

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

February 14, 2019

S.B. No. 1178: RELATING TO MANSLAUGHTER

Chair Rhoads and Members of the Committee:

We strongly oppose S.B. No. 1178 which would establish the offense of Manslaughter for distributing a dangerous drug where the recipient of the drug dies as a result of ingestion of the drug. As a general matter, we oppose criminal offenses which impose "strict liability" for performance of an act. Under the common law, every criminal offense contained a "mens rea" or culpable state of mind. This prevented the punishment of people for results of acts which were the result of mistake or good intentions.

Currently, the offense of Manslaughter punishes a person for recklessly causing a death. This standard is a long-standing standard in the law and is sufficient to punish causations of death which fall short of intentional acts. S.B. No. 1178 would unjustifiably punish persons with a Manslaughter conviction under very questionable circumstances.

Addicts often ingest dangerous drugs in a group. They often share drugs. If any person in a group dies of an overdose from shared drugs, the others who shared their drugs would be sentenced to 20 years in prison for manslaughter under this measure. This is a severe punishment as a result of strict liability for what many policymakers call a public health rather than a criminal problem.

This measure would also strictly apply to healthcare professionals such as physicians and pharmacists. Opioid pain medications and some other prescription drugs are classified as "dangerous drugs" under H.R.S. Chapter 329. Distribution of these drugs to patients who then overdose on them would result in a criminal prosecution of these professionals under this strict liability law. The only exemption under this bill is for those falling under Chapter 327L, the "Our Care, Our Choice" Act which would not apply to the vast majority of medical treatments.

Finally, this measure would be difficult, if not impossible, to enforce. In every case under this prosecution, the causation of death would have to be shown to have been caused by the particular supply of drugs that the decedent is alleged to have received from the defendant. For example, it would not be enough to show that the decedent had crystal methamphetamine in his/her system and that the defendant sold crystal methamphetamine to the decedent. That would not be sufficient to prove beyond a reasonable doubt that the defendant's supply caused the decedent's death.

On the grounds that S.B. No. 1178 would result in unjustified imprisonments, unintended prosecutions and other consequences, we respectfully oppose its passage. Thank you for the opportunity to provide testimony in this matter.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 1178, RELATING TO MANSLAUGHTER.

**BEFORE THE:**

SENATE COMMITTEE ON JUDICIARY

**DATE:** Thursday, February 14, 2019      **TIME:** 9:30 a.m.

**LOCATION:** State Capitol, Room 016

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Adrian Dhakhwa, Deputy Attorney General

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Chair Rhoads and Members of the Committee:

The Department supports this bill with one amendment.

The purpose of this bill is to allow prosecutions for the offense of manslaughter in cases where the distribution of dangerous drugs results in an overdose death.

Currently, an individual who distributes a lethal dose cannot be prosecuted for causing the overdose victim's death because the cause of death is attributed to the victim's act of ingesting the drugs, rather than the distribution of the dangerous drugs.

This bill seeks to close this loophole by imposing strict liability for causing a death by providing the means to overdose. Drug distributors know the amount, frequency, and type of drugs their end users are ingesting such that an overdose death should be a foreseeable result of dangerous drug abuse. While this bill covers all dangerous drugs, some are of particular concern in this State, namely crystal methamphetamine and opioids.

The Hawaii Opioid Initiative has made tremendous progress in "developing and implementing a proactive coordinated statewide Action Plan in order to avoid the tragedies experienced in other parts of the nation."<sup>1</sup> Much of the Hawaii Opioid Initiative's attention and effort has been on education, prevention, and training, focusing primarily on the legal distribution of opioids (i.e. prescriptions). However, another means of combating the opioid epidemic is the ability to hold both legal and illegal drug

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<sup>1</sup> The Opioid Initiative 2.0 A Statewide Response to Opioid Use and Other Substance Misuse p.1.

distributors responsible when the drugs they distribute result in the end user dying of an overdose. In addition to prescription opioids, crystal methamphetamine is still prevalent in Hawaii. We are beginning to see it laced with the opioid fentanyl, which can be 50 times more powerful than heroin and 100 times more potent than morphine.<sup>2</sup> Under this bill, whether the end user knows these dangers does not affect the drug dealer's criminal culpability.

By design, physicians and other legal prescribers of dangerous drugs are not automatically exempt from prosecution under this bill. It is the intent of this bill to allow for any dangerous drug distributor, illegal or not, to be *eligible* for prosecution if culpable.

