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HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
P.O. BOX 2121
HONOLULU, HAWAII 96805-2121
Oahu (808) 586-7390
Toll Free 1(800) 295-0089
www.eutf.hawaii.gov

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TESTIMONY BY SANDRA YAHIRO
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON JUDICIARY
ON
HOUSE BILL NO. 148
RELATING TO WRONGFUL IMPRISONMENT

February 6, 2015, 2:00 p.m.

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) Board of Trustees has not had an opportunity to take a position on this bill. However, I think it is important for the Committee to know that this bill will have a significant financial impact on the State. While the bill is not clear what specific plans the person may enroll in, such as medical, prescription drug, dental, vision and life insurance, it is clear that the coverage would extend through the life of the individual. If an individual were to receive free EUTF self-coverage of medical, prescription drug, dental and vision, starting at age 45 and ending at age 75, for example, the estimated cost to the State for one person, using a trend rate of 5%, would be \$487,700. This figure does not include any increase to the EUTF's Other Post-Employment Benefits (OPEB) liability, which would also be negatively affected. Additionally, we believe Chapter 87A, HRS, currently does not allow for non-State and county employees/retirees to be enrolled in EUTF's plans.

Thank you for the opportunity to testify.

HARRISON & MATSUOKA

Attorneys at Law

William A. Harrison

E-mail: wharrison@hamlaw.net

Keith A. Matsuoka

E-mail: kmatsuoka@hamlaw.net

Gene K. Lau, of Counsel

E-mail: glau@hamlaw.net

Davies Pacific Center
841 Bishop Street, Suite 800
Honolulu, Hawaii 96813
Telephone: (808) 523-7041
Facsimile: (808) 538-7579
Web: www.harrisonmatsuoka.net
www.hamlaw.net

February 4, 2015

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE: **COMMITTEE ON THE JUDICIARY**

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy A. San Buenaventura

DATE: Friday, February 6, 2015

TIME: 2:00 PM

PLACE: Conference Room 325

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

BILL NO.: SUPPORT HB 148/SB 145

Honorable Representatives: Karl Rhoads, Joy A. San Buenaventura and members of the Committee on the Judiciary.

Thank you for providing me this opportunity to offer testimony on behalf of the Hawai'i Innocence Project ("HIP") in strident support of House Bill 148.

As background to our support of the Bill, I am one of the founding attorneys of the "Hawai'i Innocence Project." The Hawai'i Innocence Project is an upper level clinical program at the William S. Richardson School of Law. The project provides individuals who have been wrongfully convicted, the last opportunity to seek exoneration, redress and release. The project is manned by law students who are supervised by Professor Virginia Hench, and practicing criminal defense attorneys, Brook Hart, Susan Arnett and the undersigned. The supervising attorneys have combined legal experience in excess of 120 years.

INTRODUCTION

It is the current trend of the times to pass tough legislation against crime. Our community is told time and time again the "criminals" should be incarcerated and this

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Chair: Rep. Karl Rhoads

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Legislative body should make every effort at its disposal to do so. Lost in this war against crime are the truly innocent who get caught up in the wide *hukilau* net thrown by law enforcement. The proposed bill is in fact a breath of fresh air, which seeks to protect and compensate those who are truly innocent while concomitantly protecting the integrity of our criminal justice system.

I am, and we all should be, mindful of John Quincy Adam's famous quote:

"It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, 'whether I do good or whether I do evil is immaterial, for innocence itself is no protection, and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever.'"

This Bill seeks to protect those citizens, their family and friends, and indeed our whole "village."

THE PROBLEM:

Punishment continues after incarceration

The statistics show that those proven to have been wrongfully convicted through post-conviction DNA testing spend, on average, more than 13 years behind bars. The agony of prison life and the complete loss of freedom are only compounded by the feelings of what might have been, but for the wrongful conviction. Deprived for years of family and friends and the ability to establish oneself professionally, the nightmare does not end upon release. With no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven. States have a responsibility to restore the lives of the wrongfully convicted to the best of their abilities.

Already there are Citizens in our beautiful State who have experienced wrongful convictions and who have no place to turn for reparations. As a case in point, the Hawai'i Innocence Project recently assisted two individuals who were wrongfully convicted. The first a Maui man, who was wrongfully convicted of sexual assault and who spent 20 years in prison before being released through DNA analysis. He had not seen his daughter who was born the year he was incarcerated, until he was released. The second was a Honolulu man who was wrongfully convicted of Robbery, as a result

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he suffered 6 years in prison before being pardoned by the Governor. Presently, there are no reparations for either of these unjustly incarcerated men.

Why Should Hawai'i Compensate the Wrongly Convicted?

Despite their proven innocence, the difficulty of reentering society is profound for the wrongfully convicted; the failure to compensate them adds insult to injury. Society has an obligation to promptly provide compassionate assistance to the wrongfully convicted in the following ways:

- *Monetary Compensation, Based Upon a Set Minimum Amount for Each Year Served*
- *Provision of Immediate Services, Including:*
 - Financial support for basic necessities, including subsistence funds, food, transportation;
 - Help securing affordable housing;
 - Provision of medical/dental care, and psychological and/or counseling services;
 - Assistance with the development of workforce skills; and
 - Legal services to obtain public benefits, expunge criminal records, and regain custody of children.

Do all states have compensation statutes?

The federal government, the District of Columbia, and 30 states have compensation statutes of some form. The following 20 states do not: Alaska, Arizona, Arkansas, Delaware, Georgia, **Hawaii**, Idaho, Indiana, Kansas, Kentucky, Michigan, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. Why should we, a State which prides itself on taking care of its *ohana*, not offer its people the same such protections as 31 other jurisdictions? By guaranteeing compensation to the wrongfully convicted, Hawai'i can take an important step towards ensuring the integrity of its criminal justice system, much like John Quincy Adams eloquently demanded.

