



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SEVENTH LEGISLATURE, 2014**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1717, RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE.

**BEFORE THE:**

HOUSE COMMITTEE ON PUBLIC SAFETY

**DATE:** Thursday, February 06, 2014 **TIME:** 10:00 a.m.

**LOCATION:** State Capitol, Room 309

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Lance M. Goto, Deputy Attorney General.

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Chair Aquino and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to establish reasonable guidelines and limitations for the post-conviction retention of biological evidence by law enforcement agencies and the courts, thereby making their retention responsibilities more reasonable and manageable. This bill also provides a procedure for defendants to oppose the disposal of biological evidence by filing an objection with the court.

Section 844D-126 of the Hawaii Revised Statutes sets out the requirements for the retention of biological evidence as follows:

All evidence in the custody or control of a police department, prosecuting attorney, laboratory, or court that is related to the investigation or prosecution of a case in which there has been a judgment of conviction and that may contain biological evidence that could be used for DNA analysis shall be retained at least until the later occurring of either:

- (1) The exhaustion of all appeals of the case to which the evidence is related; or
- (2) The completion of any sentence, including any term of probation or parole, imposed on the defendant in the case to which the evidence relates.

The current retention requirements are very broad and require the police to retain all evidence that may contain biological evidence in any case in which there has been a conviction. The requirements apply to all felony, misdemeanor, and petty misdemeanor cases that have resulted in convictions, regardless of whether the identity of the perpetrator was an issue. This means that evidence that may only contain biological evidence must be retained regardless of whether the biological evidence was relevant to the case.

These broad requirements have caused storage problems statewide. DNA material could be on many things. DNA could be found in things like hair, saliva, blood, semen, sweat, skin, or skin cells. It could be found in mucus material from coughs or sneezes. It could be on used tissues or cigarettes, or in a car, boat, or bus.

This bill will establish reasonable and manageable requirements for the storage retention of biological evidence that will still allow defendants the opportunity to object to the disposal of biological evidence.

The Department respectfully requests the passage of this bill.



*The Judiciary, State of Hawai‘i*

**Testimony to the House Committee on Public Safety**

Representative Henry J. C. Aquino, Chair

Representative Kaniela Ing, Vice Chair

Thursday, February 6, 2014, 10:00 a.m.

State Capitol, Conference Room 309

By

Calvin Ching

Deputy Chief Court Administrator, First Circuit Court

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**Bill No. and Title:** House Bill No. 1717, Relating to the Retention of Biological Evidence.

**Purpose:** Establishes specific offenses for which evidence shall be retained. Allows law enforcement agencies to petition the court to dispose of biological evidence. Requires the court to use a preponderance of evidence standard in determining whether to allow the law enforcement agency to dispose of the biological evidence..

**Judiciary's Position:**

The Judiciary supports the intent of House Bill No. 1717.

House Bill No. 1717 proposes to amend Section 844D-126, Hawaii Revised Statutes by establishing reasonable guidelines for post-conviction retention of biological evidence. The current statute is broad. This bill significantly reduces the number of applicable cases, thereby reducing the potential number of evidentiary items that would need to be maintained by each of the agencies, including the Judiciary; thus, making retention responsibilities more manageable.

However, we respectfully note that long-term storage issues remain as well the potential impact this measure may have on the Judiciary's workload and caseload should the defendant elect to preserve biological evidence pursuant to this bill.

Thank you for the opportunity to provide comments on this measure.

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

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KEITH M. KANESHIRO  
PROSECUTING ATTORNEY

ARMINA A. CHING  
FIRST DEPUTY PROSECUTING ATTORNEY



**THE HONORABLE HENRY J.C. AQUINO, CHAIR**  
**HOUSE COMMITTEE ON PUBLIC SAFETY**  
Twenty-seventh State Legislature  
Regular Session of 2014  
State of Hawai'i

February 6, 2014

**RE: H.B. 1717; RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE.**

Chair Aquino, Vice-Chair Ing and members of the House Committee on Public Safety, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following comments in support of House Bill 1717. This bill amends guidelines and limitations for the post-conviction retention of biological evidence by law enforcement agencies and the courts. It also provides procedures for agencies to dispose of retained evidence and for defendants to file objections to proposed disposals.

The current law relating to retention of biological evidence is causing storage problems for police departments across the State because all evidence with potential biological evidence must be retained, including large items like vehicles. House Bill 1717 will help the storage problem by requiring retention of potential biological evidence where there has been a conviction for murder, manslaughter, kidnapping, sexual assault in the first degree, sexual assault in the second degree, assault in the first degree, or attempt or criminal conspiracy to commit one of these offenses. The biological evidence is used for identifying the person who committed the offense or excluding a person from the offense.

For the reasons stated, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of House Bill 1717. Thank you for the opportunity to testify on this matter.

ALAN M. ARAKAWA  
Mayor



JOHN D. KIM  
Prosecuting Attorney  
ROBERT D. RIVERA  
First Deputy Prosecuting Attorney

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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150 S. HIGH STREET  
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CONTACT: RICHARD. K. MINATOYA  
Deputy Prosecuting Attorney  
Supervisor, Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY  
ON

HB 1717 - RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE

February 6, 2014

The Honorable Henry J. C. Aquino  
Chair  
The Honorable Kaniela Ing  
Vice Chair  
and Members  
House Committee on Public Safety

Chair Aquino, Vice Chair Ing and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, **STRONGLY SUPPORTS** HB 1717 - Relating to the Retention of Biological Evidence. The bill amends guidelines and limitations for post-conviction retention of biological evidence by law enforcement agencies and courts, and provides procedures for agencies to dispose of retained evidence and for defendants to file objections to proposed disposals.

The current law relating to the retention of biological evidence is causing storage problems statewide because all evidence with potential biological evidence, including large items like vehicles, must be retained even when identification through biological evidence is not at issue. SB 2128 will solve the storage problem by limiting the required retention to specific offenses, and creates a method for disposal with input from defendants.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, **STRONGLY SUPPORTS** the passage of this bill. We ask that the committee **PASS** HB 1717.

Thank you very much for the opportunity to provide testimony on this bill.

**Justin F. Kollar**  
Prosecuting Attorney

**Kevin K. Takata**  
First Deputy



**Rebecca A. Vogt**  
Second Deputy

**Diana Gausepohl-White, LCSW**  
Victim/Witness Program Director

**OFFICE OF THE PROSECUTING ATTORNEY**

**County of Kaua'i, State of Hawai'i**

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Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY IN SUPPORT OF  
H.B. NO. 1717 – RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE**

Justin F. Kollar, Prosecuting Attorney  
County of Kaua'i

House Committee on Public Safety  
February 6, 2014

Chair Aquino, Vice Chair Ing and Members of the Committee:

The County of Kauai, Office of the Prosecuting Attorney, **STRONGLY SUPPORTS** HB 1717 – Relating to the Retention of Biological Evidence. HB 1717 will amend guidelines and limitations for post-conviction retention of biological evidence by law enforcement entities and courts, and provides procedures for agencies to dispose of retained evidence and for defendants to file objections to proposed disposals.

The current law pertaining to retention of biological evidence is presenting storage problems statewide because all potential biological evidence must be retained, including vehicles and other large, bulky items, must be retained, even when identification through biological evidence is not at issue in the case. This bill will resolve that problem by limiting the retention to specific offenses and creating a method for disposal with input from defendants.

Based on the foregoing, the County of Kauai, Office of the Prosecuting Attorney, **STRONGLY SUPPORTS** the passage of this bill. We ask that the Committee **PASS** HB 1717.

Thank you very much for the opportunity to provide testimony on this bill.

