



The Judiciary, State of Hawaii

Testimony to the Twenty-Fifth Legislature, Regular Session of 2009

House Committee on Judiciary
The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair

Tuesday, February 17, 2009, 2:00 p.m.
State Capitol, Conference Room 325

by

Hawaii Supreme Court Standing Committee on the Rules of Evidence

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1644, Proposing an Amendment to Article I of the Hawaii State Constitution to Require the Admission of Relevant Evidence in Criminal Cases Unless Excluded by Law

Judiciary's Position:

The Hawaii Supreme Court Standing Committee on the Rules of Evidence (Evidence Committee) respectfully requests that this measure be deferred and referred to it for interim study and a report to the 2010 Legislature.

In order to assist the Legislature in its evaluation of new evidence proposals and to enable the Judiciary to fulfill its constitutional responsibility to assert primacy in matters "relating to process, practice, procedure and appeals," Chief Justice Ronald Moon created the Evidence Committee in 1993 with a mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence.

According to Article VI, section 7 of the Hawaii Constitution, the Hawaii Supreme Court has the "power to promulgate rules...relating to process, practice, procedure and appeals, which shall have the force and effect of law." This constitutional mandate includes rules of evidence. Beginning with the promulgation of the Hawaii Rules of Evidence in 1980, the Supreme Court



House Bill No. 1644, Proposing an Amendment to Article I of the Hawaii State
Constitution to Require the Admission of Relevant Evidence in Criminal Cases
Unless Excluded by Law

House Committee on Judiciary

February 17, 2009

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has elected to share this power with the Legislature. See Bowman, *The Hawaii Rules of Evidence*, 2 U. Haw. L. Rev. 431 n.3 (1981) (“The cooperative approach was designed in part to avoid a separation of powers struggle between the legislative and judicial branches of government”). Evidence rules are thus on the legislative agenda. But the Evidence Committee has a compelling interest in generating and voicing opinions regarding evidence measures such as that contained in House Bill No. 1644.

To assure the Judiciary a fair opportunity to exercise its constitutional function, the House and Senate Judiciary Committees, pursuant to a practice established several years ago, refer all new evidence measures to the Evidence Committee for interim study and a written report to the very next session of the Legislature. In this way the Evidence Committee is able to supply informed opinions to the Legislature, and the Legislature continues to have the final say in these matters. This procedure has worked well for the better part of the past decade. Accordingly, the Evidence Committee requests deferral and referral of House Bill No. 1644, because it is a new measure that has just come to our attention.

Thank you for the opportunity to testify on this measure.



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

H.B. NO. 1644, PROPOSING AN AMENDMENT TO ARTICLE I OF THE HAWAII CONSTITUTION TO REQUIRE THE ADMISSION OF RELEVANT EVIDENCE IN CRIMINAL CASES UNLESS EXCLUDED BY LAW.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 17, 2009 **TIME:** 2:00 PM

LOCATION: State Capitol, Room 325

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lance M. Goto, Deputy Attorney General

Chair Karamatsu and Members of the Committee:

The Department of the Attorney General strongly supports this bill, with one amendment.

This bill is similar to H.B. No. 839, which is one of two bills in the 2009 legislative package of the Hawaii Law Enforcement Coalition. The Coalition is composed of the Chiefs of Police of all four counties, the Prosecuting Attorneys of all four counties, the Attorney General, and the United States Attorney for the District of Hawaii. Every bill in the Coalition's legislative package has the unanimous support of every Coalition member.

H.B. No. 1644 initiates the process to amend article I of the Hawaii State Constitution to make clear that relevant evidence shall always be admitted in criminal trials unless exclusion of that evidence is required by the laws or Constitution of the United States, or by a Hawaii statute. This amendment will not affect the current Hawaii rules of evidence because those rules are state statutes.

The purpose of criminal trials ought to be to find the truth, to convict the guilty, and to free the innocent. Admission, not exclusion, of relevant evidence furthers these goals. But the

Hawaii Supreme Court has broadly interpreted the State Constitution to give protections to defendants in criminal cases that stretch far beyond the protections provided by the United States Constitution by requiring the exclusion of relevant evidence in Hawaii criminal trials that would be admissible in any federal court and in many state courts. This proposed amendment will restore a fair balance between the rights of defendants in criminal cases, and the rights of victims and the public to have relevant evidence presented to judges and juries.

Following are just a few examples of exclusion of relevant evidence in Hawaii criminal cases that would be admissible under the proposed amendment.

CONSENSUAL ENCOUNTERS

Under the United States Constitution and in states across the country, law enforcement officers may speak to a person and generate evidence that may be used against that person, if the person consents to the encounter or conversation. The federal court in Hawaii and the courts of other states permit the use of evidence obtained through these "walk and talk" and "knock and talk" consensual encounters.

But the Hawaii Supreme Court has ruled that evidence obtained through these consensual encounters cannot be used in Hawaii state courts. State v. Trainor, 83 Haw. 250, 925 P.2d 818 (1996). This means that, in Hawaii, law enforcement officers working on cases for federal prosecution can use these valuable investigative techniques, but officers working on state cases cannot use them.

Thus, in Hawaii, police officers cannot use consensual encounters to fight the importation of drugs into our state and close drug houses in our neighborhoods. County and state law enforcement officers cannot ask pertinent questions of suspected drug couriers or drug house operators, even with their consent. When neighbors call the police to complain of a possible drug house because of heavy vehicular traffic at odd hours, the police cannot

approach the occupants of the home, tell the occupants they are investigating possible drug dealing, and talk to the occupants, even if the occupants consent. All evidence obtained from such consensual encounters will be suppressed in Hawaii state courts.

Hawaii can no longer afford to hobble law enforcement efforts to prevent the importation and distribution of drugs. This proposed amendment would, in effect, adopt the rulings of the United States Supreme Court on this issue, thus ensuring that the rights of Hawaii's residents and visitors will still be well protected by the United States Constitution.

INVENTORY SEARCH OF ARRESTEE'S PROPERTY

In State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974), a female defendant arrested for attempted robbery was searched by a female police matron. The defendant pulled out a piece of tissue paper from her brassiere and gave it to the matron. The paper was folded into a square. Not knowing what it was, the matron opened the folded tissue and found four red capsules, which later turned out to be a barbiturate, and the defendant was charged with their possession.

The United States Supreme Court permits this type of inventory search and seizure because it protects the arrestee's property, protects the police from false claims of theft, protects the police and anyone present in the police station from potentially dangerous or harmful materials, and may assist the police in ascertaining or verifying the arrestee's identity. But the Hawaii Supreme Court held that the opening of the folded tissue was unreasonable, even though the court admitted that such a search and seizure would not have violated the defendant's federal constitutional rights. The court ruled that a police officer must obtain a warrant before opening the folded tissue or any other closed object, unless it is clear that the closed object contains a weapon or fruits or instrumentalities of the crime for which the person was arrested.

The court suggested that an arrestee's belongings could be placed, unopened, in a sealed envelope. But of course, police

officers do not simply seal in envelopes the items or containers seized from arrestees. Officers check these items for the very reasons recognized by the United States Supreme Court (listed above). But in Hawaii, if police officers find illegal substances in these situations, the cases cannot be prosecuted because of the Hawaii Supreme Court's decision.

CONFESSIONS COERCED BY THIRD PARTIES

In State v. Bowe, 77 Haw. 51, 881 P.2d 538 (1994), during the investigation of an assault case, police contacted a basketball coach and asked for his assistance in making arrangements to interview several members of the basketball team who were suspected of being involved. The coach told the defendant he needed to go to the police station and offered to go with him if he needed assistance. The defendant went to the station, was given Miranda warnings by an officer, waived his constitutional rights, and gave a statement. After he was charged, he claimed that his statement was coerced because he feared that if he did not follow the coach's direction, he would be suspended from the team.

