SB2128
SD1
PROPOSED

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COMMITTEE ON JUDICIARY AND LABOR
Sen. Clayton Hee, Chair
Sen. Maile Shimabukuro, Vice Chair
Friday, January 24, 2014
10:00 a.m.
Room 016

OPPOSITION TO SB 2128 SD1 – RETENTION OF BIOLOGICAL EVIDENCE

Aloha Chair Hee, Vice Chair Shimabukuro and Members of the Committee!

Hau`oli Makahiki Hou! 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.

SB 2128 SD1 amends guidelines and limitations for the post-conviction retention of biological evidence by law enforcement agencies and the courts. It provides procedures for agencies to dispose of retained evidence and for defendants to file objections to proposed disposals. The SD1 proposed draft allows for a 180-day window for objections (90-days for those incarcerated on mandatory minimum sentences) to destroying biological evidence instead of 90-days as SB 2128 proposed. A person who asserts his innocence and is serving a mandatory minimum sentence would have to rely on the prison to forward this notice to destroy evidence to him/her in a timely manner. This is problematic.

Community Alliance on Prisons is opposed to this measure on the grounds that forensics is an evolving science and tossing out evidence that could convict the guilty and free the innocent is a bad idea. 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.

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.

Each year the law enforcement coalition tries to limit Rule 40 (post-conviction complaints) despite the rising number of exonerations – 87 in 2013 alone. This begs the question: Why would they support destroying evidence?

Consider the case of Alvin Jardine, a Hawaiian man who spent more than 20 years in prison for a crime he did not commit. Mr. Jardine was convicted of the crime based on faulty eyewitness identification despite 11 witnesses placing him at another location. Most of the evidence was destroyed in that case except for one tiny piece of cloth with DNA that proved that he was not the assailant.

Preservation of evidence is crucial if our system is truly meant to convict the guilty and free the innocent. The Innocence Project website[1] on the retention of biological evidence is a great source of information.

> ***What should be contained in a statute requiring the preservation of evidence?***
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> Elements of a meaningful preservation law, either as an amendment to a post-conviction DNA testing access statute, or as a separate bill, must include:
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> - The preservation of all items of physical evidence relating to felony crimes, regardless of whether an individual files a petition for post-conviction DNA testing.
> - The retention of crime scene evidence that is associated with unsolved cases.
> - The retention of all items of physical evidence secured in connection with a felony for the period of time that any person remains incarcerated, on probation or parole, involved in civil litigation in connection with the case, or subject to registration as a sex offender.
> - Sanctions for parties responsible for the improper destruction of evidence and provisions enabling courts to determine the appropriate remedy when evidence is improperly destroyed.
>
> ***Ideally, legislation requiring the preservation of evidence will include the following provisions:***
> If biological evidence is destroyed, the court may vacate the conviction, grant a new trial, and instruct the new jury that the physical evidence in the case, which could have been subjected to DNA testing, was destroyed in violation of the law.
>
> ***An innocent inmate's last hope[2]***
> In some cases, evidence has been lost or destroyed prior to trial. Whenever a case goes to trial without sufficient evidence, the chances are greatly increased that an innocent person will be convicted or that a guilty person will be acquitted. When evidence is destroyed, justice is not served.

Criminal appeals after a conviction are a difficult road, even for the innocent. The resources of the justice system are stacked against the inmate, and once a conviction is secured there is no longer a presumption of innocence. In cases with DNA evidence, this process can take years and can hit roadblocks at any stage. Appeals are even more difficult in cases without any evidence to test because they become a web of witness statements and costly investigations.

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[1] Preservation Of Evidence http://www.innocenceproject.org/Content/Preservation_Of_Evidence.php

[2] **Evidence Preservation** http://www.innocenceproject.org/fix/Evidence-Handling.php

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.