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THE SOLUTION

Official Acknowledgement of a Wrongful Conviction

Conceding that no system is perfect, Hawai'i's public recognition of the harm inflicted upon a wrongfully convicted person through this Bill helps to foster this healing process, while assuring the public that the government – regardless of fault – is willing to take ownership of its wrongs or errors. Having to successfully sue in court for redress presents a new set of legal and financial obstacles to the wrongfully convicted - when compensation should be a simple issue of justice. There is simply no question that when an innocent person has had his life stripped from him only to endure the horror of prison, justice demands that the individual be compensated for the harm suffered. Hawai'i should adequately and promptly provide justice and restoration to the wrongly convicted through a standard, navigable, and just process. ***This bill does just that!***

CONCLUSION

Our present laws need to strike the necessary balance in recognizing the important needs of Hawai'i's citizenry-- with the needs of the State. This bill would do just that. Hawai'i must have a law to compensate those wrongfully accused and convicted, the Hawai'i Innocence Project therefore wholeheartedly supports this bill.

Mahalo again for the opportunity to submit this testimony in support of HB 148. We look forward to assisting the Committee in its efforts to pass this important legislation.

If you have any questions or need further clarification please feel free to contact me.

Sincerely,

A handwritten signature in black ink, consisting of a horizontal line with a stylized, looped flourish in the center.

William A. Harrison, Esq.
Hawai'i Innocence Project

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy Sanbuenaventura

Friday, February 6, 2015

2:00 p.m.

Room 325

STRONG SUPPORT for HB 148 - COMPENSATION for WRONGFUL CONVICTION

Aloha Chair Rhoads, Vice Chair Sanbuenaventura and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai'i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai'i individuals who are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 148 provides compensation and services to persons who can demonstrate they were wrongfully convicted of a crime and imprisoned.

Community Alliance on Prisons is in strong support of this measure. The state imprisons people who cause harm to others. Conversely, when it is the state that causes the harm, it is the moral responsibility of the state to compensate the person who suffered that harm.

It is perplexing that crime victims are compensated in all 50 states, yet those who were wrongfully imprisoned are not afforded the same respect and accommodation. This is patently unfair and unjust. We can only infer from this that the Aloha state will demand restitution on the victim's behalf for crime, but will ignore the pain and suffering of a person the state has harmed. This hurts. This heaps even more harm on the wrongfully imprisoned.

The state continues to put up barriers to ignore/deny/delay their own responsibility. The message this sends is so bad. It is the opposite of what we teach our keiki about being responsible citizens.

The state's testimony about trials being overturned on technicalities and such are just the red herrings they like to toss out when they don't want to do something. It is embarrassing and totally lacking in aloha.

THE REGISTRY, EXONERATIONS AND FALSE CONVICTIONS¹

The National Registry of Exonerations is the most comprehensive collection of exonerations in the United States ever assembled.

The great majority of false convictions never result in exoneration. Exonerations are most common among defendants wrongly convicted of the most severe violent crimes – especially murder and rape – and for those sentenced to death, life in prison, or many years in custody. Even then, whether or not a falsely convicted defendant is exonerated often depends on sheer luck.

The Registry was launched in May 2012 with a Report covering 873 exonerations from 1989 through February 2012. Since then, the Registry has added exonerations at a rate exceeding 200 a year.

About a third of the newly added exonerations are current cases which are posted within days or weeks of their occurrence. About two thirds are previously unknown exonerations that occurred months, years or decades before.

The previously unknown cases illustrate a central conclusion of our research: The exonerations we know about are just a fraction of those that have taken place.

As we continue to identify old exonerations that have remained unknown to us, we expect the range and diversity of the exonerations we list to continue to grow. For example, 83% of exonerations in our initial Report involved a rape or a murder, compared to only 62% of exonerations in the same period that were identified later by more painstaking research.

The National Registry of Exonerations was started by Northwestern University and has been tracking exonerations from 1989 onward. According to their January 27, 2015 report¹,

“2014 was a record breaking year for exonerations in the United States, by a large margin. The National Registry of Exonerations has recorded 125 exonerations in 2014. The previous highest total was 91 in 2012 and again in 2013, followed by 87 in 2013.² All told, the Registry now lists 1,535 exonerations in the United States, from 1989 through January 20, 2015.”

DNA exonerees collectively total 4,013 years of wrongful imprisonment. Thirty-three of them were under 18 when they were arrested.

¹ EXONERATIONS IN 2014, The National Registry of Exonerations, January 27, 2015
http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf

² Last year we also reported a record, 87 known exonerations in 2013, at that time the highest number in a year. See: https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf. A year later, 2012 and 2013 are tied. We learned of 4 additional exonerations in 2013, bringing the total to 91. But we also learned of 18 additional exonerations in 2012, which, together with the 83 we knew about a year ago, also totals 91. These results suggest that we have become more successful at identifying current exonerations near the time they occur.

HOW CAN THE STATE REPAIR THE HARM THEY CAUSED BY WRONGFUL IMPRISONMENT?

How can the state repair the harm they caused after ruining his life? In the case of Alvin Jardine, the man on Maui who served more than 20 years in prison for a crime he did not commit, the state shamefully stalled and delayed the processing of the only piece of evidence left (they had thrown out everything else), which proved that the DNA did not belong to Mr. Jardine.

Mr. Jardine went to prison when he was 20 years old and his baby daughter was only 4 months old. He was finally released **WITH NO SUPPORT OR COMPENSATION** as a middle-aged man who had lost the prime earning years of his life because of a misidentification by 2 eight-year old children who identified Mr. Jardine from a high school yearbook picture. Eleven other witnesses identified Mr. Jardine at another location at the time of the crime, yet he was convicted anyway.

Committee members, we want you to understand that this could happen to any of us. How many times have you been mistaken for another person? What if you looked like someone who committed a crime and no one believed that you were innocent?

What is the state's responsibility to the person wrongfully convicted?

In the case of Mr. Jardine, who spent many years incarcerated abroad, his loss of relationship with family and friends are incalculable. I am sure that being released was a huge relief, however, how does he get his life re-started with no money and no resources? Mr. Jardine may not be in prison, but he is still, in essence, incarcerated.

The federal government, the District of Columbia and thirty (30) states offer compensation in some form for wrongful imprisonment.

HAWAII OFFERS NOTHING AND DOESN'T EVEN APOLOGIZE.

Excerpts from an Innocence Project report entitled, "Making Up For Lost Time"²

State compensation statutes present a better alternative. Only state government can provide reliable, fair and immediate assistance to the exonerated. In fact, it is their responsibility to do so. Although the wrongfully convicted are especially deserving of assistance, they have historically been overlooked perhaps because they are predominately poor, minority and underrepresented in state and local government.

The recommendations are listed on page 20 of this report:

² MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION, Benjamin N. Cardozo School Of Law, Yeshiva University, An Innocence Project Report http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf

The Innocence Project is intimately familiar with the challenges exonerated people encounter after release, and has developed a series of recommendations for states to compensate the wrongfully convicted:

- ***Provide a minimum of \$50,000 per year of wrongful imprisonment, untaxed, and \$100,000, untaxed, per year on death row, which is in accordance with the federal standard.***

- ***Cover limited and appropriate attorney's fees associated with filing for compensation.***

Currently, only five states meet this standard: Texas, Alabama, Florida, Mississippi and North Carolina. The amount is intended to cover costs associated with lost liberty, lost wages, criminal defense, medical expenses; and losses, such as physical injuries and illness or psychological illness, suffered as a result of the time in prison. The amount should not be subject to taxation.

- ***Provide immediate services including housing, transportation, education, workforce development, physical and mental health care through the state employee's health care system and other transitional services.***

The county Department of Social Services or other appropriate entity should be tasked with creating a "release plan" based on the exoneree's individual needs and work with state agencies like the Department of Health to ensure that these services will be provided free of charge. Services that aren't immediately covered by the state should be reimbursed to the exoneree as part of the compensation package. A state needn't look far to meet these immediate needs, many of its own existing programs and services can fill this role. For example, transportation vouchers for public transportation could be issued as part of the release package. Emergency slots in public housing could be made available. If the exoneree is interested in pursuing higher education, the state university system should offer free tuition. Computer classes offered to state employees should be made available to exonerees as well.

- ***Issue an official acknowledgment of the wrongful conviction.***

Conceding that no system is perfect, the state government's public recognition of the harm inflicted upon the wrongfully convicted person helps to foster the healing process, while assuring the public that the state – regardless of fault – is willing to own up to its wrongs.

Pages 27-31 of this report list the statutes, support services and restrictions of the states who offer some form of compensation.

In summary, it is crucial to the integrity of our justice system and to the state that Hawai'i improves the quality of justice by providing support and compensation to those individuals who have been wrongfully convicted and imprisoned because of the state's error.

This is our moral obligation. The state MUST lead by example. Let's send the right message to our keiki. Please pass this measure and provide compensation and support to the people the state has harmed.

Mahalo for this opportunity to testify.

"If that is not cruel and unusual punishment, not only to you but to your whole family, then I don't know what is."

John Thompson

Exonerated in Louisiana after serving 18 years in prison; 14 of those on Death Row



Benjamin N. Cardozo School of Law, Yeshiva University

**TESTIMONY OF REBECCA BROWN,
DIRECTOR OF STATE POLICY, INNOCENCE PROJECT,
BEFORE THE HAWAII COMMITTEE ON THE JUDICIARY**

RE: HB 148

FEBRUARY 6, 2015

On behalf of the Innocence Project, thank you for allowing me to submit testimony before the Hawaii Committee on Judiciary.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 325 people who had been wrongly convicted of serious crimes. The Innocence Project regards each DNA exoneration as an opportunity to review where the system fell short and identify factually-supported policies and procedures to minimize the possibility that such errors will impair justice again in the future. We also regard it as a time to consider the re-entry needs and appropriate compensation due to the victims of those errors who, innocent of the crime accused, were nonetheless stripped of their lives and liberty and forced to endure the misery of prison. Not only have DNA exonerations led to a growing public awareness of the possibility of wrongful conviction, but media accounts accompanying these exonerations have brought into stark relief those issues facing individuals who are attempting to re-enter society following protracted incarceration.

This submission will describe the impacts of incarceration on the wrongfully convicted, describe their extraordinary needs upon release, and voice our support for HB 148, which would provide a mechanism for compensation to Hawaii's wrongfully convicted.

