

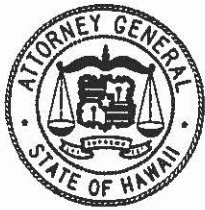
SB2128

SD1

PROPOSED

LATE

TESTIMONY



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2128, PROPOSED S.D. 1, RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, February 25, 2014 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Room 016

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

Chair Hee and Members of the Committee:

The Department of the Attorney General strongly supports this bill. While the Department appreciates and supports the intent of the proposed S.D. 1, it submits comments, concerns, and proposed amendments that it believes strengthens the intent of the proposed S.D. 1.

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 greatly appreciates the intent of the proposed S.D. 1, but has several concerns. First, with respect to the retention of evidence for the specified serious felony offenses, it eliminates the required time periods for the retention of the evidence. See page 2, lines 2-8. This means that the evidence for these cases must be retained indefinitely. And there are no exceptions to this requirement. This will create an even greater burden upon law enforcement agencies maintaining custody over the evidence.

Second, the proposed S.D. 1, starting at page 2, line 19, creates a process for an agency to obtain a court order to dispose of evidence related to a case "in which there has been a judgment of conviction for any felony other than those enumerated in subsection (a)." But there is no retention requirement for "any felony other than those enumerated in subsection (a)". It appears that the proposed S.D. 1 will require an agency to go through the notice and hearing process for every case in which any evidence is retained, regardless of whether the evidence may contain any biological evidence, and obtain a court order allowing for the disposal of the evidence. This would be incredibly burdensome for the agency, the court, and the defendant.

Third, the proposed notice and hearing process allows a defendant to file a statement of objection to the notification of proposed disposal, but it does not appear to address the situation in which the defendant chooses not to file an objection. See page 4, lines 1-5. In order to dispose of the evidence, an agency must meet certain conditions, including a court order authorizing the disposal of the evidence. It appears that a hearing must be held, and the court

must issue an order allowing for the disposal of the evidence, even though a defendant does not file a statement of objection.

In an effort to support the intent of the proposed S.D. 1, the Department submits the attached revised draft that extends the retention requirement for the specified serious felony convictions to all felony convictions. It maintains the retention periods of the current law and S.B. No. 2128. And it provides for two methods for the disposal of evidence before the expiration of the required retention period. One is based on a court order allowing for the disposal. And the second is based on a notice process that gives the defendant an opportunity to have a court hearing on the issue.

The Department greatly appreciates the Committee's consideration and efforts regarding this bill, and respectfully requests the passage of S.B. No. 2128 or a revised S.D. 1, based on the attached proposed amendments.

A BILL FOR AN ACT

RELATING TO THE RETENTION OF BIOLOGICAL EVIDENCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 844D-126, Hawaii Revised Statutes, is
2 amended to read as follows:

3 " ~~[f]~~ §844D-126 ~~[f]~~ Retention of biological evidence.

4 (a) All evidence in the custody or control of ~~[a policee~~
5 ~~department, prosecuting attorney, laboratory, or court that is]~~
6 an agency shall be retained if the evidence:

7 (1) Is related to the investigation or prosecution of a
8 case in which there has been a judgment of
9 conviction ~~[and that may contain]~~ for a felony
10 offense; and

11 (2) Contains biological evidence that could be used for
12 DNA analysis to reasonably do the following:

13 (A) Establish the identity of the person
14 who committed the offense for which there
15 was the judgment of conviction; or

16 (B) Exclude a person from the group of persons
17 who could have committed the offense for
18 which there was the judgment of conviction.

19

1 (b) The evidence shall be retained at least until the
2 later occurring of either:

3 (1) The exhaustion of all appeals of the case to which the
4 evidence is related; or

5 (2) The completion of any sentence, including any term of
6 probation or parole, imposed on the defendant in the
7 case to which the evidence relates.

8 ~~[(b) The attorney general shall establish procedures and
9 protocols, which shall be uniform throughout the State, for the
10 collection and preservation of evidence retained pursuant to
11 this section.]~~

12 (c) Notwithstanding subsections (a) and (b), evidence
13 required to be retained under those provisions may be disposed
14 of by an agency before the expiration of the time period
15 specified in subsection (b) pursuant to subsection (d) or (e).

16 (d) An agency may dispose of evidence, retained pursuant
17 to the requirements of subsections (a) and (b), if the court
18 issues an order authorizing the disposal of the evidence.

19 (e) An agency may dispose of evidence, retained pursuant
20 to the requirements of subsections (a) and (b), if all of the
21 following conditions are met:

22 (1) The agency files a notification of the proposed
23 disposal of the evidence with the court;

- 1 (2) The filed notification is served upon:
- 2 (A) The defendant against whom the judgment of
- 3 conviction was filed at the defendant's last
- 4 known address;
- 5 (B) The defendant's attorney of record;
- 6 (C) The public defender;
- 7 (D) The defendant's parole officer or probation
- 8 officer;
- 9 (3) The filed notification includes:
- 10 (A) A description of the evidence proposed to be
- 11 disposed;
- 12 (B) Notice that a defendant may file a statement of
- 13 objection within ninety days of the date of
- 14 receipt of the notification;
- 15 (C) Notice that the agency will dispose of the
- 16 evidence unless the defendant files a statement
- 17 of objection with the court and serves the
- 18 statement of objection on the agency within the
- 19 ninety-day period; and
- 20 (4) Either the defendant does not file a statement of
- 21 within the ninety-day period, or the defendant does
- 22 file a statement of objection within the ninety-day

1 period and the court, after a hearing, issues an order
2 allowing the agency to dispose of the evidence.

3 (f) If a defendant files a statement of objection, the
4 court shall schedule a hearing on the objection and notify the
5 department or agency that prosecuted the case of the hearing on
6 the statement of objection to the notification of the proposed
7 disposal of the evidence;

8 (g) If, after a hearing, the court determines by a
9 preponderance of the evidence that:

10 (1) The identity of the defendant, as the perpetrator of
11 the offense that resulted in the judgment of
12 conviction, was at issue; and

13 (2) The evidence contains biological evidence that could
14 be used for DNA analysis to reasonably establish the
15 identity of the person who committed the offense for
16 which defendant was convicted, or exclude a person
17 from the group of persons who could have committed the
18 offense for which defendant was convicted;

19 then the court may order the agency to retain the evidence for
20 the period specified in subsection (b), or if appropriate, the
21 court may order that the agency may dispose of the evidence
22 after taking reasonable measures to preserve the biological
23 evidence contained on the evidence. If, after the hearing, the

1 court is unable to make either of those findings, then the court
2 may allow the agency to dispose of the evidence.

3 (h) As used in this section:

4 "Agency" means any custodial agency that retains evidence,
5 including but not limited to the police department, prosecuting
6 attorney, laboratory, or court.

7 "Biological evidence" means an individual's blood, semen,
8 hair, saliva, skin tissue, fingernail scrapings, fingerprints,
9 teeth, bone, bodily fluids, or other identified biological
10 material including the contents of a sexual assault examination
11 kit."

12 SECTION 2. This Act does not affect rights and duties that
13 matured, penalties that were incurred, and proceedings that were
14 begun before its effective date.

15 SECTION 3. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 4. This Act shall take effect upon its approval.

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Report Title:

Retention; Biological Evidence

Description:

Amends guidelines and limitations for the post-conviction retention of biological evidence related to felony cases by various agencies and the courts. Provides procedures for agencies to dispose of certain retained evidence and for defendants to file objections to proposed disposals.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Tuesday, February 25, 2014, 10:30 a.m.
State Capitol, Conference Room 016

by
Calvin Ching
Deputy Chief Court Administrator, First Circuit Court

Bill No. and Title: Senate Bill No. 2128, Proposed S.D. 1, Relating to the Retention of Biological Evidence.

Purpose: To establish reasonable guidelines and limitations for the post conviction retention of biological evidence by law enforcement agencies and the courts; and thereby preserve a defendant's ability to test biological evidence, while making law enforcement agency retention responsibilities more reasonable and manageable.

Judiciary's Position:

The Judiciary is in support of the original SB2128 and supports the intent of SB2128, Proposed S.D. 1, but does have concerns.

SB2128 proposed to amend Section 844D-126, Hawaii Revised Statutes by establishing reasonable guidelines for post-conviction retention of biological evidence. The bill as originally proposed would significantly reduce the number of applicable cases, thereby reducing the potential number of evidentiary items that would need to be maintained by agencies and the Judiciary.

However, SB2128, Proposed SD1 eliminates the required time periods for the retention of evidence in certain specified felony offenses and adds Robbery in the First Degree. Assault in the First Degree is already a sizeable caseload and the addition of Robbery 1st will further increase the caseload monitoring. SB2128, Proposed SD1 requires that for the specified cases



Senate Bill No. 2128, Proposed SD1, Relating to the Retention of
Biological Evidence
Senate Committee on Judiciary and Labor
Friday, January 24, 2014
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evidence must be retained indefinitely with no exceptions and this will place an even greater burden on the courts and law enforcement to maintain custody over evidence.

SB2128, Proposed SD1 proposes to create a process for an agency to obtain a court order to dispose of evidence related to a case "in which there has been a judgment of conviction for any felony other than those enumerated in subsection (a)...". It appears that the Proposed SD1 will require a court order to allow for the disposal of evidence whether the evidence may contain biological evidence or not. The proposed notice and hearing process does not appear to address the situation in which a defendant chooses not to file an objection. It appears that the courts must hold a hearing and issue an order allowing for disposal even though the defendant does not file an objection.

The process of requiring notice and hearing for every case in which evidence is retained will place a heavy burden on the courts with an increase in hearings, monitoring of conviction sentences and storage for retention of evidence.

The increase in hearings would also place an additional burden on the courts and staff to provide notice to defendants, parties, excluded persons, counsel and other agencies; calendar cases for hearing; and the subsequent filing and issuing of the courts orders.

Thank you for the opportunity to provide comments.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-seventh State Legislature
Regular Session of 2014
State of Hawai'i

February 24, 2014

RE: S.B. 2128, PROPOSED S.D.1; RELATING TO RETENTION OF BIOLOGICAL EVIDENCE.

