

1. The Judiciary has implemented alternative programs pursuant to section 706-605.1, Hawaii Revised Statutes (HRS), to place, control, supervise, and treat selected defendants in lieu of a sentence of incarceration, such as Drug Court or HOPE probation. Offenders can enter Drug Court upon the filing of charges and, if they successfully complete Drug Court, will have their cases dismissed, with no criminal conviction.
2. A first-time, non-violent drug possession offender (even a repeat offender with a prior felony offense for crime that did not involve drugs) may be sentenced to probation and drug treatment, pursuant to 706-622.5, HRS. An offender who has successfully completed probation and drug treatment will be entitled to an expungement of his conviction for the drug offense. The expungement will clear the conviction from the person's record.
3. A person without any prior drug convictions could request a conditional discharge for a drug offense, pursuant to section 712-1255, HRS. The court would not enter a judgment of guilt. It would defer proceedings, and place the offender on probation with conditions such as drug treatment. Upon successful completion of the conditions of probation, the court will discharge the offender and dismiss the proceedings against the offender. There would be no conviction on the offender's record.
4. The deferred acceptance of plea ("DAG" or "DANC") pursuant to section 853-1, HRS, is very similar to a conditional discharge. A person previously granted a conditional discharge could still be eligible for a deferred acceptance of plea. Also, a person previously granted a deferred acceptance of plea could still be eligible for a conditional discharge.

The sentencing courts have many alternatives to address drug possession charges. In sentencing a defendant to prison, there is usually more than the mere conduct of possessing drugs that get them there, so discretion to reduce the indeterminate term for prison for these offenses really have no net effect for what this bill attempts to address.

Furthermore, if a defendant is sentenced to a maximum indeterminate term of imprisonment under our existing laws, the parole board, in its discretion, would determine the

actual amount of time that the defendant would serve in prison. While a defendant may be sentenced to a five-year term of imprisonment for a class C felony, the defendant might actually be released on parole within one or two years. The balance of that sentence would be used to monitor and supervise the defendant and assist the defendant in addressing drug abuse issues or any other issues the defendant may have.

Notwithstanding the opposition noted above, the Department also has serious concerns that this bill is actually not excluding anything from part IV of chapter 712. This bill appears to be trying to exclude: (1) the mandatory minimum or enhanced sentencing provisions (repeat offender, use of firearm, and Manufacturing a Controlled Substance with a Child Present); and (2) a list of enumerated offenses. Under (2), these listed enumerated sections do not contain any provisions to except them from indeterminate term sentencing, i.e., there is no mandatory minimum incarceration built in to the offense, they are just classified as “class C felony” or “class B felony.” In this bill, the reduced indeterminate term provisions can still apply, even if any of the specified “excluded” sections are applicable at sentencing. For example, it appears that a defendant, facing sentencing for Promoting a Dangerous Drug in the Second Degree, and who is also subject to repeat offender sentencing, can still get a reduced indeterminate term from a sentencing court under this bill.

Accordingly, the Department of the Attorney General respectfully requests this bill be held.

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 KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawai'i

March 22, 2013

RE: S.B. 68, S.D. 1; RELATING TO SENTENCING.

Chair Rhoads, Vice-Chair Har, 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 strong opposition to S.B. 68, S.D. 1.

The effects of S.B. 68, S.D. 1, would give courts free-reign to establish any maximum term of imprisonment for class B and class C drug felonies, up to 10 years and 5 years respectively. Not only would this pose a drastic change to the current perception of class B and class C felonies, generally undermining the consistency and predictability that comes with this type of classification system, but it also seems to go against the very purpose for which our drug schedules and criminal drug offenses were designed.

Class B and class C drug felonies are, by their very classification, tremendously serious offenses, and should be subject to terms of imprisonment consistent with other class B and C felonies. This is particularly important, given that many class B and C drug felony convictions are the result of plea agreements for crimes originally charged as class A felonies. Moreover, those who commit drug offenses are provided numerous opportunities for diversion and rehabilitation, through various programs such as HOPE and Drug Court, conditional discharge under HRS §712-1255, and special sentencing (expanded in 2012) under HRS §706-622.5.