Respectfully,

Justin F. Kollar  
Prosecuting Attorney

# POLICE CHIEFS OF HAWAII ASSOCIATION

C/O 801 SOUTH BERETANIA STREET  
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## POLICE CHIEFS

LOUIS M. KEALOHA  
Honolulu  
HARRY S. KUBOJIRI  
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GARY A. YABUTA  
Maui



## DEPUTY POLICE CHIEFS

MICHAEL M. CONTRADES  
Kauai  
PAUL K. FERREIRA  
Hawaii County  
DAVE M. KAJIHIRO  
Honolulu  
MARIE A. McCAULEY  
Honolulu  
CLAYTON N. Y. W. TOM  
Maui

OUR REFERENCE TN/DMK-DK

February 6, 2014

The Honorable Henry J. C. Aquino, Chair  
and Members  
Committee on Public Safety  
House of Representatives  
Hawaii State Capitol, Room 309  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Aquino and Members:

SUBJECT: House Bill No. 1717, Relating to the Retention of Biological Evidence

I am Deputy Chief Dave M. Kajihiro of the Honolulu Police Department (HPD), City and County of Honolulu.

The members of the Police Chiefs of Hawaii Association support House Bill No. 1717, Relating to the Retention of Biological Evidence.

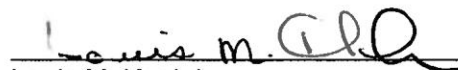
This bill defines the offenses for which biological evidence shall be retained. It also requires a nexus for which the biological evidence shall be used in establishing the identity of the defendant or the exclusion of possible suspects. The proposed amendments additionally provide a process for disposal of retained evidence to release critical storage space.

Thank you for the opportunity to testify.

Sincerely,

  
Dave M. Kajihiro  
Deputy Chief of Police

Approved:

  
Louis M. Kealoha  
Chief of Police

cc: Chief Harry S. Kubojiri  
Chief Darryl D. Perry  
Chief Gary A. Yabuta



ALAN M. ARAKAWA  
MAYOR

OUR REFERENCE  
YOUR REFERENCE

# POLICE DEPARTMENT

## COUNTY OF MAUI

55 MAHALANI STREET  
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February 6, 2014



GARY A. YABUTA  
CHIEF OF POLICE

CLAYTON N.Y.W. TOM  
DEPUTY CHIEF OF POLICE

The Honorable Henry J.C. Aquino, Chair  
And Members of the Committee on Public Safety  
House of Representatives  
State Capitol  
Honolulu, HI 96813

RE: House Bill No. 1717 – Relating to the Retention of Biological Evidence

Dear Chair Aquino and Members of the Committee:

The Maui Police Department supports the passing of HB 1717. This bill establishes offenses for which evidence shall be retained; allows law enforcement agencies to petition the court to dispose of biological evidence, and requires the court to use a preponderance of evidence standard in determining whether to allow the law enforcement agency to dispose of the biological evidence.


The bill proposes guidelines for the post-conviction disposal of biological evidence upon filing a notification of proposed disposal with the court, which will help to alleviate the ever growing storage and retention issue of evidence in our facility, as well as others across the state. Providing adequate space for the storage and security of evidence has always been a challenge for police departments, as the retention of evidence quickly outgrows the facilities provided for them. Currently, an estimated 25% of evidence stored by the Maui Police Department can be considered biological evidence.

This bill also proposes a method to properly approve disposal of biological evidence, which includes input from defendants, and will greatly assist police departments throughout the state with evidence storage issues.

The Maui Police Department supports the passage of HB 1717.

Thank you for the opportunity to testify.

Sincerely,

  
For GARY A. YABUTA  
Chief of Police



**TESTIMONY OF THE HAWAII POLICE DEPARTMENT**  
**HOUSE BILL 1717**  
**RELATING TO REGISTRATION OF COVERED OFFENDERS**  
**BEFORE THE COMMITTEE ON PUBLIC SAFETY**

DATE : Thursday, February 6, 2014

TIME : 10:00 A.M.

