

STAND. COM. REP. NO. 2608

Honolulu, Hawaii

FEB 28 2014

RE: S.B. No. 2128
S.D. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred
S.B. No. 2128 entitled:

"A BILL FOR AN ACT RELATING TO THE RETENTION OF BIOLOGICAL
EVIDENCE,"

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Provide guidelines and limitations for the post-conviction retention of biological evidence by the police, prosecuting attorney, laboratories, or courts; and
- (2) Establish procedures for agencies to dispose of retained evidence and for defendants to file objections to proposed disposals.

Your Committee received testimony in support of this measure from the Judiciary. Your Committee received testimony in opposition to this measure from the Office of the Public Defender and Hawaii Innocence Project of the University of Hawaii William S. Richardson School of Law.

Prior to the hearing on this measure, your Committee posted and made available for public review a proposed S.D. 1, which amends this measure by deleting its contents and inserting language to:



- (1) Require custodial agencies that retain evidence to retain evidence if:
 - (A) The evidence is related to the investigation or prosecution of a case in which there has been a judgment of conviction for certain specified felonies; and
 - (B) Contains biological evidence that could be used for DNA analysis to establish identity of the person who committed the offense or exclude a person from the group of persons who could have committed the offense;
- (2) Allow an agency to dispose of evidence related to the investigation or prosecution of a case in which there has been a judgment of conviction for any felony other than the specified felony crimes if:
 - (A) The agency files a notification of the proposed disposal of the evidence with the court;
 - (B) The filed notification is served upon specified individuals or entities;
 - (C) The filed notification contains certain information;
 - (D) The court schedules a hearing if the defendant files a statement of objection; and
 - (E) The court issues an order to allow the agency to dispose of the evidence;
- (3) Allow the court to order an agency to retain evidence until the exhaustion of all appeals or the completion of any sentence if the evidence is related to the investigation or prosecution of a case in which there has been a judgment of conviction for any felony other than certain felony crimes; and
- (4) Add definitions of "agency" and "biological evidence".

Your Committee received testimony in support of the proposed S.D. 1 from the Department of the Prosecuting Attorney, City and



County of Honolulu; Department of the Prosecuting Attorney, County of Maui; Police Chiefs of Hawaii Association; and Police Department, County of Maui. Your Committee received testimony in opposition to the proposed S.D. 1 from the Office of the Public Defender, Community Alliance on Prisons, and one individual. Your Committee received comments on the proposed S.D. 1 from the Judiciary and Department of the Attorney General.

Your Committee finds that the existing law regarding the retention of biological evidence is broad and requires agencies to retain all evidence that may contain biological evidence in any case that results in a conviction, regardless of whether the biological evidence is relevant to the case. The proposed S.D. 1 establishes reasonable guidelines for the retention of post-conviction biological evidence to address statewide evidence storage issues while preserving a defendant's ability to file objections to a proposed disposal of biological evidence.

Your Committee notes the concerns raised in written testimony from the Office of the Public Defender and a criminal defense attorney that the proposed S.D. 1 substantially narrows the retention of biological evidence law by protecting against the destruction of biological evidence for a list of only several specified felonies and significantly minimizes the current scope of the law pertaining to evidence that definitely contains biological evidence. Thus, testimony in opposition contends that the proposed S.D. 1 is unnecessary because the existing retention of biological evidence law provides clear and comprehensive protection.

Your Committee further notes that according to the national Innocence Project website, there have been 312 post-conviction DNA exonerations in the United States since 1989. Furthermore, in 153 of those exoneration cases, the true suspects or perpetrators were identified as a result. Testimony submitted by a criminal defense attorney indicated that in 2011, the Hawaii Innocence Project used DNA evidence to successfully obtain a circuit court order vacating the conviction of a defendant. In 1992, Alvin Jardine III of Maui was convicted of four counts of first degree sexual assault, three counts of attempted first degree sexual assault, and one count each of kidnapping and first degree burglary. He was sentenced to thirty-five years of imprisonment. The Hawaii Innocence Project presented to the circuit court in Maui a tablecloth with DNA evidence that excluded the defendant as the perpetrator. This tablecloth was the only tangible piece of evidence that the police



did not destroy. The criminal defense attorney testified that the proposed S.D. 1 will unnecessarily and unreasonably hinder the ability of the Hawaii Innocence Project and other defense attorneys in Hawaii to challenge wrongful and unjust convictions in other Hawaii cases involving DNA evidence.

Accordingly, your Committee has amended this measure by adopting the proposed S.D. 1 and amending it further to:

- (1) Adopt the language suggested by the Department of the Attorney General by:
 - (A) Broadening the requirement to retain biological evidence that is related to the investigation or prosecution of a case in which there has been a judgment of conviction for all felonies rather than certain specified felonies;
 - (B) Clarifying that the court may allow an agency to dispose of the retained biological evidence if the defendant does not file an objection to the proposed disposal within ninety days; and
 - (C) Deleting the prosecuting attorney as a recipient of notification of the proposed disposal of evidence;
- (2) Adopt the language suggested by a criminal defense attorney by:
 - (A) Applying the retention of biological evidence requirement to evidence that may contain, rather than definitely contains biological evidence;
 - (B) Adding that evidence retained may contain biological evidence that can be used for DNA analysis to create a reasonable doubt about the identity of the person who committed the offense for which there was a judgment of conviction;
 - (C) Requiring retained biological evidence related to a judgment of conviction for a felony to be retained until the exhaustion of all appeals and any collateral proceedings or the completion of the sentence, whichever occurs later; and



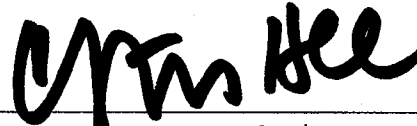
- (D) Requiring an agency to attempt personal service before it can mail a notification to the defendant's last known address upon a reasonable documented good faith attempt for personal service;
- (3) Allow an agency to dispose of evidence related to the judgment of conviction for any felony before the expiration of all appeals or any collateral proceedings or completion of any sentence, whichever occurs later, if:
- (A) Pursuant to a court order;
 - (B) The agency files a notification of the proposed disposal of the evidence with the court;
 - (C) The filed notification is served upon specified individuals or entities;
 - (D) The filed notification contains certain information; and
 - (E) Either the defendant does not file an objection or the defendant does file an objection and the court, after a hearing, issues an order to allow the agency to dispose of the evidence;
- (4) Adopt the language suggested by the Hawaii Innocence Project to add the Hawaii Innocence Project and any additional persons the agency deems necessary as recipients of the notification of the proposed disposal of evidence;
- (5) Require the court to schedule a hearing on the objection if a defendant files a statement of objection, and notify the department or agency that prosecuted the case of the hearing; and
- (6) Make technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B.



No. 2128, as amended herein, and recommends that it pass Third Reading in the form attached hereto as S.B. No. 2128, S.D. 1.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,

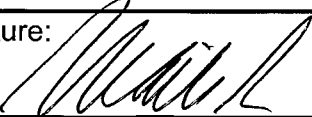


CLAYTON HEE, Chair



The Senate
 Twenty-Seventh Legislature
 State of Hawai'i

Record of Votes
Committee on Judiciary and Labor
JDL

Bill / Resolution No.:*	Committee Referral:	Date:		
SB 2128	JDL	2/26/14		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
HEE, Clayton (C)	✓			
SHIMABUKURO, Maile S.L. (VC)		✓		
GABBARD, Mike	✓			
GALUTERIA, Brickwood	✓			
IHARA, Jr., Les		✓		
SOLOMON, Malama				✓
SLOM, Sam				✓
TOTAL	3	2		2
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes