



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

H.B. NO. 2074, H.D. 1, RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE .

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, March 18, 2022 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 16, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Lance Goto, 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, being sentenced for an offense that was committed while serving a sentence of imprisonment on a separate unrelated felony conviction, cannot be given credit for a period of presentence detention that took place while the defendant was also serving the sentence of imprisonment for the separate unrelated felony conviction.

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, in 2012 Senate Journal, at 1353-1354. It also stated that "[t]his measure creates uniform application and deters imprisoned offenders from incurring new offenses." *Id.*

But in State v. Abihai, 146 Hawai'i 398, 408-410, 463 P.3d 1055, 1065-1067 (2020), the Hawaii Supreme Court found that the plain language of section 706-671(3), HRS, which would have denied the defendant's entitlement to presentence credit, does not eliminate the defendant's entitlement to presentence detention credit pursuant to section 706-671(1), HRS. The result was that the defendant was given credit for the

time that he had been detained pretrial, even though he was still serving a sentence of imprisonment for a separate unrelated felony offense. Id. at 410, 463 P.3d at 1067.

The Abihai court concluded that the current language of section 706-671(3), HRS, does not eliminate defendant's entitlement to presentence detention credit pursuant to the plain language of section 706-671(1), HRS. Id. at 408-410, 463 P.3d at 1065-1067

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

The Department notes that the Office of the Public Defender (PD) submitted testimony in opposition to this bill at the House Committee on Judiciary and Hawaiian Affairs hearing on February 8, 2022. The PD made three arguments. First, it argued that the bill would violate constitutional rights based on the ruling by the Supreme Court of Hawai'i in *State v. Thompson*, 147 Hawai'i 1, 464 P.3d 286 (2020). That case is inapplicable to this bill. Thompson challenged the credit given to him at a 2017 resentencing for time he served following his conviction and sentencing in 2001 for multiple sexual assault offenses. In 2001, Thompson was sentenced to concurrent terms of nine life terms, two twenty-year terms, eight ten-year terms, and one one-year term, and earned credit under that sentence, before being resentenced seventeen years later to consecutive terms. As indicated, his 2001 sentence was vacated, and upon resentencing in 2017, he was sentenced to consecutive three twenty-year terms and a one-year term, for a total of sixty-one years. The resentencing court stated that Thompson's credit for time served under the 2001 sentence would only be applied once against the first of the 2017 three consecutive twenty-year terms. The Hawai'i Supreme Court, however, found that Thompson had previously earned credit for each of the offenses he was sentenced to in 2017, but the resentencing court only applied the credit

to the combined sixty-one-year total consecutive sentence. In 2017, Thompson had served seventeen years on all of his 2001 concurrent sentences. The Thompson case addressed whether credits for time served for concurrent sentences should be applied when a defendant is resentenced to consecutive terms for the same offenses. The Court decided that not crediting Thompson for the time already served for the same offenses for which he was resentenced would violate the constitutional rights under the double jeopardy clause of article I, section 10 of the Hawai'i Constitution and the Fifth Amendment to the United States Constitution. This bill however, sets a limitation on the credit earned for a time a defendant had been detained pretrial for a separate subsequent offense, not on the credit earned for the same offense for which the defendant had been already convicted and sentenced.

The PD's second argument was that this bill would violate a defendant's constitutional right to trial, "as it would act as a deterrent to defendants wishing to exercise their constitutional right to trial." The PD cited no authority to support this argument. This bill clearly does not violate or otherwise interfere with a defendant's right to trial. As indicated in the 2012 Senate Standing Committee Report No. 3188, cited above, the purpose of the bill is to deter prisoners from committing any additional offense while imprisoned.

The PD's final argument was that the bill "will deny a defendant all detention credit, and act as a *de facto* consecutive sentence". The PD argued that the bill "language 'any periods of detention' would include pre-trial, pre-sentence and post-sentence detention time," and would mean that a defendant would not receive credit for any of those times. The argument does not appear to consider all of the proposed wording in the bill. The full proposed amendment reads:

"(3) Notwithstanding subsection (1) and any other law to the contrary, when a defendant is [convicted] **sentenced** for a crime committed while serving a sentence of imprisonment on a separate unrelated felony conviction, [credit for time being served for the term of imprisonment imposed on the defendant for the separate unrelated felony conviction shall not be deducted from the term of imprisonment imposed on the defendant for the subsequent conviction.] and the defendant was detained in any state or local correctional or other institution following the defendant's arrest for the crime for which a sentence is imposed, any

periods of detention following the defendant's arrest that took place while the defendant was also serving a sentence of imprisonment for the separate unrelated felony conviction shall not be deducted from the minimum and maximum terms of the sentence imposed on the later crime."

(Emphasis added.)

The credit determination is made when a defendant is being sentenced for the subsequent crime, and the bill specifically refers to "periods of detention following the defendant's arrest". The proposed wording clearly refers to presentence detention and not imprisonment time.

Enactment of this clarification of section 706-671(3), HRS, will serve to deter convicted criminals from committing crimes while incarcerated and ensure that the sentences of imprisonment for any such crimes committed will not be subsumed within or diminished by the sentences of imprisonment the defendants were already serving.