Like all criminal offenses, our criminal drug offenses are carefully classified to reflect the dangerousness of the offense; one of the most important considerations is the drug in question. When the legislature passed the Uniform Controlled Substances Act in 1972—the same year the Hawai'i Penal Code was passed—they intentionally created drug schedules that "reflect the relative danger of a substance," and ensured that these schedules would be subject to continuous

review and updates, to remain consistent with changes in society and science. House Stand. Comm. Rep. No. 87-72, in 1972 House Journal (emphasis added). Indeed, our current drug schedules are based solely on the degree of danger or probable danger posed by each drug therein, considering not only the biomedical hazards, but the probability and detriment of abuse, the anticipated impacts of widespread abuse, and other significant factors. HRS §329-11. With this deliberate crafting of the drug schedules, the 1972 legislature simultaneously crafted criminal drug offenses in the Hawai'i Penal Code, and linked those offenses directly to the drug schedules. Conf. Com. Rep. No. 2-72, in 1972 Senate Journal; Conf. Com Rep. No. 3-72, in 1972 Senate Journal.

In addition to the dangerousness of a particular scheduled drug, our criminal drug offenses—and their correlating classifications as class A felonies, class B felonies, class C felonies, misdemeanors and petty misdemeanors—also distinguish between the differing levels of danger posed by the nature of the offense (possession, use, manufacture and/or distribution), and the amount of substance involved. *Id.* Thus, like every other class B and class C felony, the classification of our class B and class C drug offenses correlate to the level of danger presented—that is, danger to society as well as to the individual—and should be sentenced accordingly.

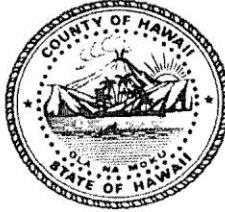
If the legislature determines that certain class B or class C felony drug offenses are not tantamount to their current classifications, or that particular drugs are not tantamount to their current scheduling, it is clearly within the legislature's authority to change those classifications or drug schedules. However, classifications and schedules, such as these, are the primary tool that the legislature has to maintain some semblance of consistency and predictability within our criminal justice system—not only for the parties involved in a particular case, but for the public at large—and should be taken very seriously.

The drastic and sweeping change posed by S.B. 68, S.D. 1, would severely discount the significance of establishing drug schedules or class B or class C felony classifications (for drug offenses), and essentially undermine the purpose of creating these things. As noted above, drug offenders are afforded numerous opportunities for diversion and rehabilitation, and some of these measures were enacted so recently that they have barely begun to take effect.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of S.B. 68, S.D. 1. Thank you for the opportunity to testify on this matter.

MITCHELL D. ROTH
PROSECUTING ATTORNEY

DALE A. ROSS
FIRST DEPUTY
PROSECUTING ATTORNEY



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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION OF SENATE BILL 68 SD1

RELATING TO SENTENCING

COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair

Rep. Sharon E. Har, Vice Chair

Friday, March 22, 2013 2:00 p.m.
State Capitol, Conference Room 325

Chair Rhoads, Vice Chair Har, and Members of the Committee:

The Hawaii County Office of the Prosecuting Attorney, joins the rest of the State's law enforcement community and **STRONGLY OPPOSES** Senate Bill 68 SD1, Relating to Sentencing.

This vast majority of the serious violent crime cases seen by the Office of the Prosecuting Attorney are drug related cases. Further the majority of Class C felony and Class B felony drug cases seen by the Prosecutor's office are related to people who are dealing drugs, primarily methamphetamine (ICE). Basically, this bill seeks to reduce the penalty to the people who are causing the greatest problems to our community by distributing drugs, which are the primary cause of most crime in Hawaii County.

For the forgoing reasons, the Office of the Prosecuting Attorney, County of Hawaii, Strongly Opposes SB 68SD1.

Mahalo for the opportunity to provide testimony on this bill.

Mitchell D. Roth
Prosecuting Attorney
County of Hawaii



DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
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
SB 68, SD 1 - RELATING TO SENTENCING

March 22, 2013

The Honorable Karl Rhoads
Chair
The Honorable Sharon E. Har
Vice Chair
and Members
House Committee on Judiciary

Chair Rhoads, Vice Chair Har, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, OPPOSES SB 68, SD 1, Relating to Sentencing.

This bill provides for "discretion" for sentencing judges when sentencing drug offenders for class B and C felonies.

The main problem is that the bill would allow defendants in certain cases to receive "ten years or less" for Class B felonies, and "five years or less" for Class C felonies. This negates the difference in severity of those Class B and Class C felonies, because a defendant may be sentenced in a Class B case to a prison term that is far less than a defendant in a Class C case. At the very least, the bill should be amended to provide "not less than 5 years nor more than 10 years" for Class B cases.

Second, it appears that a repeat offender who would normally be subject to repeat offender sentencing, may be eligible for a reduced indeterminate term under this bill. Such sentencing opportunities for repeat offenders are a disservice to the safety and security of our communities.

Finally, we are also concerned that the bill appears to call for retroactive application to cases that we already finished. We believe that this is an improper application of law. Section 3, and references to Section 3 in Section 4, should be deleted.