**Barry C. Scheck, Esq. and Peter J. Neufeld, Esq., *Directors* Maddy deLone, Esq., *Executive Director*
100 Fifth Avenue, 3rd Floor • New York, NY 10011 • Tel: 212/364-5340 • Fax: 212/264-5341**



Impacts of Incarceration on the Wrongfully Convicted: The Need for Monetary Compensation

According to a recent report written by the Re-entry Policy Council, a bipartisan group comprised of leading elected officials, policymakers and practitioners working in state and local governments, barriers to successful reentry are profound: “Research shows that when people who are released from prison or jail return to the community, their job prospects are generally dim, their chances of finding their own place to live are bleak, and their health is typically poor.”¹

Psychological literature recognizing the emotional and psychological harm wrought by incarceration is also well established. Indeed, carceral trends over the past 35 years, characterized by incapacitation and containment as opposed to rehabilitation, have exacerbated the profound reentry issues facing individuals who are returning to society after long prison stays. The 1970’s marked the beginning of exponential prison population growth and a concomitant seachange in carceral policy. As the prison population began to skyrocket, there was an attendant reduction in available resources and staffing, increased prison disturbances, diminished living conditions and limited access to meaningful prison programs, leading psychologists to observe that the transition from prison life to freeworld society is today “more difficult and problematic.”²

Institutionalization reaps profound psychological consequences for the incarcerated, from diminished decision-making capabilities to overwhelming distrust of others to psychological distancing. Prison culture demands the rejection of any behavior that might reveal any sort of emotional weakness or

¹ *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community.* Council of State Governments. Reentry Policy Council. New York: Council of State Governments. January 2005.

² Haney, Craig. *The Psychological Impact of Incarcerations: Implications for Post-Prison Adjustment.* Paper prepared for the Urban Institute National Policy Conference, From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities. 2002.



intimacy. As a result, the “emotional flatness” that an individual might have adopted in prison in the service of self-protection can be devastating to his social relationships upon release.³

Of course, all of these experiences are only compounded by one’s knowledge that he has been wrongfully convicted and incarcerated. A 2004 study that examined the psychological effects of wrongful conviction presented a series of clinical findings based on assessments of a sample of wrongfully convicted men. More than 75% of the sample group experienced enduring personality changes, defined as “personality change with characteristics that were not previously seen such as hostile or mistrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of threat, and estrangement.”⁴ Two-thirds of those assessed experienced post-traumatic stress disorder, and 90% evidenced some form of a psychiatric disorder. As one might expect, nearly all of individuals interviewed experience incredible feelings of bitterness and “strong and unresolved feelings of loss.”⁵

These feelings of loss are not limited to grief and mourning over loved ones -- often parents – who expired during the course of their incarceration; relationships with family members, including children, are often permanently fractured or destroyed. As well, feelings of “what might have been” extend to their professional lives. The average prison stay of individuals exonerated through DNA testing is 13 years. During the course of those years, many of the exonerated missed out on educational and workforce development opportunities. They return to their communities feeling out of step, often unable to meet even basic professional expectations.

³ Ibid.

⁴ Grounds, A. 2004, Psychological Consequences of Wrongful Conviction and Imprisonment. *Canadian Journal of Criminology and Criminal Justice*. 46(2): 165-183.

⁵ Ibid.

In addition, the exonerated typically face serious medical issues upon release. Research shows that the strain and trauma of prison life yields a higher incidence of medical problems for the incarcerated as compared to the general population. For instance, the health of fifty-year-old prisoner has been found, on average, to be similar to that of the average sixty-year-old in the freeworld.⁶ Of course, prison life also increases exposure to communicable and serious diseases, including HIV and Hepatitis B and C, many of which require longterm and comprehensive healthcare upon release. Medical care provided to prisoners is notoriously poor, exacerbating existing conditions and leaving others untreated. Prison rape is also prevalent, with some experts estimating that more than 40% of the prison population has been victimized.⁷ As such, the medical and mental health problems facings individuals upon release are enormous.

A New York Times expose that was recently published tracked the experiences of those wrongfully convicted individuals proven innocent through DNA testing and found that most “have struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of years of questionable or wrongful imprisonment.”⁸ The news story further noted a delay in the provision of monetary compensation and services, if these were to come at all: “Nearly 40 percent — got no money for their years in prison...More than half of those who did receive compensation waited two years or longer after exoneration for the first payment.”⁹

⁶ Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 *Fed. Probation* 3, 5 (2001).

⁷ Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 *PRISON i.* 413, 414 (1995).

⁸ Roberts, Janet and Elizabeth Stanton. “A Long Road Back After Exoneration, and Justice is Slow to Make Amends.” *New York Times*, November 25, 2007.

⁹ *Ibid.*

Why Litigation Does Not Promise Monetary Compensation

Some speculate that the wrongly convicted who live in states that have not passed universal compensation legislation will be able to recover monetary compensation for their wrongful imprisonment under what are known as “1983 claims.” However, in order to even state such a claim, the wrongly convicted individual must demonstrate that his conviction was the result of official misconduct that directly led to a constitutional violation.

First, the wrongly convicted person must show that he was a victim of “intentional misconduct.” Next, in order to prevail under a 1983 claim, the wrongly convicted must also prove that the misconduct fit into a narrow category of established constitutional standards *and* that the standards existed at the time that the crime was committed. For instance, alleged misconduct on the part of police or forensic lab personnel must be shown to have been obviously unconstitutional at the time of the criminal investigation.

Examples of what may *not* constitute “intentional misconduct” under a 1983 claim include:

- ✓ When individuals provided false confessions
- ✓ When individuals agreed to plea agreements [Eighteen of the nation’s nearly 245 people who were later proven innocent through DNA testing agreed to a plea at the time of trial].
- ✓ When individuals were victimized by jailhouse informants, or other incentivized testimony
- ✓ When mistaken eyewitness identifications resulted from procedures or protocols that were not rendered unconstitutional at the time that the criminal investigation was undertaken

It should also be noted that even if someone successfully reaches this stage of the process, many of the official actors, including prosecutors, are often absolutely immune for their actions.



Simply put, 1983 claims do not guarantee compensation for three basic reasons:

1. The wrongly convicted plaintiff must not only prove that mistakes were made, but that there was deliberate and reckless conduct on the part of officials.
2. In most cases, qualified and absolute immunity doctrines shield official actors, such as police, crime lab personnel, and prosecutors from allegations of constitutional misconduct.
3. Even if there is a successful suit, litigation takes years and there is still no guarantee that the wrongly convicted plaintiff will recover damages even if he prevails in the years after filing. Often, small towns are not insured or do not have sufficient funds in their coffers to cover significant claims. As well, outside insurers that cover municipalities often refuse to cover the most egregious conduct carried out by official actors.

Therefore, the Innocence Project recommends that each state pass a statute that includes a fixed sum of recovery for each year spent in prison. President George W. Bush endorsed Congress's recommended amount of **up to \$50,000 per year, with up to an additional \$50,000 for each year spent on death row.** All fixed sums included in state compensation laws should, at minimum, meet the federal standard and include a provision that contemplates inflation and makes annual adjustments on that basis.

Conclusion

The victims of criminal justice system error deserve strong support from the government that harmed them - however inadvertently – to return them to where they could have been in life but for their wrongful conviction, and to compensate them for the horror they endured. Passage of HB 148 will help ease the unimaginable transition for the wrongfully convicted from prison life to mainstream society.



THE HAWAII INNOCENCE PROJECT – LAW OFFICES
THE WILLIAM S. RICHARDSON SCHOOL OF LAW
Professor Virginia E. Hench, Project Director
Attorney Number 6821
2515 Dole Street, Honolulu, HI 96822
hench@hawaii.edu or innocenceprojecthawaii@gmail.com

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE ON THE JUDICIARY

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy A. San Buenaventura

DATE: Friday, February 6, 2015

TIME: 2:00 PM

PLACE: Conference Room 325

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

HB 148/SB 145

STRONG SUPPORT

Honorable Chair Rhoads, Honorable Vice-Chair San Buenaventura and Honorable Members of the Committee on the Judiciary, Representatives Belatti, Morikawa, Brower, Nakashima, Creagan, Takayama, Hashem, Woodson, Kawakami, McDermott, Lee, and Thielen:

My name is Virginia Hench, and I am the Director and one of the founders of the Hawai'i Innocence Project, and I am here to testify in strong support of House Bill 148.

In 1913, California and Wisconsin became the first states to create systematic financial restitution for citizens wrongly deprived of their liberty by wrongful convictions. For decades, they were the only states to provide this important safety net to help restore the wrongly convicted to a productive life. However, as exonerations began to be more publicized, more states began to enact statutory compensation. Between the turn of the 21st century and 2014, when Minnesota enacted a compensation statute, a total of 30 states (as well as the federal government and the District of Columbia) enacted compensation statutes. Not one of those jurisdictions has chosen to repeal a compensation statute.

As we begin the year 2015, however, Hawai'i remains among the minority of jurisdictions that fails to provide reasonable compensation to innocent persons who have been unjustly required to sacrifice their liberty and serve time for another person's crime.

In looking over the states with compensation, it is interesting to note that a majority of

2515 DOLE STREET • HONOLULU, HAWAII 96822-2328
TEL (808) 956-6547 • FAX 1-808-443-0554 or 1-808-956-6547 • INTERNET
www.innocenceprojecthawaii.org

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southern states, as well as a majority of “red” states over-all, have compensation statutes. This may be because compensation for the wrongly convicted is not just a liberal ideal. It is sound policy, regardless of politics.

A person who is imprisoned for another person’s crime loses more than liberty and connections to family and community. The exoneree loses reputation, chances for education, earning power, credit towards a pension. Moreover, upon release, the exoneree’s knowledge and skills are usually outdated. Many exonerees are diagnosed with post-traumatic stress disorders, which can further exacerbate their struggles in re-establishing a normal, productive life. Ironically, the exoneree does not even have access to the re-entry services available to a guilty person who has been released after serving their sentence.

Financial compensation, free tuition or job training, and other compensatory benefits can help the wrongfully convicted person make a smoother re-entry into society and increase their future self-sufficiency. Compensation also allows government and citizens to make amends to the wrongfully convicted person and, more generally, helps to repair damage to the state’s public legitimacy and boost public faith in the good judgment and fairness of our system.

Hearing this bill is an important first step toward righting a wrong, and I thank you for the opportunity to testify. Please move this bill forward. Thank you.

Yours sincerely,
/s/ Virginia E. Hench
Director, Hawai`i Innocence Project

Law Offices of
BROOK HART
A LAW CORPORATION
333 Queen Street, Suite 610
Honolulu, Hawaii 96813

RECEIVED FEB 05 2015

TEL: (808) 526-0811

brookhartlaw@gmail.com

FAX: (808) 531-2677

HAND DELIVERED TO ROOM 305 OF THE STATE CAPITOL

February 5, 2015

Representative Karl Rhoads
Chairman, Judiciary Committee
Hawaii House of Representatives
State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill No. 148,
"Relating To Wrongful Imprisonment"

Dear Chairman Rhoads and Judiciary Committee Members:

I am a private practice attorney based in Honolulu and concentrating in criminal defense law. I have been a member of the Hawaii bar since 1968. Additionally, I have served as a Lecturer in Law at the William S. Richardson School of Law since 2005, co-teaching (as a founding member) the Hawaii Innocence Project courses, along with William Harrison, Esq., Susan Arnett, Esq., and Professor Virginia Hench.