Chair Hee, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following comments in support of Senate Bill 2128, Proposed S.D. 1.

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, including a reasonable mechanism by which defendants may object to their proposed disposal. The Department supports this intent and urges the Committee to pass this measure, to promote further discussion and consideration of the bill's specific language.

The current language of HRS §884D-126(a) contains a blanket requirement that law enforcement agencies retain all evidence that "may contain biological evidence that could be used for DNA analysis," regardless of whether such evidence was relevant to a defendant's purported defenses. While police departments across the State are doing their best to comply with the current laws, this also forces them to maintain vast storage facilities to store items, including large items like vehicles, that may be irrelevant to the very purpose of keeping DNA evidence. Senate Bill 2128, Proposed S.D. 1, seeks to address these issues by establishing specific procedures and standards for agencies to retain or dispose of relevant biological evidence, and for defendants to file objections to proposed disposals, as determined by the courts. In certain cases, biological evidence can help to identify the person who committed an offense or exclude a person from those who could have committed the offense.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of Senate Bill 2128, Proposed S.D. 1. Thank you for the opportunity to testify on this matter.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: richard.minatoya@mauicounty.gov
Subject: Submitted testimony for SB2128 on Feb 25, 2014 10:30AM
Date: Monday, February 24, 2014 12:00:32 PM

SB2128

Submitted on: 2/24/2014

Testimony for JDL on Feb 25, 2014 10:30AM in Conference Room 016

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---|---------------------------|---------------------------|
| Richard K. Minatoya | Maui Department of the Prosecuting Attorney | Support | No |

Comments: The Department of the Prosecuting Attorney, County of Maui, SUPPORTS the passage of SB 2128, Proposed SD 1, and joins in the testimony submitted by the Honolulu Department of the Prosecuting Attorney.

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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POLICE CHIEFS OF HAWAII ASSOCIATION

C/O 801 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96813
TELEPHONE: (808) 723-3848

POLICE CHIEFS

LOUIS M. KEALOHA
Honolulu
HARRY S. KUBOJIRI
Hawaii County
DARRYL D. PERRY
Kauai
GARY A. YABUTA
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Maui

OUR REFERENCE TN-DNK/DMK

February 25, 2014

The Honorable Clayton Hee, Chair
and Members
Committee on Judiciary and Labor
State Senate
Hawaii State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Members:

**SUBJECT: Senate Bill No. 2128, SD 1, SSCR 2048, 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 (PCHA) support the intent of Senate Bill No. 2128, SD 1, SSCR 2048, Relating to the Retention of Biological Evidence, to amend Section 844D-126, Hawaii Revised Statutes (HRS).

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.

The PCHA has concerns with certain amendments with this bill relating to:

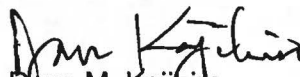
- Page 3, notification, the defendant and attorney of record is sufficient; the notification of the public defender, prosecuting attorney, and the defendant's parole or probation officer is unnecessary. For Honolulu, the prosecuting attorney is the agency who will be filing these notifications.
- Page 3, the length of time for the defendant to file an objection would be reasonable at 90 days versus the proposed 180 days.

The Honorable Clayton Hee, Chair
and Members
Committee on Judiciary and Labor
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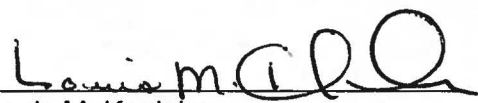
- Page 5, definition of "agency," for Honolulu, the custodial agency is the HPD. The agency who will file requests with the courts and provide notification will be the prosecuting attorney.
- Section 844D-126, HRS, addresses post-conviction evidence; the defendant has already been convicted and sentenced. Any appeals or reconsideration should be filed or in the process of being filed. The prosecuting attorney currently grants the return or destruction of evidence only when the appeal process is exhausted.

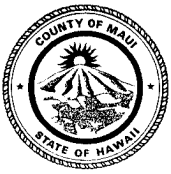
Thank you for the opportunity to testify.

Sincerely,


Dave M. Kajihira
Deputy Chief of Police

APPROVED:


Louis M. Kealoha
Chief of Police



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

February 25, 2014

The Honorable Clayton Hee, Chair
and Members of the Committee on Judiciary and Labor
The Senate
State Capitol
Honolulu, HI 96813

RE: Senate Bill No. 2128 Proposed SD1 – Relating to the Retention of Biological Evidence

Dear Chair Hee and Members of the Committee:

The Maui Police Department supports the passing of SB 2128; however, has concerns regarding the proposed SB 2128, SD1 bill.

One concern is the proposed change in the time for a defendant to file an objection from 90 days to 180 days. Allowing approximately six months for defendants who are not currently serving a mandatory minimum sentence of imprisonment to submit a response would seem unreasonable.

The Maui Police Department is also in agreement with additional concerns submitted in testimony by the members of the Police Chiefs of Hawaii Association (PCHA).

The Maui Police Department supports the intent of SB 2128, SD1, with the noted concerns.

Thank you for the opportunity to testify.

Sincerely,

GARY A. YABUTA
Chief of Police