours to correct the recalculations under COR.05.05, than to spend $137 per day, per inmate on incarceration costs beyond what the court intended. Numerous cases have been won and there is a 9th Circuit case that will be heard in Hawai`i on this issue that Mr. Read told the Ways & Means Committee that he knew nothing about, despite the fact that he had been deposed.

During a deposition in one of the Alston case, defendant Read stated during his deposition, that "there's no duty for us to go down [to the state court] *for every case in the entire state of Hawaii* and search through the clerk's files for court documents that the court doesn't send us. Why are taxpayers burdened with paying for the errors of workers too lazy to do the research?

The remedy to this mess is simple:

- Have PSD identify all the cases (they are the only ones in possession of the letters they sent to inmates)
- Direct the staff to go online http://hoohiki1.courts.state.hi.us/jud/Hoohiki/main.htm to review the minutes of these cases to determine if the court ordered concurrent or consecutive sentences. No one even has to leave their work station!

Mahalo for hearing this measure and for the opportunity to testify. We earnestly hope that the Legislature puts a stop to this rogue division of public safety and corrects this egregious injustice.

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finding that, Here, the Court finds at minimum that there are disputes of "material historical fact." *Saucier* requires a court to address whether a reasonable prison official with Defendants' duties could have believed that their conduct "was unlawful *in the situation [they] confronted.*" *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. There are factual disputes about, among other questions, whether Read or Simmons had a duty to inquire further before changing Alston's release date and whether they acted with actual "deliberate indifference." Thus, it is unclear what "the situation they confronted" was when they failed to investigate whether their change in Alston's release date from 2007 to 2011 was contrary to the language of Alston's November 20, 1997 judgment. The Court cannot at this stage grant Defendants immunity from suit.

Id. at 1081.

March 24, 2011

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

From: Jeanne Y. Ohta, Executive Director

RE: SB 106 SD1 Relating to the Hawaii Penal Code
Hearing: Thursday, March 24, 2011, 2:00 p.m., Room 325

Position: Strong Support

The Drug Policy Forum of Hawai`i writes in strong support of SB 106 SD1 Relating to the Hawaii Penal Code.

SB 106 SD1 retroactively requires that multiple terms of imprisonment run concurrently unless the court orders or the law mandates that the terms run consecutively; applying to all terms of imprisonment imposed before, on, or after 7/1/2011and 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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