

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

H.B. NO. 895, RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, March 19, 2021 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Landon M.M. Murata, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) strongly supports this bill.

The purpose of this bill is to amend section 706-671(3), Hawaii Revised Statutes (HRS) to clarify that a defendant who is convicted of a crime committed while serving a term of imprisonment cannot receive credit for any presentence detention time served for the new offense that overlaps with time being served for the old offense.

When the Legislature passed section 706-671(3), HRS, in 2012, it indicated in its final report from the Senate Committee on Judiciary and Labor that “[t]he purpose and intent of this measure is to clarify that a defendant will not earn credit for time served for a subsequent crime while the defendant is serving an imprisonment sentence for a separate, unrelated offense.” Senate Stand. Com. Rep. No. 3188, at 1 (2012). It also stated that “[t]his measure creates uniform application and deters imprisoned offenders from incurring new offenses.” Id.

In 2020, however, the Hawaii Supreme Court held that a plain reading of section 706-671(1), HRS, which entitles a defendant who is sentenced to imprisonment to credit for time served prior to the defendant’s sentence, required the Court to give defendant credit for the time that he had been detained pretrial, even though he had been serving a sentence of imprisonment for a separate unrelated felony offense when he committed the new offense. State v. Abihai, 146 Hawai’i 398, 408, 453 P.3d 1055, 1065 (2020). In

giving the Abihai defendant credit for the time that he had been detained pretrial for the new escape charge, the Hawaii Supreme Court reasoned that the time the defendant was serving “was not just ‘time being served for the separate unrelated felony conviction’ but was also ‘time being served for the escape.’” Id. at 409, 453 P.3d at 1066.

The Abihai court concluded that the current language of section 706-671(3) does not eliminate defendant’s entitlement to presentence detention credit pursuant to the plain language of section 706-671(1), HRS. Id.

We believe that the court’s holding was inconsistent with the original intent of the Legislature as expressed when section 706-671(3) was added in 2012. The amendments in this bill are needed to clarify that the limitations of section 706-671(3) are applicable to imprisoned offenders, notwithstanding any other law to the contrary, including section 706-671(1), and that an imprisoned offender is not entitled to credit for the period of detention served for the subsequent offense.

The Department respectfully requests the passage of this bill.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

March 19, 2021

H.B. 895: RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE

Chair: Sen. Karl Rhoads, Vice Chair: Sen. Jarrett Keohokalole and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. 895, which would amend HRS § 706-671(3) to deny pre-sentence detention credit to a defendant who is accused of committing a subsequent criminal offense while already serving a prison sentence.

The proponents of this bill assert that this change to HRS § 706-671 (3) is necessary to correct a statutory construction problem that was exposed in State v. Abihai, 146 Hawai‘i 398, 463 P.3d 1055 (2020), and to serve as a deterrent to individuals who contemplate committing subsequent crimes while serving an unrelated prison sentence.

What the proponents of this bill do not address, are the constitutional rights that it violates. In a subsequent ruling to Abihai, the Hawai‘i Supreme Court, in the summary disposition order of State v. James Thompson, SCWC-17-0000427 (July 1, 2020) (SDO), stated that denying pre-sentence detention credit to a defendant that had earned it would be paramount to a violation of the double jeopardy clause of article I, section 10 of the Hawai‘i Constitution and the Fifth Amendment to the Constitution of the United States as: “the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully “credited in imposing sentence.” (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969)).

Furthermore, this statutory change would act as a deterrent to criminal defendants wishing to exercise their constitutional right to trial. If a criminal defendant were to resolve his case as soon as he is charged by way of a plea of guilty, he would immediately begin to earn detention credit upon being sentenced. However, if the same defendant chose to exercise his right to a jury trial, which could take months

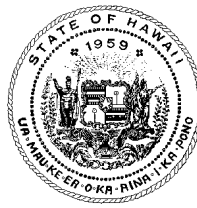
or longer to commence, the pre-sentence detention credit earned in custody while he awaited his trial would be denied him at sentencing. Thus, exercising his constitutional right to a trial, wherein he would be presumed innocent, until and unless he was proven guilty beyond a reasonable doubt, would cause him to be incarcerated longer than if he chose to plead guilty.

Lastly, as expressed in Abihai, the rule of *lenity* would require that any pre-sentence detention credit earned be given to a defendant even in light of any ambiguity between HRS §§ 706-671(1) and 706-671(3), which might be created by this statutory change.

We understand that there is a need to have some method of deterrence to prevent people from committing crimes while incarcerated, but this proposed statutory change is not the answer. Judges who sentence defendants who fall into this category of offenders already have at their disposal the ability to deal with those for whom lengthier incarceration is necessary.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR



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No. _____

TESTIMONY ON HOUSE BILL 895
RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE.

by
Max N. Otani, Director

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Friday, March 19, 2021; 9:30 a.m.
Via Videoconference

Chair Rhoads, Vice Chair Keohokalole, and members of the Committee:

House Bill (HB) 895 seeks to clarify that defendants may not earn credit for time served while awaiting sentencing on a conviction if they are already serving time for a previous felony conviction during the same time period; that the earning of credit for time served commences upon the new felony conviction.