We recommend one amendment to this bill based on concerns that the current wording is too broad and may criminalize all legitimate prescriptions. To address these concerns, the Department recommends inserting "and unlawfully" after "knowingly" (page 1, line 8). The new wording would read:

"(c) The person knowingly and unlawfully distributes a dangerous drug . . ."

Inserting "unlawfully" would remove criminal liability for those distributors acting within the lawful parameters of their profession, and distributors who commit unlawful acts could still be prosecuted. This is not an unprecedented initiative as there are approximately 21 other states with a similar law in place.

Additionally, this bill specifically exempts actions authorized under the "Our Care, Our Choice Act" (codified in chapter 327L, Hawaii Revised Statutes). Health care providers prescribing in accordance with chapter 327L would not be prosecuted.

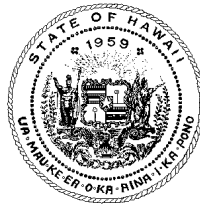
It should be noted that prosecutors would continue to exercise their discretion in deciding whether to charge a distributor with manslaughter, depending on the facts and circumstances of each case, and whether there is sufficient evidence to prove the charge beyond a reasonable doubt.

We respectfully ask the Committee to pass this bill with the amendment above.

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<sup>2</sup> <https://www.cnn.com/2016/05/10/health/fentanyl-opioid-explainer/index.html> (last visited 1/31/19).

DAVID Y. IGE  
GOVERNOR



**NOLAN P. ESPINDA**  
DIRECTOR

**Maria C. Cook**  
Deputy Director  
Administration

**Jodie F. Maesaka-Hirata**  
Deputy Director  
Corrections

**Renee R. Sonobe Hong**  
Deputy Director  
Law Enforcement

**LATE**

STATE OF HAWAII  
**DEPARTMENT OF PUBLIC SAFETY**  
919 Ala Moana Boulevard, 4th Floor  
Honolulu, Hawaii 96814

No. \_\_\_\_\_

**TESTIMONY ON SENATE BILL 1178  
RELATING TO MANSLAUGHTER.**

by

Nolan P. Espinda, Director  
Department of Public Safety

Senate Committee on Judiciary  
Senator Karl Rhoads, Chair  
Senator Glenn Wakai, Vice Chair

Thursday, February 14, 2019; 9:30 a.m.  
State Capitol, Conference Room 016

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

The Department of Public Safety (PSD) supports Senate Bill (SB) 1178, which amends section 707-702(1), Hawaii Revised Statutes, to authorize manslaughter prosecutions for dangerous drug distribution that results in overdose deaths.

This bill furthers the goal of the Hawaii Opioid Initiative to reduce opioid related deaths. SB 1178 is another tool to combat the opioid epidemic by holding people responsible for illegally distributing dangerous drugs, resulting in another person dying as a result of those drugs.

Thank you for the opportunity to testify on this measure.

**Justin F. Kollar**  
Prosecuting Attorney

**Jennifer S. Winn**  
First Deputy



**Rebecca A. Vogt Like**  
Second Deputy

**Diana Gausepohl-White**  
Victim/Witness Program Director

**OFFICE OF THE PROSECUTING ATTORNEY**

**County of Kaua'i, State of Hawai'i**

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808-241-1888 ~ FAX 808-241-1758  
Victim/Witness Program 808-241-1898 or 800-668-5734

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**THE HONORABLE KARL RHOADS, CHAIR  
SENATE COMMITTEE ON JUDICIARY  
The Thirtieth Legislature  
Regular Session of 2019  
State of Hawai'i**

February 14, 2019

**RE: S.B. 1178: RELATING TO MANSLAUGHTER.**

Chair Rhoads, Vice-Chair Wakai, and members of the Senate Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua'i is in support of S.B. 1178 – Relating to Manslaughter. The purpose of this Bill is to authorize manslaughter prosecutions for dangerous drug distribution that results in overdose deaths.

Accidental drug overdose deaths constitute the largest category of injury death in the United States. Illicit opioids like heroin and fentanyl accounted for more than 35,000 deaths in the United States in 2016. Almost all of the street heroin sold in Hawai'i and in the United States is adulterated with some type of highly-lethal fentanyl or fentanyl analogue. While there is no single answer to this epidemic, there is no question that heroin dealers know their product has a high likelihood of causing a fatal overdose. Disregarding this risk should place a heroin dealer in the same category as a motorist who disregards a risk and kills a person. Prosecutors should have the ability to charge a drug dealer with manslaughter if that dealer recklessly provides deadly drugs to an individual who then dies from an overdose.

In conclusion, we respectfully ask that your Committee PASS this Bill.

Thank you for this opportunity to testify on this bill.

POLICE DEPARTMENT  
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL  
MAYOR

SUSAN BALLARD  
CHIEF

JOHN D. McCARTHY  
JONATHAN GREMS  
DEPUTY CHIEFS

MK-KK

OUR REFERENCE

February 14, 2019

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

Dear Chair Rhoads and Members:

SUBJECT: Senate Bill No. 1178, Relating to Manslaughter

I am Mikel Kunishima, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 1178, Relating to Manslaughter.

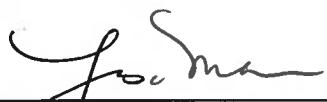
Incidents that result in death are the most serious cases that law enforcement investigates. Deaths caused by the opioid epidemic and other dangerous drugs are widespread across the nation, and its ripple effect is starting to reach Hawaii. The HPD supports manslaughter prosecutions for dangerous drug distribution that results in overdose deaths.

The HPD urges you to support Senate Bill No. 1178, Relating to Manslaughter.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,

  
\_\_\_\_\_  
Susan Ballard  
Chief of Police

  
Mikel Kunishima, Captain  
Criminal Investigation Division

## TESTIMONY IN OPPOSITION TO SB 1178

TO: Senate Committee on Judiciary

FROM: Nikos Leverenz  
Grants, Development & Policy Manager

DATE: February 14, 2019 (9:30 AM)

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Chair Rhoads, Vice-Chair Wakai, and Members of the Committee:

Hawai'i Health & Harm Reduction Center (HHRC) **strongly opposes** SB 1178, which authorizes prosecutors to bring manslaughter charges against any person who “knowingly distributes a dangerous drug in any amount and another person dies as a result of ingesting that drug.” “Distribute” means “to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.”

This bill will foreseeably result in increased deaths by overdose by deterring individuals from taking active measures, including calls to obtain emergency medical assistance, when a person close to them suffers from an overdose. As such, it will undermine and jeopardize the salutary life-saving efforts of Governor Ige’s Department of Health in facilitating overdose prevention training and wider naloxone (Narcan) availability throughout the state.

To the extent that neither the Attorney General nor county prosecutors will bring manslaughter charges against corporate leaders of pharmaceutical companies, which are strictly liable on a civil basis for products entered into the marketplace, this proposed provision will foreseeably be used to further stigmatize, dehumanize, and criminalize persons who use drugs. Those who are engaged in large-scale trafficking of illicit drugs are adequately addressed by existing statutory provisions.

Experience shows that those prosecuted under similar statutes in other jurisdictions are low-level dealers, family, friends, and romantic partners. Removing *mens rea* requirements and



imposing strict criminal liability is a wayward punitive overreach that will expose persons already impacted by social determinants of health to protracted periods of incarceration and criminal justice supervision. Last month, the Robert Wood Johnson Foundation [issued a report that surveyed the deleterious long-term effects of incarceration on a person's health](#):

People who are incarcerated face greater chances for chronic health conditions, both while confined and long after their release. Incarceration exposes people to a wide range of conditions, such as poor sanitation and ventilation and solitary confinement, that are detrimental to long-term physical and mental health. After release, previously incarcerated individuals often face higher mortality rates and experience limited opportunities for gainful employment, stable housing, education, and other conditions needed for good health.

The justification sheet provided by the Attorney General states that this bill “is responsive to the opioid epidemic but will cover all dangerous [Schedule I or II] drugs [not including cannabis].” Further, “victims and their families will have better access to justice” and “enhanced criminal penalties for drug distribution will improve public safety.”

Each of these justifications is without merit.

[The Hawai'i Opioid Initiative](#), which is focused on a “commitment to leverage opportunities to drive improvements in the public health system for substance misuse, use disorder, and related health consequences,” does not contemplate increased criminalization. The Initiative refers to the [Surgeon General's Report on Alcohol, Drugs and Health](#) (2016) underscoring “the importance of addressing addiction as a chronic illness and mobilizing a public health approach in response.” In 2018, the Surgeon General's “[Spotlight on Opioids](#)” also called for a health-centered approach: “[S]hifting our attitudes and working together to widen access to prevention, treatment, and recovery services for opioid misuse and opioid use disorders are essential for saving lives.”