We ask that SB 68, SD 1 be HELD.

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

3990 Ka'ana Street, Suite 210, Līhu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY IN OPPOSITION TO
S.B. NO. 68, S.D. 1
A BILL FOR AN ACT RELATING TO SENTENCING**

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

House Committee on Judiciary

**Friday, March 22, 2013
2:00 p.m., Room 325**

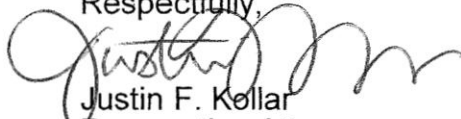
Honorable Chair Rhoads, Vice-Chair Har, and Members of the House Committee on Judiciary, the Office of the Prosecuting Attorney, County of Kaua'i submits the following testimony in strong opposition to Senate Bill No. 68, S.D. 1.

The purpose of Senate Bill No. 68 S.D. 1 is to amend the Hawai'i Revised Statutes, Section 706-660 by allowing the courts discretion when sentencing a defendant convicted in a class B or class C felony drug case to a length in prison deemed appropriate to an offender's particular offense and underlying circumstances.

The Hawai'i Paroling Authority already performs this function and determines the defendant's minimum term; it would be unnecessary to change the statute to allow judges "discretionary" terms in determining sentencing when there are guidelines already set in place. Previous acts also allow for probation sentences for first-time and non-violent drug offenders.

For these reasons we are in strong opposition to Senate Bill No. 68 S.D. 1. Thank you for the opportunity to testify on this matter.

Respectfully,


Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

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

LATE

March 28, 2013

S.B. NO. 68, S.D.1 RELATING TO SENTENCING.

Representative Rhoads and Members of the Committee:

S. B. 68, S.D. 1 proposes to allow discretionary prison terms for most class “B” (currently carries a maximum 10 year prison term or a possible term of 5 years’ probation with up to 18 months prison) and class “C” (currently carries a maximum 5 year prison term or a possible term of 5 years’ probation with up to 12 months prison) drug offenses.

Instead of the maximum terms noted above for class “B” and “C” cases, this bill proposes that a judge would have the discretion to sentence offenders in those instances to “10 years or less” in class “B” cases and to “5 years or less” in class “C” cases; in other words, the court would be able to go below the current maximum indeterminate terms currently mandated by statute. It is noteworthy that this bill would only apply to those drug cases where prison was imposed; i.e., it would not affect those cases where a sentence of probation was imposed.

We believe that the application of this bill would be very narrow. It would not apply to defendants being sentenced to prison as repeat offenders who are therefore not eligible for probation. It would also not be necessary for defendants being sentenced for second drug offenses as they are currently eligible for probation under Chapter 706-622.5 (which allows for probation even if the person is a repeat offender).

Therefore, it appears that this bill would only apply to non-repeat, non-first or second-time drug offenders. In other words, it would apply to persons eligible for probation but who the court chose to sentence to prison, persons whose probation was revoked and prison was being imposed, and to persons being sentenced for a third or subsequent drug offense. In those cases, this bill would allow the judge to impose less than the maximum sentence currently in our statute.

We do have concerns regarding some of the offenses that are excluded from the discretionary sentencing provided for in the bill. For example, we don’t believe that selling single cigarettes or packs less than 20 (712-1257) should be excluded from the application of this proposed new law.

We also do not support the provision in Section 3 that a defendant could seek a one-time review of the sentence but would not be allowed to appeal, even in the case of abuse of discretion. We suggest deleting the sentence beginning at line 15 and ending in line 16 at page six.

With the noted reservations, we support this legislation. Thank you for the opportunity to comment on this bill.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu-pd.org



KIRK W. CALDWELL
MAYOR

LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE JK-TA

March 22, 2013

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: Senate Bill No. 68, S.D. 1, Relating to Sentencing

I am Jason Kawabata, Captain of the Narcotics/Vice Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes Senate Bill No. 68, S.D. 1, Relating to Sentencing.

With its continuing designation as a high-intensity drug-trafficking area, Hawaii remains a target of the international drug trade. The mandatory minimum sentencing guidelines provide consistent penalties that promote public safety by serving as deterrents to drug traffickers and users.

While we agree that effective treatment for substance abusers is an important part of the process, strict sentencing guidelines provide incentive for offenders to comply with such programs. Furthermore, as written, Senate Bill No. 68, S.D. 1, would permit reduced sentencing for persons who distribute Schedule V substances in large quantities in violation of Section 712-1247, Hawaii Revised Statutes.

The Honolulu Police Department urges you to oppose Senate Bill No. 68, S.D. 1, Relating to Sentencing.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,

A handwritten signature in black ink, appearing to read "Louis M. Kealoha", written over a horizontal line.