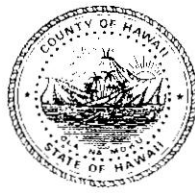
PLACE : Conference Room 309  
State Capitol  
415 South Beretania Street

PERSON TESTIFYING:

Acting Police Chief Paul K. Ferreira  
Hawaii Police Department  
County of Hawaii

(Written Testimony Only)

William P. Kenoi  
*Mayor*



Harry S. Kubojiri  
*Police Chief*

Paul K. Ferreira  
*Deputy Police Chief*

## County of Hawai'i

### POLICE DEPARTMENT

349 Kapiolani Street • Hilo, Hawai'i 96720-3998  
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February 4, 2014

Representative Henry J.C. Aquino  
Chairperson and Committee Members  
Committee on Public Safety  
415 South Beretania Street, Room 309  
Honolulu, Hawai'i 96813

**RE: HOUSE BILL 1717, RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE**

Dear Representative Aquino:

The Hawai'i Police Department supports House Bill 1717 with its purpose being to amend guidelines and limitations for the post-conviction retention of biological evidence by law enforcement agencies and the courts.

We believe it is necessary to amend the guidelines and limitations due to the overwhelming burden that the retention of evidence places on Law Enforcement Agencies (LEA) even after cases have been adjudicated in the Courts. The guidelines and procedures as set forth allows for an LEA to dispose of retained biological evidence that is deemed no longer necessary for the pursuit of justice while at the same time providing for protections for the defendants as it allows them to file objections to proposed disposals.

The Hawai'i Police Department currently utilizes a total of 37,553 square feet of evidence storage space, which is not inclusive of the pending addition of another 3,000 square foot warehouse. Our department currently leases some of the previously identified evidence storage space at a monthly sum of approximately \$16,538. At the current pace of evidence being added, we will soon have to seek even more storage space with climate controls in order to properly maintain biological evidence. Given the cost factors involved, manpower to continuously maintain and inventory the evidence and more so, for the duration of time involved with the current requirements, this legislation as drafted will greatly aid our department.

For these reasons, we urge this committee to approve this legislation.

Thank you for allowing the Hawai'i Police Department to provide comments relating to House Bill 1717.

Sincerely,

PAUL K. FERREIRA  
ACTING POLICE CHIEF

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON PUBLIC SAFETY

Rep. Henry Aquino, Chair

Rep. Kaniela Ing, Vice Chair

Thursday, February 6, 2014

10:00 a.m.

Room 309

## OPPOSITION TO HB 1717 - RETENTION OF BIOLOGICAL EVIDENCE

Aloha Chair Aquino, Vice Chair Ing and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 5,800 Hawai'i individuals living behind bars, always mindful that approximately 1,500 Hawai'i individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 1717 establishes specific offenses for which evidence shall be retained. Allows law enforcement agencies to petition the court to dispose of biological evidence. Requires the court to use a preponderance of evidence standard in determining whether to allow the law enforcement agency to dispose of the biological evidence.

Community Alliance on Prisons opposes this bill.

The Senate version of this bill was rushed through committee and was up for third reading on February 4<sup>th</sup> until it was recommitted to the Judiciary and Labor Committee.

Preserved evidence can help solve closed cases - and exonerate the innocent. Preserving biological evidence from crime scenes is critically important because DNA can provide the best evidence of innocence - or guilt - upon review of a case. Forensic science is evolving and tossing out evidence that could convict the guilty and free the innocent is a bad idea.

Consider this scenario: The prosecutor is leveling charges against a person and then decides to have the case dismissed. The evidence is tossed out. Then, at a later date, the prosecutor decides to try the case that was previously dismissed, but now all the evidence has been thrown out; evidence that could free the innocent and convict the guilty is gone. How is that justice?