The Hawaii Supreme Court suppressed the defendant's confession, not because of any police misconduct, but as a result of conduct by a private party. The Court held that the undue influence of an unrelated third party, i.e., the coach, rendered the defendant's confession inadmissible. In making this ruling, the Court recognized that it was deviating from the United States Supreme Court's interpretation of the federal Constitution.

Under United States Supreme Court case law, suppression of a confession is granted when police misconduct renders a confession involuntary. In so ruling, the United States Supreme Court noted that the reason a police-coerced confession is suppressed is to deter future constitutional violations by the police. Extending this doctrine to third parties serves absolutely no purpose in enforcing constitutional guarantees.

RECOMMENDED AMENDMENT

The Department of the Attorney General recommends one amendment to this bill. On page 2, lines 9 through 11 should be amended to read, "Section . Any other provision of this constitution notwithstanding, relevant evidence shall not be excluded from evidence in criminal cases except pursuant to the laws or Constitution of the United States or a State of Hawaii statute." This amendment would address any case law that might be based on another Hawaii constitutional provision.

CONCLUSION

The Hawaii Supreme Court has interpreted the Hawaii Constitution to give protections to criminal defendants that are much greater than the protections provided by the United States Constitution and many states. This proposed amendment will restore a fair balance between the rights of defendants in criminal cases, and the rights of victims and the public to have relevant evidence presented to judges and juries. Admission, not exclusion of relevant evidence, will help judges and juries find the truth, convict the guilty, and free the innocent.

For the foregoing reasons, the Department of the Attorney General strongly supports this bill and respectfully requests that it be passed, with our recommended amendment, so that Hawaii's voters may consider this important constitutional question.

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

February 17, 2009

H.B. No. 1644: PROPOSING AN AMENDMENT TO ARTICLE 1 OF THE HAWAII
STATE CONSTITUTION TO REQUIRE THE ADMISSION OF
RELEVANT EVIDENCE IN CRIMINAL CASES UNLESS EXCLUDED
BY LAW.

Chair Karamatsu and Members of the Committee:

House Bill No. 1644 proposes a constitutional amendment to remove the Hawaii State Constitution and the Hawaii State Supreme Court from any role in deciding the admissibility of evidence in criminal cases. The proposed amendment states:

“Relevant evidence shall not be excluded from evidence in criminal cases except pursuant to the laws of Constitution of the United States or a State of Hawaii statute.”

We strongly oppose this bill because it seeks to eliminate consideration of the provisions of our State Constitution and to eliminate the role of trial judges, the Intermediate Court of Appeals and the Hawaii Supreme Court in interpreting those provisions.

The rationale stated in this bill for changing our constitution is to eliminate our state Supreme Court from interpreting our Hawaii Constitution in ways that the proponents of the bill claim “impede the truth-finding function of criminal trials”.¹

The only point of a criminal trial is for the jury to determine if the government has proven beyond a reasonable doubt that the defendant committed the crime charged or an included offense. Relevant evidence is presented to a jury in order that they may carry out that function. There are restrictions on the evidence that may be presented that prohibit, for example, illegally obtained evidence or evidence that is privileged, etc.

The reasons for the exceptions are many. For example, exclusion of illegally obtained evidence grew from the abuses that occurred when there were no such restrictions, such as denying defendants a right to counsel, or illegally searching a person's home. Exclusion of privileged information recognizes the

¹ It is important to understand the nature of a criminal trial, which is not “to find the truth”. A jury in a criminal case doesn't have investigative powers or the right to subpoena witnesses. In fact, we often learn through juror questions during trial or jury communications during deliberation that the jury wonders why certain forensic testing wasn't done or specified persons were not called as witnesses.

relationships (husband-wife, doctor-patient, etc.) where the exchange of information needs to be unrestricted.