The Department of Public Safety (PSD) strongly supports this measure as its intent is to ensure defendants in custody for a previous felony conviction(s), who are subsequently convicted of a new felony offense(s), are not credited for time served on the new felony offense(s) prior to sentencing on the new felony offense(s). This clarification to Hawaii Revised Statutes (HRS) 706-671(3) is needed as result of the recent Hawaii Supreme Court Opinion in the case of Abihai vs. State of Hawaii.

Thank you for the opportunity to present this testimony in strong support of HB 895.


OFFICE OF HAWAIIAN AFFAIRS
‘Ōlelo Hō‘ike ‘Aha Kau Kānāwai
Legislative Testimony

HB895

RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE
Ke Kōmike ‘Aha Kenekoa o ka Ho‘okolokolo
Senate Committee on Judiciary

Malaki 19, 2021

9:30 a.m.

Hālāwai Keleka‘a‘ike

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on HB895, which amends Hawai‘i Revised Statutes §706-671(3) to clarify that a defendant who is serving time for a felony, who commits another, separate offense, cannot receive presentence credit for any time in custody prior to their conviction for the new offense.

OHA understands that this measure was put forth as a response to *State v. Abihai*, 146 Hawai‘i 398, 463 P. 3d 1055 (2020), to deter individuals from committing subsequent crimes while serving an unrelated prison sentence. **OHA does have concerns that this measure may only exacerbate the disproportionate impacts of the criminal justice system on Native Hawaiians, and could potentially even lead to higher rates of recidivism for pa‘ahao who do complete their terms of imprisonment.**

Native Hawaiians are overrepresented in every facet of the criminal justice system. Native Hawaiians are more likely to be arrested than other ethnic groups; are disproportionately represented in our jail and prison populations; are more likely to receive a prison sentence when convicted, even when controlling for age, gender, and type of charge; and receive longer prison sentences and probation terms than other ethnic groups, even controlling for age at arrest, gender, and severity of charge.¹ Notably, as a result of their overrepresentation in the criminal justice system, Native Hawaiians may also be disproportionately impacted by the rampant overcrowding² and lack of sufficient rehabilitation and reentry programming and resources in our correctional facilities.

By essentially elongating the sentence of pa‘ahao by denying judges the option of providing them with presentence credit, this bill may only exacerbate the disproportionate impacts of the criminal justice system on Native Hawaiians, and even increase recidivism rates overall. Native Hawaiians who are already overrepresented in our correctional facilities and

¹ THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 10-11 (2010), available at http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf.

² See, e.g., TOM HELPER ET. AL., OUTBREAK 8 (2020), available at <https://www.hiequaljustice.org/reports/outbreak> (quoting Nolan Espinda, former director of the Department of Public Safety: “Unfortunately, the critical overcrowding situation must be addressed right now. Since the 1990s, Hawai‘i’s prison and jail population has grown well beyond capacity, during which time no new facilities were added. We are forced to triplebunk single cells, add beds to crowded dorms and convert spaces normally used for rehabilitative programs to housing. Overcrowding and inefficient infrastructure create safety and security risks to staff, inmates and the public.”).

who are already given longer sentences than other ethnic groups may be more likely to be barred from receiving presentence credit under this measure. The longer prison terms that may result from this measure would also only exacerbate the extreme overcrowding seen in our correctional facilities, which would in turn also limit the ability of pa‘ahao to participate in rehabilitative and reentry programming essential for their successful return to the community. Given the direct link between recidivism and the inability to succeed post-incarceration,³ this measure could thereby actually increase recidivism rates, as more pa‘ahao may be released without the benefit of rehabilitation programming and reentry support that could have otherwise facilitated their post-incarceration success.

Mahalo nui for the opportunity to testify on this measure.

³ THE OFFICE OF HAWAIIAN AFFAIRS, THE NATIVE HAWAIIAN JUSTICE TASK FORCE 20 (2012), *available at* https://www.oha.org/wp-content/uploads/2012NHJTF_REPORT_FINAL_0.pdf.



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LATE

March 18, 2021

Testimony for HB 895

My name is Wendy Hudson, I'm a criminal defense attorney on Maui and I strongly OPPOSE HB 895. I was the supervising attorney at the Maui Office of the Public Defender for over 14 years until I started my own firm in 2017.

To not give concurrent credit for additional crimes, will mean more trials instead of plea agreements and is truly over punitive and just plain mean. I have had so many clients who committed subsequent offenses after being sentenced to a first offense (because let's face it, PSD doesn't provide very meaningful programming to prevent recidivism). This would mean the only option for these clients is consecutive sentencing and would basically leave no room for negotiations if concurrent sentences are off the table.

It costs about \$40k per year to house defendants in prison. By passing this bill, you're effectively increasing PSD costs for many, many years going forward. The national trend is to REDUCE prison populations and thus reduce costs. Don't pass this bill.

Very truly yours,

/s/ Wendy A. Hudson

Wendy A. Hudson