Justice is not served by creating social conditions that will foreseeably produce more overdose deaths. Increasing the possibility of criminal prosecution of family members, friends, and romantic partners, will deter them from seeking needed emergency medical assistance.

With respect to improvements in public safety through enhanced penalties, large-scale drug traffickers are already addressed by existing statutory provisions. The [final report of the HCR 85](#)

[Task Force on Prison Reform](#), which called for “a new and more sustainable correctional model” that employs “greater use of community-based alternatives to incarceration,” noted the unsustainability of continued over-incarceration: “If we continue on the path we have been on for the past four decades, we can expect the same poor outcomes and high recidivism rates we have experienced in the past, and our communities will not be safer despite the hundreds of millions of dollars we will spend on corrections.”

HHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions. Incarceration for any length of time for those with undiagnosed or undertreated behavioral health conditions compounds human suffering and is neither wise nor compassionate public policy.

In contrast to the carceral-centric approach advanced by the Attorney General in this instance, and broadly enforced by county prosecutorial preferences, Hawai'i should increase its capacity to provide low-threshold, evidence-based care and medical treatment for those who need it apart from the criminal justice framework.

The continued criminalization of behavioral health concerns under existing law and prevailing prosecutorial practices is not conducive to individual or public health. This bill exacerbates the harms of the current carceral-centered approach and should be deferred.

Thank you for the opportunity to testify on this measure.

# COMMUNITY ALLIANCE ON PRISONS

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

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## COMMITTEE ON JUDICIARY

Sen. Karl Rhoads, Chair

Sen. Glenn Wakai Vice Chair

Thursday, February 14, 2019

9:30 am

Room 016



### **STRONG OPPOSITION TO SB 1178 - AMENDING 707-702(1), HRS - MANSLAUGHTER**

Aloha Chair Rhoads, Vice Chair Wakai 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 in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the families of **ASHLEY GREY, DAISY KASITATI, JOEY O'MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE "CARE AND CUSTODY" OF THE STATE** as well as the approximately 5,400 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that more than 1,600 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

SB 1178 amends section 707-702(1), Hawaii Revised Statutes, to authorize manslaughter prosecutions for dangerous drug distribution that results in overdose deaths.

Community Alliance on Prisons strongly objects to this bill that contravenes the research that emphasizes that substance use disorders should be treated as a public health issue - not a criminal justice issue - despite the uninformed testimony of the department of public safety on HB 951. The legislature has acknowledged this fact and our community values and passed the naloxone law to prevent overdose.

We are concerned that this bill on many levels. It may increase overdose because of the fear of prosecution. This is not in the best interest of our communities. The bill would also apply to healthcare professionals because opioids and other prescription drugs are classed as dangerous drugs under Chapter 329. If a patient does overdose, they could be held liable if this bill passes.

Community Alliance on Prisons asserts that this bill is the **WRONG** approach to substance use and overdose. We would, however, support the state bringing charges against the conscience-free pharmaceutical industry who have reaped obscene profits from the massive harms they have caused in communities across the United States.

We respectfully ask the committee to hold this wrong-headed approach to overdose and support our community values of aloha and malama in caring for our people who are struggling with pain and addiction.

Mahalo for this opportunity to testify.



Hawai'i

**LATE**

Committee: Senate Committee on Judiciary  
Hearing Date/Time: Thursday, February 14, 2019, 9:30 a.m.  
Place: Conference Room 16  
Re: Testimony of the ACLU of Hawai'i in Opposition to S.B. 1178, Relating to Manslaughter

Dear Chair Rhoads, Vice Chair Wakai, and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in opposition to S.B. 1178, which would include within the definition of manslaughter the distribution of a dangerous drug, in any amount, to another person who dies as a result of ingesting that drug.

This legislation may have the unintended effect of causing more overdose deaths, as people may hesitate to call for medical attention for a friend or loved one who is showing signs of an overdose, for fear of criminal prosecution. As a matter of policy, this bill seemingly contradicts the intention behind the Hawai'i Opioid Initiative, which is led by the Department of Health, by perpetuating a misguided and ineffective punitive approach to drug addiction. Any efforts to address opioid addiction in Hawai'i must do so through a lens of public health, not criminalization.

Thank you for the opportunity to testify.