This letter constitutes my written testimony and the Hawaii Innocence Project's supplemental written testimony in strong support of House Bill No. 148, which was introduced by the Speaker of the House, Rep. Joseph Souki. House Bill No. 148 provides for essential compensation and important services for people who are wrongfully convicted in Hawaii state courts of criminal offenses and then are incarcerated because of the wrongful convictions. That bill is scheduled to receive a hearing by the House Judiciary Committee at 2:00 p.m. on Friday, February 6, 2015, in Conference Room 325.¹

¹To avoid needless repetition, this written testimony incorporates by reference the written testimonies submitted in favor of House Bill No. 148 by Rebecca Brown (Director

Representative Karl Rhoads
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A "fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). "The oft-quoted principle that it is better to let guilty men go free than to punish an innocent man is axiomatic in Anglo-American criminal law and has deep roots. Besides reflecting the fundamental value our legal system places on personal liberty and the high burden required to deprive someone of that liberty, the principle also embodies a basic admission - that the single most egregious error a justice system can commit is to punish the innocent." Note, *Re-Punishing The Innocent: False Confession As An Unjust Obstacle To Compensation For The Wrongfully Convicted*, 63 Case Western Reserve Law Review 1393, 1394 (2013) (underlining added; footnote omitted). "The natural corollary to this principle is that society has a special responsibility to make efforts toward righting the wrong when it occurs. A majority of U.S. states, along with the District of Columbia and the federal government, have recognized that responsibility by passing statutes that provide compensation for exonerees after their release." Id. (underlining added). It is now definitely time for Hawaii to join the majority of American states and the federal government in enacting a statute such as the statute proposed in House Bill No. 148.

That is especially true because of the scientific advancement of DNA testing, which has generated a "revolution in the criminal justice system." Id. at 1395 (footnote omitted). It is now "possible in certain cases to produce conclusive scientific evidence of a wrongful conviction years or even decades after the crime." Id. Indeed, DNA testing "has taught us that there are more innocent people in jail than we ever thought." Id. (footnote omitted).

of State Policy for the Innocence Project at the Benjamin Cardozo School of Law in New York City); criminal defense attorney William Harrison, also on behalf of the Hawaii Innocence Project; State Public Defender John M. Tonaki; and Kat Brady of the Community Alliance on Prisons.

Representative Karl Rhoads
Chairman, Judiciary Committee
February 5, 2015
Page 3

Notably, "scholars and exoneree advocates generally agree that statutory compensation is the 'only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours.' The powerful social-justice rationale for a uniform compensation regime funded with public money was eloquently stated by Yale University Professor Edwin Borchard in 1941: 'Where the common interest is joined for a common end - maintaining the public peace by the prosecution of crime - each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.'" Id. at 1396 (parentheses in original; footnotes omitted).

Although I and the Hawaii Innocence Project staunchly support House Bill No. 148, as addressed below we propose some additions and revisions that in our professional opinions would improve the current version of that bill.

Regarding page 5 (lines 15-16) of House Bill No. 148, we would recommend that the blank space in the sentence "Not less than \$ [blank space] for each year of incarceration" be filled in with a minimum amount of at least \$100,000. That substantial sum would not only constitute reasonable compensation for individuals who were wrongfully convicted and incarcerated, but it would also provide a significant financial incentive for the State of Hawaii to take effective steps to minimize the potential for wrongful convictions and incarceration.

Similarly, on page 6 (lines 12-13) of House Bill No. 148, the blank space in the sentence "Not less than \$ [blank space] for each year served either on parole, probation, or as a registered sex offender," should be filled in with a minimum amount of at least \$50,000.

On page 8 (lines 4-5) of House Bill No. 148, the imposition of a statutory cap of some yet-to-be-determined amount on attorney's fees should be eliminated. Eliminating an absolute cap on attorney's fees will provide attorneys with

Representative Karl Rhoads
Chairman, Judiciary Committee
February 5, 2015
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the financial incentive to represent defendants in cases that are more complex than usual and that will require significantly more time and effort. House Bill No. 148 should provide for reasonable attorney's fees to be determined by the court on a case-by-case basis. The attorney compensation of "10 percent of the damage award plus expenses," in lines 2-3 on page 8 of the bill, should be a minimum amount.

On page 13 (line 1) of House Bill No. 148, the phrase regarding the provision of "Secondary or higher education" to defendants who were wrongfully convicted and incarcerated should be expanded to "Elementary, secondary or higher education," because some defendants may not have even completed an elementary school education.

On page 13 (line 20) of House Bill No. 148, the phrase "annulling, canceling, and rescinding the record of arrest" should be expanded to "annulling, canceling, rescinding and sealing the record of arrest."

On page 14 (lines 14-17) of House Bill No. 148, the one-year waiting period for expungement "upon discharge of the defendant and dismissal of the charge against the defendant in the case of a deferred acceptance of guilty plea or nolo contendere plea" is unnecessary, discriminatory, and should be eliminated.

On page 14 (lines 19-21) of House Bill No. 148, the sentence "Any person entitled to an expungement order hereunder may by written application also request return of all fingerprints or photographs taken in connection with the person's arrest" should be expanded to "Any person entitled to an expungement order hereunder is entitled to return of all fingerprints and photographs taken in connection with the person's arrest, and to the return of all non-contraband items of property that were seized from the person."

On page 15 (lines 1-6) of House Bill No. 148, the language "The attorney general or the attorney general's duly authorized representative within the department of the attorney general, within 120 days after receipt of the written

Representative Karl Rhoads
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application, shall, when so requested, deliver, or cause to be delivered, all fingerprints or photographs of the person, unless the person has a record of conviction" should be followed by the clarifying words "for one or more convictions that have not been reversed, vacated, or the subject of a pardon."