LOUIS M. KEALOHA
Chief of Police

A handwritten signature in black ink, appearing to read "Jason Kawabata", written in a cursive style.

JASON KAWABATA, Captain
Narcotics/Vice Division

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
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LATE

KIRK W. CALDWELL
MAYOR



LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE **JI-TA**

March 28, 2013

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: Senate Bill No. 68, S.D. 1, Relating to Sentencing

I am Jerry Inouye, Major of the Narcotics/Vice Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes Senate Bill No. 68, S.D. 1, Relating to Sentencing.

With its continuing designation as a high-intensity drug-trafficking area, Hawaii remains a target of the international drug trade. The mandatory minimum sentencing guidelines provide consistent penalties that promote public safety by serving as deterrents to drug traffickers and users.

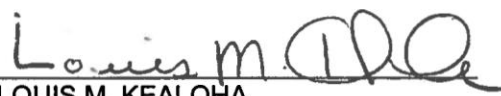
While we agree that effective treatment for substance abusers is an important part of the process, strict sentencing guidelines provide incentive for offenders to comply with such programs. Furthermore, as written, Senate Bill No. 68, S.D. 1, would permit reduced sentencing for persons who distribute Schedule V substances in large quantities in violation of Section 712-1247, Hawaii Revised Statutes.

The Honolulu Police Department urges you to oppose Senate Bill No. 68, S.D. 1, Relating to Sentencing.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,


LOUIS M. KEALOHA
Chief of Police


JERRY INOUE, Major
Narcotics/Vice Division



ALAN M. ARAKAWA
MAYOR

OUR REFERENCE
YOUR REFERENCE

POLICE DEPARTMENT

COUNTY OF MAUI

55 MAHALANI STREET
WAILUKU, HAWAII 96793
(808) 244-6400
FAX (808) 244-6411



GARY A. YABUTA
CHIEF OF POLICE

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

March 21, 2013

The Honorable Karl Rhoads, Chair
And Members of the Committee on Judiciary
House of Representatives
Hawaii State Capitol
Honolulu, HI 96813

RE: Senate Bill No. 68, SD1 - RELATING TO SENTENCING

Dear Chair Rhoads and Members of the Committee:

The Maui Police Department OPPOSES the passing of S.B. No. 68, SD1. This bill allows judges discretion in setting incarceration terms when sentencing drug offenders in certain class B and class C felony cases to make the length of the sentence proportionate to the offense and related conduct.

The Maui Police Department opposes this measure because it puts too much discretion in the hands of judges when sentencing occurs for certain Class B and C felonies. This measure could potentially allow judges to sentence offenders convicted for these felonies for less than the jail times established for these felonies. By allowing this, it will do a disservice to the community and will allow convicted felons on the street sooner. This measure may give incentives to offenders to continue their criminal behavior as the consequences for their actions would be reduced.

The Maui Police Department again asks for your OPPOSITION to S.B. No. 68, SD1.

Thank you for the opportunity to testify.

Sincerely,

for A.C.D. Yabuta
GARY A. YABUTA
Chief of Police



THE LEAGUE
OF WOMEN VOTERS OF HAWAII
49 South Hotel Street, Room 314, Honolulu,
HI 96813
www.lwvhi-hawaii.com

TESTIMONY ON SB 68, SD1, RELATING TO SENTENCING BEFORE THE HOUSE
COMMITTEE ON JUDICIARY

Committee on Judiciary
The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Date: Friday, March 22, 2013
Time: 2:00 P.M.
Place Conference Room 325

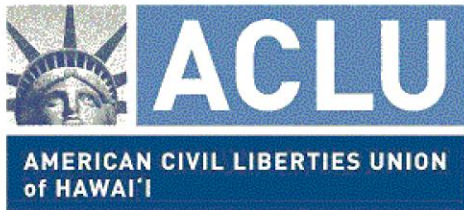
Testimony written by Jean Aoki, member, LWV Legislative Committee,

The League of Women Voters of Hawaii supports SB 68, SD1.

SECTION 1 of this bill makes a strong case for eliminating mandatory sentencing for drug users. For League which would like to eliminate mandatory sentencing, leaving judges to decide on the severity of punishments, we strongly agree with the case laid out by this bill for giving judges the discretion for determining the sentences to be given.

In the sentencing of drug users, for example, the terms, low years or less in the case of those convicted of class B felony, and the terms, 5 years or less for those convicted of class C felonies make a lot of sense. The money that we would be spending for long mandatory sentences could be better spent on rehabilitating them, and equipping them with skills that may help them find meaningful work when they leave the prisons.