Sincerely,  
  
Mandy Fernandes  
Policy Director  
ACLU of Hawai'i

*The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for 50 years.*

American Civil Liberties Union of Hawai'i  
P.O. Box 3410  
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[www.acluHawai'i.org](http://www.acluHawai'i.org)



**LATE**

*Dedicated to safe, responsible, humane and effective drug policies since 1993*

TO: Senate Committee on Judiciary  
FROM: Carl Bergquist, Executive Director  
HEARING DATE: February 14, 2019, 9:30AM  
RE: SB1178, Relating To Manslaughter, **OPPOSE**

Dear Chair Rhoads, Vice Chair Wakai and Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **strongly opposes** this measure to criminalize actions that are commonplace in the daily lives of those with substance use problems. By authorizing manslaughter prosecutions if an overdose death occurs after one person has sold or shared a drug with another, the Legislature would be forging a punitive hammer where a compassionate hand is more suitable.

In 2015, the Legislature did adopt that compassionate approach when it passed the Good Samaritan law (Act 217, Session Laws 2015). This law immunizes a person from prosecution for drug possession as well as parole/probation violations if the evidence against them is obtained as a result of the person calling 911 to help prevent an overdose. SB1178 as written, would negate the Good Sam law, and may place the caller at risk of a manslaughter prosecution, reducing the chance that they would place a potentially life-saving call in the first place.

The intent of these "drug-induced manslaughter/homicide" laws is to reduce overdoses, but as the example above shows, the opposite is a more than likely outcome. Moreover, who are the individuals most likely to be prosecuted? The big-time drug dealer far from the scene of the overdose or the small-time user who happened to share his or her own supply with a friend in need, or perhaps sell a little to someone in order to support their own habit? Are those actions that meet the definition of manslaughter? In a comprehensive review of similar laws across the United States, the Drug Policy Alliance wrote:

Because prosecutors need to prove that a defendant “caused” the death of the person who overdosed, charges become more difficult the higher up the distribution chain one goes. As a result, the cases that are charged are usually against the last person to touch the drugs prior to their ingestion – that is, the lowest person in the hierarchy of the distribution chain of command, and sometimes a person who had no intention to sell at all, but was merely sharing drugs or simply the last person to see the deceased alive. New Jersey’s law proves illustrative. In the majority of cases. . .the law has been used to “prosecute minors with no record or evidence of prior drug dealing, family members who engaged in drug use ‘recreationally,’ and ‘small time users,’ who the legislature stated should be rehabilitated, not incapacitated.”<sup>1</sup>

In my criminal law class, I learned about the felony murder rule. At root, this rule means e.g. that a person, who lends a car to someone who then drives it and kills someone, could be charged with murder.<sup>2</sup> You might ask “where was the intent?”, and you would be told that the intent was “transferred”. This seemed crazy to me, so I was pleased my professor told me that felony murder was abolished in Hawai’i by this Legislature.<sup>3</sup> From the Commentary on HRS §707-701:

The application of the felony-murder rule dispenses with the need to prove that culpability with respect to the homicidal result that is otherwise required to support a conviction for murder and therefore leads to anomalous results . . . It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. . . Nor does the felony-murder rule serve a legitimate deterrent function. The actor has already disregarded the presumably sufficient penalties imposed for the underlying felony. . . the Code has eliminated from our law the felony-murder rule.<sup>4</sup>

This bill opens the door to that rule’s re-introduction and I ask that you shut it firmly. Mahalo for the opportunity to testify.

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<sup>1</sup> [https://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf). p.42.

<sup>2</sup> <https://www.nytimes.com/2007/12/04/us/04felony.html>.

<sup>3</sup> [https://www.capitol.hawaii.gov/hrscurrent/Vol14\\_Ch0701-0853/HRS0707/HRS\\_0707-0701.htm](https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0701.htm).

<sup>4</sup> Id.

**LATE**

**SB-1178**

Submitted on: 2/14/2019 7:57:42 AM  
Testimony for JDC on 2/14/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
David Shaku	Individual	Oppose	No

Comments:

The capacity for this bill to be mishandled is very high. Though there is no doubt our society's approach to the opioid epidemic is in need of a shift, this is the wrong direction. The resources being wasted on punishment need to be drastically shifted, and this bill has the potential to punish a great deal of people who need treatment, not punishment. Until the state has taken a serious review of the current lack of access to mental health and substance use treatment facilities on this island, it has no business taking the draconian route of Rodrigo Duterte. Not a good drug policy to emulate.