In a web search on this issue, we found a great article[3] in the free library:

"Contrary to the assertions of criminal justice officials, ***imposing a blanket duty to preserve evidence would not result in a great fiscal burden, nor would it cause administrative disarray in evidence retention.*** *First, there is no biological evidence recovered in the overwhelming majority of criminal cases. Biological evidence is recovered primarily in cases involving rape and sexual assault. In fact, the majority of the DNA-based exonerations to date have involved underlying charges of rape or sexual assault. Moreover, national statistics show that more than 75 % of all crimes reported in the United States are property offenses, crimes that generally do not involve the recovery of biological evidence. By contrast, rape and sexual assault cases, where biological evidence is most likely to be recovered, account for less than 1% of all reported crimes. Thus, even though police departments and prosecutors must handle hundreds of thousands of cases each year, the duty to preserve biological evidence will only exist in a very small percentage of cases.*

Second, in order to fulfill its duty to preserve evidence, ***the government would not be required to keep and store thousands (or even hundreds) of 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. Thereafter, in accordance with evidence disposal procedures in many innocence protection statutes, the bulky and oversized physical evidence can be discarded or returned to the rightful owner.*

Nor would the government incur exorbitant expenses to preserve biological evidence in costly refrigerated facilities. 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. ***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.*

Finally, the duty to preserve biological evidence would require the continued preservation only of evidence the government has maintained since the initial investigation of the case. The government would not be required to collect any new evidence or assume additional responsibilities to preserve the evidence beyond steps previously taken to preserve the evidence for its own investigative use. In fact, if the case remained open and unsolved, law enforcement officials would have continued to preserve the biological evidence until the perpetrator was identified and prosecuted. Fiscal and administrative concerns do not dictate whether the criminal justice system preserves biological evidence needed to prosecute the guilty and 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.

Community Alliance on Prisons respectfully asks the committee to hold this bill. Mahalo for this opportunity to testify.

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[3] ***Evidence destroyed, innocence lost: the preservation of biological evidence under innocence protection statutes***.http://www.thefreelibrary.com/Evidence+destroyed,+innocence+lost%3A+the+preservation+of+biological...-a0140524321

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HAND DELIVERED

February 24, 2014

Senator Clayton Hee
Chairman, Committee on Judiciary & Labor
Hawaii State Senate
c/o Committee Clerk, Room 407
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Written Testimony Of Brook Hart (And On Behalf Of Professor Of Law Virginia Hench, William Harrison, Esq., And Susan Arnett, Esq.) In Opposition To Senate Bill No. 2128 (S.D. 1 Proposed), "Relating To The Retention Of Biological Evidence"

Dear Chairman Hee and Committee Members:

Since 1968, I have practiced primarily criminal defense law and constitutional law in Hawaii. I also serve as a Lecturer in Law at the University of Hawaii's William S. Richardson School of Law. I have been an adjunct faculty member at our law school since 2005, co-teaching the "Hawaii Innocence Project" seminars with Professor Virginia Hench and criminal defense attorneys William Harrison and Susan Arnett.

I write this letter, along with Professor Hench, Mr. Harrison and Ms. Arnett, to express our strong opposition to Senate Bill No. 2128 (S.D. 1 Proposed), entitled "Relating To The Retention Of Biological Evidence." That bill is set for a hearing by the Committee on Judiciary & Labor at 10:30 a.m. on February 25, 2014, in Conference Room 016 of the State Capitol. This letter supports (and incorporates by reference) the two written testimonies against the original version of S.B. No. 2128 that were submitted on January 24, 2014, by the State Office of the Public Defender and the Community Alliance on Prisons.

Since its enactment in 2005, H.R.S. § 844D-126 has wisely provided clear and comprehensive protection for Hawaii's people regarding "Retention of biological evidence." That statute states in pertinent part: "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." [Underlining added.]