In conclusion, I and the Hawaii Innocence Project urge the House Judiciary Committee to approve House Bill No. 148, after incorporating the additions and revisions that have been set forth above.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation



BROOK HART
Hawaii Innocence Project,
William S. Richardson School of Law

Submitted By	Organization	Testifier Position	Present at Hearing
Mary Lacques	Individual	Support	No

Comments:

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Polk	Individual	Support	No

Comments: It is shameful that Hawaii, the land of Aloha, is one of only 20 states that do not provide compensation for wrongful imprisonment. I do not understand why the victim of a criminal is entitled to compensation, but the victim of the State of Hawaii is not. Though there may be amendments to this bill, I encourage you to pass it to provide reasonable compensation for those wrongfully imprisoned. Thank you.

Submitted By	Organization	Testifier Position	Present at Hearing
Lezlie Kiaha	Individual	Support	No

Comments:

Submitted By	Organization	Testifier Position	Present at Hearing
Teri Heede	Individual	Support	No

Comments:

Submitted By	Organization	Testifier Position	Present at Hearing
R. Kinslow	Individual	Support	No

Comments: Support. Please move out of committee

Submitted By	Organization	Testifier Position	Present at Hearing
Diane DiMaria	Individual	Support	No

Comments: HELLO, AS THE MOTHER OF A WRONGFULLY CONVICTED INMATE, WHO HAS THRU FOIA REQUEST OBTAINED NEWLY DISCOVERED EVIDENCE OF EGREGIOUS PROSECUTORIAL MISCONDUCT (WITHHOLDING CRUCIAL EVIDENCE FROM THE DEFENSE COUNSEL, THE TRIAL JUDGE AND JURY, AND EVERY APPELATE JUDGE. MY SON HAS LANGUISHED IN PRISON SINCE 1999 (AT HALAWA FOR THE LAST 7 YEARS). PERHAPS WHEN THE ODC AND JUDGES FINALLY GET TO SEE THE WITHHELD DOCUMENTS, MY SON, RICHARD DAMIAN SERRANO, WILL HAVE A CHANCE TO COME HOME TO CALIFORNIA. PLEASE MAKE COMPENSATION AVAILABLE TO THE TRULY INNOCENT WRONGFULLY CONVICTED INMATES, SOME OF WHOM, SUCH AS MY SON, REFUSED THE (10 YEAR) PLEA DEAL AND WENT TO TRIAL. HE RECEIVED 120 YEARS FOR HIS ATTEMPT TO PROVE HIS INNOCENCE, WITH ONE HAND BEHIND HIS BACK, BECAUSE OF THE CORRUPT HILO DA'S OFFICES' DECISIONS TO HANG MY SON FOR CRIMES THAT 2 OTHER MEN COMMITTED, PLEA DEALS IN HAND THEY CRUCIFIED MY AFRICAN AMERICAN SON IN 2000. THE OTHER MEN RECEIVED SENTENCES OF 5 YEARS PROBATION, AND 20 YEARS, THIS MAN WILL BE RELEASED IN AUGUST OF THIS YEAR. THANK YOU FOR CONSIDERING THE CORRUPT NATURE OF THE PROSECUTORS OFFICES IN HAWAII,THE DISMAL SCARED COURT APPOINTED ATTORNEYS, AND PASS THIS LAW ASAP, FOR THE LOVE OF JUSTICE, AND TO DEMONSTRATE COMPASSION FOR THE WRONGFULLY CONVICTED AND THEIR PARENTS, CHILDREN AND FRIENDS. THANK YOU FOR YOUR ATTENTION, DIANE DIMARIA, SANTA CRUZ, CALIFORNIA 831-239-9774

DAVID Y. IGE
GOVERNOR



BERT Y. MATSUOKA
CHAIR

JOYCE K. MATSUMORI-HOSHIJC
MICHAEL A. TOWN
ANNELLE C. AMARAL
FITUINA F. TUA
MEMBERS

TOMMY JOHNSON
ADMINISTRATOR

LATE

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

1177 Alakea Street, First Floor
Honolulu, Hawaii 96813

No. _____

**TESTIMONY ON HOUSE BILL 148
RELATED TO WRONGFUL IMPRISONMENT**

By
Bert Y. Matsuoka, Chairman
Hawaii Paroling Authority

House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Joy A. Buenaventura, Vice Chair

Friday, February 6, 2015; 2:00 p.m.
State Capitol, Conference Room 325

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

The Hawaii Paroling Authority (HPA) opposes House Bill 148 Relating to Wrongful Imprisonment which seeks to provide compensation and services to persons who can demonstrate they were wrongfully convicted of a crime and imprisoned.

Specifically, the HPA opposes all sections of this measure which seek to provide any level of compensation to offenders and/or the offender's family members following the granting of a gubernatorial pardon.

As written, this measure does not consider the fact that a pardon does not erase the crime(s), criminal history of the offender, or the loss suffered by the victim(s). The granting of pardon forgives the offender for the offense(s) previously committed and in no way proclaims an offender's innocence. The granting of a pardon is normally based on the demonstrated changes in behavior and life style of an offender over a substantial period of time following the offender's involvement in the criminal justice system. Also, this measure does not consider the fact that some offenders are multi-state offenders, who often have several convictions in other jurisdictions similar to and/or the same as their offense(s) in Hawaii.

Implementation of this measure as it relates to providing compensation for offenders granted a pardon would be very costly for the State and may have a chilling effect on the pardon process.

Thank you for the opportunity to provide testimony on HB 148.