Thank you for considering such a bill, and thank you for the opportunity to testify on this SB 68, SD1



Committee: Committee on Judiciary
Hearing Date/Time: Friday, March 22, 2013, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii in Support of S.B. 68, S.D. 1, Relating to Sentencing

Dear Chair Rhoads and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of S.B. 68, S.D. 1, which grants a sentencing court the discretion to sentence a defendant convicted of a class B or class C felony to a prison sentence of a length appropriate to an offender’s particular offense and underlying circumstances.

We support S.B. 68 because it seeks to limit the use of mandatory minimum sentences which generate unnecessarily harsh sentences, tie judges’ hands in considering individual circumstances, create racial disparities in sentencing and empower prosecutors to force defendants to bargain away their constitutional rights.

Many in the judicial system have come to see mandatory minimum sentences as antithetical to fair sentencing. Judges across the country and across the ideological spectrum have decried determinate sentencing schemes like mandatory minimum sentences that tie judges’ hands and force them to impose harsher-than-necessary sentences. The United States Supreme Court in *United States v. Booker*¹ and subsequent cases² 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 minimum sentences are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.

Mandatory minimum sentences 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. 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

¹ 543 U.S. 220 (2005).

² See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

American Civil Liberties Union of Hawaii
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Honolulu, Hawaii 96801
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www.acluhawaii.org

Chair Rhoads and Members of the Committee on Judiciary
March 22, 2013
Page 2 of 2

commits precious federal and state dollars to paying for years' worth of unnecessary incarceration.³

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney and Legislative Program Director
ACLU of Hawaii

The American Civil Liberties Union ("ACLU") is our nation's guardian of liberty - working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country.

³ 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 Statutes To Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration 1 (July 21, 2009), at <http://judiciary.house.gov/hearings/pdf/Sady090721.pdf>.

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SB68

Submitted on: 3/20/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Gladys C. Baisa	Individual	Support	No

Comments: I support this measure.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

Re: Testimony in support of SB68, RELATING TO SENTENCING.

Dear Chair Rhoads, Vice-Chair Har and Members of the Judiciary Committee:

Thank you for the opportunity to provide testimony on such an important issue.

I wholeheartedly **support** the proposed legislation to allow judges' discretion in setting incarceration terms when sentencing drug offenders in class B and class C felony cases to make the length of the sentence proportionate to the offense and related conduct.

Furthermore, I wish to offer one amendment to the current bill that serves to enhance judicial discretion by implementing the use of evidence-based measures of assessment of offender's risks and needs.

(1) The Committee may wish to adjust the language of H.R.S. 706-660 Sentence of imprisonment for class B and C felonies; ordinary terms; discretionary terms, which will include consideration of statistically reliable and valid risk assessment measures.

Background:

As a dual degree student pursuing a J.D. and Clinical Psychology Ph.D. at the University of Hawai'i at Manoa, my research is focused on juvenile delinquency, implicit bias in judicial decision-making and the dissemination and implementation of evidence based mental health treatment. I have also been fortunate to attend a class at the William S. Richardson School of Law on the effects of mandatory minimum drug sentencing, taught by the Hon. Judge Mark W. Bennett (United States District Court Judge in the Northern District of Iowa).

Support for Amendment:

In order to effect therapeutic jurisprudence, it is critical that judges be allowed discretion, guided by evidence based risk assessment measures, to mandate a term of imprisonment below the mandatory minimum appropriate to an offender's particular offense and underlying circumstances.

Section 706-660 of the Hawaii Revised Statutes was originally enacted in 1972 (last amended in 1986) during a time period where mandatory minimum sentencing for felony drug offenses were perceived as being an effective deterrent to high level drug dealers, drug addiction and re-offending.¹² Mandatory minimums

force judges to give sentences based entirely on “the weight of the drug or the drug mixture” without taking into account offender characteristics, their role and responsibility in the crime (USSC, 1991, p. 27-28).³ It is now clear from social science, public policy and criminology research that mandatory minimum drug sentencing does not work to prevent substance use, recidivism and has disproportionately affected racial minorities, women, and children of those incarcerated.

Mandatory minimum sentencing has had a significant negative impact across the United States and Hawai‘i, where currently 47.4% of all inmates in the Federal Bureau of Prisons are incarcerated for drug offenses.⁴ A case study of a cohort of drug offenders released from Hawai‘i’s prisons in 2006, replicated long-standing research showing that drug related offenses are not synonymous with violent crime. Over 97% of drug offenders convicted in Hawai‘i are incarcerated for non-violent crime, with the majority being imprisoned for possession.⁵ Research indicates that Hawai‘i is more punitive of drug offenders compared to other jurisdictions, with offenders receiving on average 10 months longer sentence compared to offenders sentenced for the same drug crimes in New York State (a state known for tough drug laws with limited reformation in 2009).⁶

Data suggests that mandatory minimum drug sentencing contributes to incarceration rates that are prejudicial to minorities, specifically, African Americans, Latinos and Native Hawaiians.^{7,8} In Hawai‘i, Native Hawaiians represent the greatest proportion of people incarcerated for drug offenses (32%), with the majority of charges related to methamphetamine use (38%).⁹ In contrast, Native Hawaiians report using methamphetamine at only slightly higher rates than people of other races, yet this variation does not match the proportion of the total number of Native Hawaiians admitted to prison or jail for drug offenses.¹⁰

Mandatory minimum drug sentencing has a significant negative intergenerational impact on quality of life and mental health outcomes for incarcerated parents, their children and families. Currently, women are being incarcerated at a greater rate than males, leaving more children without maternal support.^{11,12} A qualitative review involving court records and interviews with female parolees in Hawai‘i convicted of Felony C (44.5% drug related) offenses indicates that many of these women experienced domestic violence, sexual and physical abuse and trauma.¹³ Children who have incarcerated parents also face a 10% increased risk of experiencing antisocial behavior compared to peers.¹⁴

It is clear from research that drug use is not primarily a criminal justice problem but a mental health issue best treated by evidence-based interventions rather than by deterrence methods such as lengthy punishment. The common view of drug addiction is that a person is in full cognitive control of their decision to use

drugs. Contrary to this perception, scientific research shows that drug addiction impacts brain development whereby drug users relapse behavior is cued by “the ghost” of their addiction, e.g. the *involuntary* physical, withdrawal symptoms and, or drug tolerance effects triggered by antecedent environmental cues associated with prior drug administration.¹⁵ Lengthy mandatory minimum sentencing does nothing to change this relapse cycle, which is why recidivism very often occurs upon an offender’s release. Drug treatment programs that combine intensive community supervision with cognitive behavioral treatment have been shown to have significant impact on re-offending compared to either alone.¹⁶

Studies strongly indicate that sentences of and length of incarceration for drug offenders is not effective in reducing recidivism.¹⁷ Data suggests that greater focus on court ordered treatment will likely help improve individual outcomes, lower recidivism and reduce costs. Research suggests that court-ordered offenders are over 10 times more likely to complete community-based outpatient substance abuse treatment, have better outcomes after 1 year and similar outcomes after 5 years compared to voluntary patients.^{18 19} Treatment completion is significantly associated with substantial reductions in criminal recidivism.²⁰

Judicial discretion is critical because many factors play a role in drug offending and currently mandatory minimums often don't fit the severity of the offender’s crime and the nature of their criminal history. There are many underlying circumstances that judges should be allowed to consider when deciding the appropriate sentence specific to the individual offender (age of offender, history of drug treatment, number of family dependents, marital status, criminal history, degree of dangerousness).²¹²² Concern that judicial discretion will lead to subjective, non standard-sentencing which may increase recidivism can be addressed by implementing evidence based risk assessment measures in presentencing reports to guide judges’ decision making regarding the appropriate sentence for offender’s criminal history and severity of the crime. These measures have been adopted by other states (e.g. Missouri, Virginia) and can help guide intervention and treatment strategies.²³²⁴ Risk assessment measures have been welcomed by probation officers and judges as an objective tool to assessing risk factors and were not perceived as infringing on judicial discretion.²⁵²⁶

Rather than continuing to adhere to the uniformity of mandatory minimum sentencing, continued evaluation of current and alternative forms of community supervision, recidivism monitoring and treatment programs are needed. Ongoing assessment of jail diversion program outcomes is critical for further informing judicial decision making in recognizing which individual offenders would be best suited for treatment, continued supervision, or jail time. Hawai’i has had early success with a judge led experimental probation program: Hawaii Opportunity

Probation with Enforcement (H.O.P.E.), where risk assessment measures were used to select offenders who were at elevated risk of violating the terms of their probation through drug use, missed appointments or reoffending.^{27,28} Using an evidence based behavioral approach, H.O.P.E. was able to use immediate and high probability threats of mild punishment (short jail stay quickly after probation violation) to significantly reduce offenders drug use and differentiate which offenders would benefit from drug treatment compared to whose drug use behavior could be extinguished by threat of immediate sanctions for violations.²⁹

Conclusion:

As a mental health advocate and law student who has had several years of clinical experience working with children and their families in Hawai'i affected by drug addiction and parental incarceration, I strongly urge the legislature to allow judges' discretion as guided by evidence-based risk assessment measures to consider mitigating factors and underlying circumstances when in setting incarceration terms and sentencing drug offenders. As Former United States District Judge, John S. Martin stated mandatory minimum drug sentences are "cruel, unfair, a waste of resources, and bad law enforcement policy."³⁰ Judicial discretion will reduce reliance on incarceration; minimize mandatory minimum sentencing's anti-therapeutic consequences, lessen detrimental effects on families, allow greater opportunities for treatment for offenders and enable judges to outline clearer incentives for treatment program completion.