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 18, 2022

H.B. No. 2074, HD1: RELATING TO CREDIT FOR TIME OF DETENTION
PRIOR TO SENTENCE

Chair Senator Karl Rhoads, Vice Chair Senator Jarrett Keohokalole and Members of the Committee

The Office of the Public Defender respectfully opposes H.B. No. 2074 HD1, 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 will violate. In a subsequent ruling to Abihai, the Hawai‘i Supreme Court, in the State v. Thompson, 147 Hawai‘i 1 (2020), [SCWC-17-0000427 \(July 1, 2020\) \(SDO\)](#), held 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, § 10 of the Hawai‘i Constitution and the fifth amendment to the United States Constitution. *See also* North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969)(“[t]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully “credited in imposing sentence.”).

Furthermore, this statutory change would violate a defendant’s constitutional right to a trial in violation of article 1, §§ 5 and 14 of the Hawai‘i Constitution and the sixth amendment to the U.S. Constitution, as it would act as a deterrent to defendants wishing to exercise their constitutional right to trial. If a defendant were to resolve their case as soon as they are charged by way of a guilty plea, they would

immediately begin to earn detention credit upon being sentenced. However, if the same defendant chose to exercise their right to a jury trial, which could take months or longer to commence, the pre-sentence detention credit earned while awaiting trial would be denied to the defendant at sentencing. Thus, exercising one's constitutional right to a trial, wherein one would be presumed innocent, until and unless one was proven guilty beyond a reasonable doubt, would cause one to be incarcerated longer than if one chose to plead guilty. There should be no penalty for exercising one's right to a trial.

Lastly, the proposed language of this bill goes well beyond its intended purpose or title, as it could be interpreted to deny a defendant all detention credit, and act as a *de facto* consecutive sentence. See line 2 of page 3 of the proposed bill, the language "any periods of detention following the defendant's arrest" would include pre-trial, pre-sentence and post-sentence detention time, and coupled with the language on page 3 line 5: "shall not be deducted from the minimum and maximum terms of the sentence imposed on the later crime" means that the defendant shall not receive any detention credit, not just pre-sentence detention credit, for a subsequent offense while serving their first sentence. This would only compound the constitutional violations described above.

The OPD understands 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.

LATE

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirty-First State Legislature
Regular Session of 2022
State of Hawai'i

March 18, 2022

RE: H.B. 2074, H.D. 1; RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE.

Chair Rhoads, Vice Chair Keohokalole, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in **support** of H.B. 2074, H.D. 1.

The purpose of H.B. 2074, H.D. 1, is to address the Supreme Court of Hawaii's decision in *State v. Abihai*,¹ clarifying that a defendant, sentenced for an offense committed while already serving a sentence of imprisonment (on a prior unrelated felony conviction), cannot be given credit for any pre-sentencing detention.

The Department believes that the current holding in *Abihai* is inconsistent with the original intent of the Legislature when it enacted section 706-671(3) of the Hawaii Revised Statutes ("HRS") in 2012. In *Abihai*, the Supreme Court held that the plain language in HRS §706-671(3) did not eliminate the defendant's entitlement to pre-sentence detention credit pursuant to the language outlined in HRS §706-671(1). However, when the Legislature codified HRS §706-671(3), during the 2012 Legislative Session, it indicated its intent in the Senate Committee on Judiciary and Labor's committee report:

¹ *State v. Abihai*, 146 Haw 398, 463 P.3d 1055 (2020), available online at <https://cases.justia.com/hawaii/supreme-court/2020-scwc-17-0000546.pdf?ts=1588098720>; last accessed February 6, 2022.

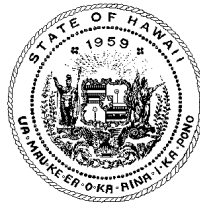
“...the purpose and intent of this measure is to clarify that a defendant will not earn credit for time served for a subsequent crime while the defendant is serving an imprisonment sentence for a separate, unrelated offense.”

Senate Stand. Com. Rep. No. 3188 (2012)

The passage of H.B. 2074, H.D. 1, would further clarify and solidify the legislative intent of HRS §706-671(3), which was originally established in 2012. Additionally, it would ensure that convicted offenders do not benefit from effectively shortened sentences, if they commit new crimes while incarcerated.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **supports** the passage of H.B. 2074, H.D. 1. Thank you for the opportunity to testify on this matter.

DAVID Y. IGE
GOVERNOR



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WRITTEN TESTIMONY ONLY

TESTIMONY ON HOUSE BILL 2074, HOUSE DRAFT 1
RELATING TO CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE.

By
Max N. Otani, Director
Department of Public Safety

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

Friday, March 18, 2022; 9:30 a.m.
Via Videoconference

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

House Bill (HB) 2074, House Draft (HD) 1, seeks to clarify that defendants may not earn credit on a sentence imposed for a subsequent conviction for time being served on a previous felony conviction.

The Department of Public Safety (PSD) supports this bill and appreciates the clarification in determining detention credit for repeat felony offenders. This measure will provide the Department with needed guidance in sentence computation and help to prevent future costly litigation.

Thank you for the opportunity to present this testimony.