By contrast, S.B. No. 2128 (S.D. 1 Proposed) would substantially narrow H.R.S. § 844D-126 to only apply enhanced protection against destruction of biological evidence to a very restrictive list of specified offenses: "(A) Murder; (B) Manslaughter; (C) Kidnapping; (D) Robbery in the first degree; (E) Sexual assault in the first degree; (F) Sexual assault in the second degree; (G) Assault in the first degree; or (H) An attempt or criminal conspiracy to commit one of these offenses." Notably, that list omits many felony offenses that can result in years of imprisonment, such as robbery in the second degree, burglary in the first degree, sexual assault in the third degree, and assault in the second degree. Yet, second-degree robbery and first-degree burglary are punishable by up to ten years of imprisonment, or up to twenty years of imprisonment if extended-term sentencing is applied. Third-degree sexual assault and second-degree assault are punishable by up to five years of imprisonment, or up to ten years of imprisonment pursuant to extended-term sentencing. That drastically limited list also excludes Class A felony offenses such as continuous sexual assault of a minor under the age of fourteen years, and promoting a dangerous drug in the first degree, which are punishable by up to twenty years of imprisonment, or can result in up to life imprisonment if extended-term sentencing is utilized.

Furthermore, even for the above-quoted list of particular offenses, the proposed legislation would significantly shrink the current scope of H.R.S. § 844D-126 from a broad retention of all evidence "that may contain biological evidence that could be used for DNA analysis" to a narrow retention of

evidence that definitely "Contains biological evidence that could be used for DNA analysis." [Underlining added.] Thus, if enacted, it could result in scientifically unqualified and potentially biased individuals such as police officers and prosecutors making decisions about whether material "contains" biological evidence that could be used for DNA analysis. Of course, after evidence has been destroyed, the evidence can never be recovered if the police officer's or prosecutor's decision -- biased or not -- was incorrect.

Moreover, even for the above-quoted short list of named offenses, the proposed legislation unfairly restricts protection only to evidence that "could be used for DNA analysis to reasonably do the following: (A) Establish the identity of the person who committed the offense for which there was the judgment of conviction; or (B) Exclude a person from the group of persons who could have committed the offense for which there was the judgment of conviction." [Underlining added.] Yet under long-established Hawaii law, all that is required to mandate acquittal of a defendant is for the finder of fact to have a "**reasonable doubt**" about the defendant's guilt. Hawaii Pattern Jury Instructions: Criminal Instruction 3.02 (2013) (bold typeface added). Unconscionably, the language of the proposed legislation fails to encompass cases in which the DNA evidence would only create a "reasonable doubt" about "the identity of the person who committed the offense" or would only create a "reasonable doubt" about whether the defendant was excluded "from the group of persons who could have committed the offense" -- even though such "reasonable doubt" could be a basis for acquittal.

There can be no doubt that a police officer, a police evidence specialist, a prosecutor or even a judge cannot know in advance whether particular biological evidence could eventually be used by an accused person or his or her defense counsel for DNA analysis to "[e]stablish the identity of the person who committed the offense" or "[e]xclude a person from the group of persons who could have committed the offense." That is one of the reasons why H.R.S. § 844D-126 contains no such unreasonable restriction on the wide umbrella of protection it provides to Hawaii's residents. Additionally, a police officer or a prosecutor is definitely not a neutral party, yet S.B. No. 2128 (S.D. 1 Proposed) could effectively entrust determinations about whether biological evidence can be destroyed to the very persons who have an occupational

prejudice against convictions being vacated. As noted above, after evidence has been destroyed, the evidence can never be recovered if a police officer's, a police evidence specialist's or a prosecutor's advance judgment (biased or not) about the potential usefulness of the evidence to the defense was incorrect.

For the many cases involving the numerous penal offenses not on the above-quoted short list, S.B. No. 2128 (S.D. 1 Proposed) authorizes destruction of biological evidence under certain conditions, including the filing of "a notification of the proposed disposal of the evidence with the court." However, there is no requirement in the bill that a defendant himself or herself be served in person with that notice; rather, it can be "served upon ... [t]he defendant against whom the judgment of conviction was filed at the defendant's last known address." [Underlining added.] Considering the unreliability of prison mail systems, prisoners (especially those who have been incarcerated in more than one facility) may never receive the notification. The notification must also be served upon the "defendant's attorney of record," who of course may no longer represent the defendant or even know the defendant's current location, or who may no longer be practicing law because of retirement, disability or death; the "public defender," who may no longer be representing the defendant or who may have never represented the defendant, and who may not know a defendant's current location;[1] the "prosecuting attorney," an adverse party who has an obvious incentive not to notify the defendant; and the defendant's "parole officer or probation officer," if one exists, who may not know the defendant's current location and who clearly has no specific legal duty to provide the defendant with the notification in any event.