LATE



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Joy A. San Buenaventura, Vice Chair

Friday, February 06, 2015
State Capitol, Conference Room 325

by
Sidney Nakamoto
Adult Client Service Branch Administrator
First Circuit Court

Bill No. and Title: House Bill No. 148, Relating to Wrongful Imprisonment.

Purpose: Provides compensation and services to persons who can demonstrate they were wrongfully convicted of a crime and imprisonment.

Judiciary's Position:

The Judiciary takes no position on the merits of House Bill No. 148 and respectfully offers the following comments:

Section ___-4(f) of House Bill No. 148, page 11, lines 9-12, states that the chief justice is responsible for reasonable attempts to notify those granted judicial relief of their rights under the new chapter. However, it may be prudent for the Committee to also consider the role of the governor in notifying people who have been pardoned. Under article V, section 5 of the Hawai‘i Constitution, the governor is the only individual who has or may be given the authority to grant pardons. Information concerning people who have been pardoned in the past is therefore probably most readily available to one of the governor’s executive agencies rather than the Judiciary. We respectfully suggest the following language to replace the section ___-4(f) as proposed in House Bill 148:

“(f) The governor or the governor’s designee shall make reasonable attempts to provide notice of the rights under this chapter to all persons pardoned prior to the effective date of this chapter.



House Bill No.148, Relating to Wrongful Imprisonment
House Committee on Judiciary
Friday, February 06, 2015
Page 2

(g) The chief justice or the chief justice's designee shall make reasonable attempts to provide notice of the rights under this chapter to all persons granted, prior to the effective date of this chapter, judicial relief consistent with the criteria set forth in section __-1(a)."

House Bill No. 148 may benefit from clarification of all types of convictions that are covered under this bill, since it may impact district and circuit courts operations. For example, probation programs may also be impacted by subsection (B) on page 6, lines 12-15, as probation may need to provide records confirming the length of time a defendant has served on probation. Probation records are destroyed after 20 years in accordance with applicable law. However, these claims could surface many years after a defendant has completed probation.

Thank you for the opportunity to testify on House Bill 148.

LATE

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

H.B. NO. 148, RELATING TO WRONGFUL IMPRISONMENT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 6, 2015 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Mark M. Nomura, Deputy Attorney General or
Caron M. Inagaki, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (“the Department”) appreciates the intent of this bill to provide prompt and certain compensation to innocent persons who have been wrongfully convicted of crimes and imprisoned. The Department, however, opposes the bill because it makes the State, in effect, the insurer of any errors in the criminal justice system.

The purpose section of the bill cites no data or anecdotal evidence demonstrating the need for the legislation. As a result, this Committee is being asked to approve a comprehensive compensation bill absent any information showing the need for it. If appropriate, the Department recommends the appointment of a group to study the need for innocence redress legislation in the State, and if so, to propose carefully circumscribed legislation to meet that need. The group should consist of judges, prosecuting attorneys, public defenders, a representative of the private defense bar, a representative of the Department, and experts on DNA and other scientific testing.

The National Innocence Project’s model compensation law, upon which this bill is based, has not been followed by any of the states whose compensation laws have been reviewed by the Department to date. Moreover, the state compensation laws reviewed by the Department differed from each other in significant ways. This bill, like the National Innocence Project’s “model” law, is problematic for reasons outlined below.

The phrase “not inconsistent with innocence” is vague and open to multiple interpretations. The intended scope of the bill is to require compensation for “innocent” persons, i.e., persons who did not commit criminal acts, but who were nevertheless convicted and

imprisoned. However, the bill appears to allow claims to be brought by persons who committed crimes and were convicted, and therefore not “innocent,” but were later pardoned. Pardons almost always involve persons who actually committed the crime for which they were convicted, and later seek a pardon based on good behavior since their conviction. Therefore, pardons are inconsistent with a claim of innocence.

In addition, this bill does not preclude claims for convictions that were vacated or reversed due to a legal deficiency. For example, a claim could be brought by a person who had drugs in his possession and was convicted for a drug possession offense, but whose conviction was later overturned because of the failure to obtain a search warrant before searching and recovering the drugs. As another example, a claim could be brought by a person who committed the crime for which he was convicted, but whose conviction was overturned because of the failure to read him his Miranda rights after he had been placed in custody.

Moreover, the bill fails to specify the type of evidence required to prove one’s “innocence.” Will DNA testing exclusively be required? Will other types of scientific evidence, such as the results of a polygraph test, or other tests of varying degrees of scientific acceptance, be sufficient? Will a “new” witness or a witness who changes or recants the witness’ former testimony be sufficient to prove one’s innocence? Without further clarification, an unintended consequence of the bill may be to provide financial incentive for persons convicted of crimes to challenge their convictions, when they might not otherwise do so, because if they succeed, they will be entitled to compensation for the reasons, and in the amounts, set out in the bill.

Finally, the bill allows the court no discretion in awarding compensation, even where the court may find the amount to be unjustified or inappropriate. For example, on page 5 of the bill, lines 13-16, the court must award the claimant no less than a yet to be specified amount, for each year of incarceration, for any “physical injury,” no matter how minor. There is also no provision to prorate this amount for partial years of incarceration. The court must further award another yet to be specified amount, for each year served on parole or probation. (Page 6, lines 12-15.) The court must also award compensation to the claimant for child support payments owed by the claimant, which accrued during the claimant’s incarceration, plus interest, even if the claimant had refused to pay child support prior to or after claimant’s incarceration. (Page 7, lines 10-13.)

We respectfully request that this bill be held.

LATE

Committee	Organization	Testifier Position	Present at Hearing
Kenny Wustig	Individual	Support	No

Comments:

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Demaris	Individual	Comments Only	No

Comments: Support