Thank you for the opportunity to testify,

Respectfully,

Henri-Lee Stalk, M.A.
J.D./Ph.D. Candidate
University of Hawai'i at Manoa
William S. Richardson School of Law

¹ West, Westlaw, HRS. §706-66, through 2012 amendments

² Jefferson Smith, C., & Young, D. S. (2003). The multiple impacts of TANF, ASFA, and mandatory drug sentencing for families affected by maternal incarceration. *Children and Youth Services Review*, 25(7), 535-539.

³ Cano, M. V., & Spohn, C. (2012). Circumventing the Penalty for Offenders Facing Mandatory Minimums Revisiting the Dynamics of "Sympathetic" and "Salvageable" Offenders. *Criminal Justice and Behavior*, 39(3), 310.

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- ⁴ United States Department of Justice Federal Bureau of Prisons (2013, January 26). Retrieved from <http://www.bop.gov/news/quick.jsp#1>.
- ⁵ Lengyel, T. E., Brown, M., & Hilo, H. I. (2009, June). Everyone Pays: A Social Cost Analysis of Incarcerating Parents for Drug Offenses in Hawai'i. In *conference on "Unlocking Justice: Community Protection & Smart Spending."* Chaminade University, Honolulu. October (Vol. 17), 1-2.
- ⁶ Lengyel & Brown, 3.
- ⁷ Office of Hawaiian Affairs, Justice Policy Institute, University of Hawai'i and Georgetown University (2010), The Disparate Treatment of Native Hawaiians in the Criminal Justice System.
- ⁸ Cole, D. (2011). Turning the Corner on Mass Incarceration. *Ohio St. J. Crim. L.*, 9, 2.
- ⁹ Office of Hawaiian Affairs, 12.
- ¹⁰ Office of Hawaiian Affairs, 12.
- ¹¹ Glaze, L. E. (2010). Correctional populations in the United States, 2009. Washington, DC: Bureau of Justice Statistics.
- ¹² Greenfeld, L.A. and Snell, T.L. (1999). Special Report: Women Offenders. Washington, D.C: Bureau of Justice Statistics, U.S. Department of Justice.
- ¹³ Brown, M. (2006). Gender, ethnicity, and offending over the life course: Women's pathways to prison in the Aloha state. *Critical Criminology*, 14(2), 137-158.
- ¹⁴ Murray, J., Farrington, D. P., & Sekol, I. (2012). Children's antisocial behavior, mental health, drug use, and educational performance after parental incarceration: A systematic review and meta-analysis.
- ¹⁵ Siegel, S. The Ghost in the Addict: Drug Anticipation and Drug Addiction
- ¹⁶ Loeber, R. & Farrington, D.P. (2012). From Juvenile Delinquency to Adult Crime. New York: Oxford University Press. 265.
- ¹⁷ Murray, J., Farrington, D. P., & Sekol, I. (2012). Children's antisocial behavior, mental health, drug use, and educational performance after parental incarceration: A systematic review and meta-analysis.
- ¹⁸ Coviello, D. M., Zanis, D. A., Wesnoski, S. A., Palman, N., Gur, A., Lynch, K. G., & McKay, J. R. (2012). Does mandating offenders to treatment improve completion rates?. *Journal of substance abuse treatment*.
- ¹⁹ Kelly, J. F., Finney, J. W., & Moos, R. (2005). Substance use disorder patients who are mandated to treatment: Characteristics, treatment process, and 1-and 5-year outcomes. *Journal of Substance Abuse Treatment*, 28(3), 213-223.
- ²⁰ Welsh, W. N. (2007). A multisite evaluation of prison-based therapeutic community drug treatment. *Criminal Justice and Behavior*, 34(11), 1481-1498.
- ²¹ Cano & Spohn, 308-332
- ²² Freiburger, T. L., & Iannacchione, B. M. (2011). An examination of the effect of imprisonment on recidivism. *Criminal Justice Studies*, 24(4), 369-379.
- ²³ Wolff, M. A. (2008). Evidence-based judicial discretion: Promoting public safety through state sentencing reform. *NYUL Rev.*, 83, 1389.
- ²⁴ The National Center for State Courts and the Virginia Criminal Sentencing Commission (2002). Offender Risk Assessment in Virginia: A Three Stage Evaluation. Retrieved from www.vcsc.virginia.gov/risk_off_rpt.pdf
- ²⁵ Wolff
- ²⁶ The National Center for State Courts
- ²⁷ Kiyabu, R., Steinberg, J., & Yoshida, M. (2010). Hawai'i's Opportunity Probation with Enforcement (HOPE): An Implementation Analysis.
- ²⁸ Office of Justice Programs, National Institute of Justice. (2012, February, 3). "Swift Sanctions Swift and Certain" Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program, retrieved from <http://www.nij.gov/topics/corrections/community/drug-offenders/hawaii-hope.htm>
- ²⁹ Office of Justice Programs
- ³⁰ Martin Jr, J. S. (2004). Why Mandatory Minimums Make No Sense. *Notre Dame JL Ethics & Pub. Pol'y*, 18, 311.