None of the nation's 312 DNA exonerations would have been possible had the biological evidence not been available to test. Had the evidence been destroyed, tainted, contaminated, mislabeled, or otherwise corrupted, the innocence of these individuals would never have come to light.

The proponents of the Senate bill asserted that their duty to preserve evidence is a great economic and administrative burden. Community Alliance on Prisons asserts that biological evidence is not collected in the majority of criminal cases.<sup>1</sup> Murder, rape and sexual assault cases, where biological evidence is most likely to be recovered, are a small percentage of the thousands of criminal cases police and prosecutors must handle each year. Therefore, the duty to preserve biological evidence will only exist in a very small percentage of cases.

The proponents have said that they are running out of room because they have to store large items such as cars. However, the government is not required to keep and store bulky, oversized pieces of physical evidence. When biological material is found on large pieces of evidence, the government would only be required to extract a sample of the biological material in a sufficient quantity to allow DNA testing.<sup>2</sup>

While storage space may be a concern, HB 1717 would free up little space. DNA testable material is found in only approximately ten percent (10%) of all cases, and the items which may contain biologically testable material will typically be few, and not bulky. Thus, allowing the destruction of potentially testable material will free up little space, and will benefit no-one, apart from the actual murderer or rapist in a case in which the wrong person has been convicted.

In 2004, Congress passed the Justice for All Act (H.R. 5107), which provides financial incentives for states to preserve evidence, and withholds those same monies for states that do not adequately preserve evidence. If additional storage space is needed, it would be far better to seek funding for adequate facilities, rather than to destroy crucial evidence AND potentially become ineligible for federal assistance for needed facilities.

The proponents cite the expense of having to comply with the law. Under the current state of technology, DNA analysis can be successfully performed on biological material as long as the evidence is stored in a dry, dark, air-conditioned room.<sup>3</sup> No costly refrigeration is required. In fact, the biological evidence successfully analyzed in many DNA exonerations had previously been stored for many years in un-refrigerated evidence storage rooms.<sup>4</sup>

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<sup>1</sup> Convicted By Juries, supra note 15, at xxiii (stating it is unlikely that the perpetrator of a crime will leave biological material at the crime scene in cases other than sexual assault); John T. Rago, "Truth or Consequences" and Post-Conviction DNA Testing: Have You Reached Your Verdict?, 107 DICK. L. REV. 845, 851-52 (2002-2003) (estimating that in approximately 80% of serious felony cases there is no biological evidence); see also Findley, supra note 18, at 22 (stating in most cases the perpetrator does not leave biological evidence).

<sup>2</sup> E.g., D.C. CODE [section] 22-4134(c) (2001) ("The District of Columbia shall not be required to preserve evidence that must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable. If practicable, the District of Columbia shall remove and preserve portions of this material evidence sufficient to permit future DNA testing before returning or disposing of it."); Accord Innocence Protection Act of 2004, 18 U.S.C. [section] 3600A (c)(4)(A)-(B) (Supp. 2005); ARK. CODE ANN. [section] 12-12-104 (c)-(d) (2003); 725 ILL. COMP. STAT. 5/116-4(C)(1)-(2) (Supp. 2005); MD CODE ANN., CRIM. PROC. [section] 8-201 (j)(4)(ii) (Supp. 2004); N.M. STAT. ANN. [section] 31-1a-2 (M)(3)-(4) (Supp. 2003); VA. CODE ANN. [section] 19.2-270.4:1(D) (2004).

<sup>3</sup> S. REP. NO. 107-315 at 20.