Assuming arguendo that the defendant even receives the notification, reads it, and then is able to sufficiently

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[1] The written testimony of the State Office of the Public Defender that was submitted on January 24, 2014, recognizes that at "the point where destruction of evidence would be sought, oftentimes the public defender will have no information on the defendant's case and will have had no attorney-client relationship with the defendant." [Underlining added.]

understand it (KHNL News reported in 2009 that "1 in 6 Hawaii adults are functionally illiterate"), the defendant may file "a statement of objection." The burden of filing that legal document is placed on the defendant, who may be unrepresented by counsel, undereducated, mentally challenged, mentally ill, an immigrant not fluent in the English language, a prisoner incarcerated on the mainland, etc.

The internet website of the national "Innocence Project" (www.innocenceproject.org), the well-respected litigation and public policy organization dedicated to exonerating wrongfully convicted individuals, reports that since 1989 there "have been 312 post-conviction DNA exonerations in the United States."[2] None of those DNA exonerations would have occurred if the DNA evidence had been destroyed. In fact, in 153 of those exoneration cases, the "true suspects and/or perpetrators have been identified." The hundreds of "DNA exoneration cases have provided irrefutable proof that wrongful convictions are not isolated or rare events," but rather can readily be caused by factors such as "eyewitness misidentification," "unvalidated or improper forensic science," "false confessions and incriminating statements," and "unreliable" testimony by informants. Sadly, the Innocence Project's review of its closed cases from 2004 to 2010 has "revealed that 22 percent of cases were closed because of lost or destroyed evidence." [Underlining added.]

Right here in Hawaii, in 2011, the Hawaii Innocence Project utilized DNA evidence to successfully obtain a circuit court order vacating the unjust convictions of Alvin Jardine III. In 1992, Mr. Jardine had been convicted on Maui 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. The key issue in the case was the identity of the perpetrator. Alvin Jardine III had been sentenced to thirty-five years of imprisonment, and served nearly twenty years behind bars -- almost his entire

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[2] Professor Samuel Gross of the University of Michigan Law School maintains the National Registry of Exonerations (www.law.umich.edu/special/exoneration/Pages/about.aspx), which lists 1,317 exonerations in the United States since 1989. However, that total includes both DNA exonerations and non-DNA exonerations.

adult life -- before he was released and was granted a new trial by the Maui circuit court. The Hawaii Innocence Project presented the circuit court with DNA evidence that excluded Mr. Jardine as the source of fluids present on a tablecloth that had been covering a chair on which the real perpetrator of the crimes had been sitting while sexually assaulting the victim in that case. The tablecloth was the only tangible evidence that had not been destroyed by Maui police and prosecutors after Mr. Jardine's conviction in 1992. Enactment of S.B. No. 2128 (S.D. 1 Proposed) would unnecessarily and unreasonably hinder the ability of the Hawaii Innocence Project and other defense attorneys to challenge wrongful and unjust convictions in other Hawaii cases involving DNA evidence.

For all of the foregoing reasons, I strongly urge the members of the Committee on Judiciary & Labor to vote against this remarkably dangerous and exceptionally flawed proposed legislation, and to refrain from seriously damaging the critically important protections currently provided by H.R.S. § 844D-126. Destruction of DNA evidence would definitely harm our community when individuals remain wrongfully convicted and wrongfully incarcerated, and at the same time, when the actual perpetrators of major crimes remain at large because of cases that have been falsely "solved" by wrongful convictions.

Very truly yours,

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