SB68

Submitted on: 3/20/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Karin Hokoana	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Kyle Sleppy

March 22, 2013 @ 1400 hours

JUD- 325

SB68

I fully support SB68 in its proposed amendment to Hawaii Revised Statutes, 706-660, which allows a judge to use discretion when determining and sentencing a person convicted of a class B or C felony regarding drugs instead of being forced to follow the mandatory minimums set at 10 years for Class B and 5 years for Class C felonies.

This bill allows a lot of, as stated and shown by statistics in the bill, money to be saved that have been increasingly spent because of mandatory minimum sentences as well as sentencing of the accused to be for less time than mandatory minimums upon reasonable assessment of crimes committed by the accused and the discretion of the judge to be used in determining the length of the sentence being given. I am not one to be for judicial discretion because it is often used in negative ways that just worsen things, but in this case judicial discretion is allowing a judge to sentence for less time, in which case this is a very positive move.

Sincerely,

Kyle Sleppy

SB68

Submitted on: 3/19/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Sandy Salmers	Individual	Support	No

Comments: I support SB 68 SD1. Please support SB 68 SD1. I am opposed to mandatory minimum sentences for drug offenders with class B and C felony cases. I support judges in using their judicial discretion and experience in setting appropriate incarceration terms for certain drug offenders. Thank you.

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SB68

Submitted on: 3/20/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Shannon Rudolph	Individual	Support	No

Comments:

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SB68

Submitted on: 3/20/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Olivia Vasquez	Individual	Support	No

Comments: I support SB68

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SB68

Submitted on: 3/20/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Lillian Harwood-Wakinekona	Individual	Support	No

Comments:

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SB68

Submitted on: 3/21/2013

Testimony for JUD on Mar 22, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Michelle L Johnson	Individual	Support	No

Comments: Judges need to be allowed to have discretion in minor offenses. Especially when these mandatory minimum sentences are only clogging up our jails with non-violent offenders. These offenders can be punished by other means or have shorter jail terms.

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SB68

Submitted on: 3/22/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Ronald D. Rodriguez	Individual	Support	No

Comments: The legislature shouldn't be making these determinations. Give discretion back to the judges.

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SB68

Submitted on: 3/25/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
courtney Bruch	Individual	Support	No

Comments:

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SB68

Submitted on: 3/23/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Deborah Imonti	Individual	Support	No

Comments:

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SB68

Submitted on: 3/23/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Julia Horn	Individual	Support	No

Comments:

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SB68

Submitted on: 3/24/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Katherine Dassis	Individual	Support	No

Comments: I believe the judges should be given discretion in setting incarceration terms when sentencing drug offenders in certain class B and class C felony cases to make the length of the sentence proportionate to the offense and related conduct.

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SB68

Submitted on: 3/23/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Shannon Rudolph	Individual	Support	No

Comments:

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SB68

Submitted on: 3/23/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
sherrian witt	Individual	Support	No

Comments:

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SB68

Submitted on: 3/25/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
james crowe	Individual	Support	No

Comments: Sensible bill. Immediate circumstances should have a more rational bearing on length of sentences.

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SB68

Submitted on: 3/26/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Sandy Salmers	Individual	Support	No

Comments: I support judicial discretion in sentencing individuals with class B & C drug felonies. Mandatory minimum sentences are punitive for drug offenders with Class B & C felonies. Our prisons are overcrowded and it costs the state over \$50,000.00 a year to house an inmate. It's punitive and costly to lock up nonviolent drug offenders in a violent prison environment like Halawa Correctional Facility or Saguaro Correctional Center. Please restore judicial discretion in these cases. Thank you.

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LATE

SB68

Submitted on: 3/28/2013

Testimony for JUD on Mar 28, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Matthew LoPresti	Individual	Support	No

Comments:

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