<sup>4</sup> ARTICLE; *EVIDENCE DESTROYED, INNOCENCE LOST; THE PRESERVATION OF BIOLOGICAL EVIDENCE UNDER INNOCENCE PROTECTION STATUTES*, Cynthia E. Jones, American Criminal Law Review, 42 Arn. Crim. L. Rev. 1239, Fall 2005. <http://leg.mt.gov/content/Committees/Interim/2011-2012/Law-and-Justice/Meeting-Documents/15-16dec11/evidence.pdf>

HB 1717 would allow destruction of evidence at the end of an appeal. This would preclude testing of evidence for purposes of relief based on newly discovered evidence under HRPP Rule 40, as well as thwarting any relief based on DNA testing that may be allowed under a petition for a writ of habeas corpus in the federal courts. A direct appeal is a vehicle for reviewing legal error, so to limit the preservation of biological evidence to the direct appeal would entirely preclude relief based on new DNA testing.

For years Hawai'i prosecutors have been trying to limit Rule 40 – post conviction cases, despite the emergence of new forensic science and evidence that the number of these cases has decreased over the last several years.

Preserved evidence can help solve closed cases – and exonerate the innocent. Preserving biological evidence from a crime scenes is critically important because DNA can provide the best evidence of innocence – or guilt – upon review of a case.

Preserved evidence (most of which had been thrown out) freed the Maui man who served more than 20 years in prison for a rape he did not commit. This is not justice.

“There have been 312 post-conviction DNA exonerations in United States history. These stories are becoming more familiar as more innocent people gain their freedom through post-conviction testing. They are not proof, however, that our system is righting itself. The common themes that run through these cases – from global problems like poverty and racial issues to criminal justice issues like eyewitness misidentification, invalid or improper forensic science, overzealous police and prosecutors and inept defense counsel – cannot be ignored and continue to plague our criminal justice system.

- 18 people had been sentenced to death before DNA proved their innocence and led to their release.
- The average sentence served by DNA exonerees has been 13.6 years.
- About 70 percent of those exonerated by DNA testing are people of color.
- In almost 50 percent of DNA exoneration cases, the actual perpetrator has been identified by DNA testing.
- Exonerations have been won in 35 states and Washington, D.C.
- The Innocence Project was involved in 172 of the 312 DNA exonerations. Others were helped by Innocence Network organizations, private attorneys and by pro se defendants in a few instances.”<sup>5</sup>

2013 was a record-breaking year for exonerations in the United States. The National Registry of Exonerations has recorded 87 exonerations that occurred in 2013. The next highest total was in 2009, with 83 known exonerations, and the difference is bound to grow as we learn about additional exonerations that occurred in 2013.<sup>6</sup>

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<sup>5</sup> The Innocence Project, *Know the Cases*, <http://www.innocenceproject.org/know/>

<sup>6</sup> EXONERATIONS IN 2013, The National Registry of Exonerations, February 4, 2014. [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf)

None of the nation's 312 DNA exonerations would have been possible had the biological evidence not been available to test. Had the evidence been destroyed, tainted, contaminated, mislabeled, or otherwise corrupted, the innocence of these individuals would never have come to light.

Biological evidence retention is a crucial piece of justice and must be retained. Post-conviction DNA is needed to prosecute the guilty and free the innocent. Fiscal and administrative concerns should not dictate whether evidence is preserved to exonerate the innocent.

For years the prosecutors have been trying to limit Rule 40 - post conviction cases, despite the emergence of new science and evidence that the number of these cases has decreased over the last several years.

Lastly, in our humble opinion, the notification process is flawed. In practice, it will be difficult or impossible in many cases to notify persons who may wish to object to the destruction of evidence. Attorneys die, retire, move to other jurisdictions, or otherwise become unavailable. Notices directly to inmates are subject to the errors of outdated addresses, name confusion, prison lockdowns, or other problems which can prevent the inmate from receiving timely notice directly.

Chapter 844D of the Hawai'i Revised Statutes intentionally provided for the preservation of all items of physical evidence relating to felony crimes and it remains in the best interests of Hawai'i's people to maintain the ability to prosecute cold cases and exonerate the innocent.

Community Alliance on Prisons, therefore, respectfully asks the committee to hold this measure and retain HRS Chapter 844 D in its present form.

Mahalo for this opportunity to testify.