There are exceptions to the exceptions. While it is widely believed that “hearsay” evidence is not admissible at trial, there are 24 exceptions in Hawaii Rules of Evidence (HRE) 803(b) alone, which set out instances when hearsay evidence is permitted, such as “excited utterance”, “present sense impression”, “public records”, etc. All of these rules have been the subject of interpretation by our trial judges and our Hawaii Supreme Court pursuant to our Hawaii State Constitution over many decades of review.

This proposed bill seeks to wipe out those decades of caselaw by eliminating the Hawaii Constitution and the Hawaii Supreme Court from any role in the review of these evidentiary matters. The Hawaii Supreme Court has final, unreviewable authority to review our laws under our state Constitution. H.B. No. 1644 proposes to usurp the Hawaii Supreme Court’s authority by changing our constitution and handing over the interpretations of our laws to the United States Supreme Court under the U.S. Constitution.

It is clear that proponents of this legislation take issue with certain decisions of the Hawaii Supreme Court. In any legal community, anywhere, you will find those who take issue with court decisions on all sides of every question. That simply reflects the adversarial nature of legal practice. As a policy matter, we must consider carefully what it means to amend our state constitution. It would be unfortunate, indeed, if every time an agency (whether public or private), a special interest group, or an individual did not agree with a Hawaii Supreme Court ruling, they could immediately resort to amending the constitution to weaken the authority of Hawai‘i’s Courts. We believe that is bad policy.

Our courts exemplify the democracy of our state. Circuit and appellate judges are nominated by an elected Governor and approved by elected state Senators. Current judges are appointees of both Democratic and Republican governors. Why do persons so chosen based on legal experience, scholarship and ability need to be eliminated from interpreting our laws under our Constitution?

Hawaii became the Fiftieth state of the United States on August 21, 1959. All laws and benefits of statehood were bestowed on Hawaii equal to the other 49 states. This includes the right to have our own free elections, our own State Judiciary, Supreme Court, and Legislature, and our own State Constitution. As a mere Territory, Hawaii was ruled by a Governor appointed by the President some 6,000 miles away. To now abdicate our state’s right to govern ourselves to the powers of the Federal government in Washington, D.C. is a step backwards. Hawaii is a unique place with a unique history and population. To allow a federalization of our government and laws ignores our history, ignores those citizens who fought and sacrificed to provide the impetus for statehood, and returns us to the time that decisions were made for us by those who live an ocean and a continent away.

Thank you for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
PROSECUTING ATTORNEY



DOUGLAS S. CHIN
FIRST DEPUTY
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THE HONORABLE JON RIKI KARAMATSU, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-fifth State Legislature
Regular Session of 2009
State of Hawai'i

February 17, 2009

**RE: H.B. 1644; PROPOSING AN AMENDMENT TO ARTICLE I OF THE HAWAII
CONSTITUTION TO REQUIRE THE ADMISSION OF RELEVANT EVIDENCE
IN CRIMINAL CASES UNLESS EXCLUDED BY LAW.**

Chair Karamatsu, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony in support of the intent of HB 1644.

The purpose of HB 1644 is to provide that relevant evidence shall not be excluded from criminal cases except pursuant to the laws of Constitution of the United States or a State of Hawaii statute.

Victims, law enforcement, jurors, court observers and general members of the public are often outraged to learn that relevant evidence excluded from criminal prosecutions in state court is or would have been allowed in federal court. A defendant's explicit confession to murder - withheld from a jury in state court - is admissible one block away in the defendant's trial for federal racketeering charges. The discrepancy is largely due to Hawaii's state appeals courts reading into the state constitution far greater protections for defendants than those provided under interpretations by the United States Supreme Court on the same or similar provisions in the United States Constitution. By providing greater protections to criminal defendants, the balance between the constitutional rights of criminal defendants and the rights of crime victims and the public to have relevant evidence presented to judges and juries has been skewed. The proposed amendment addresses the imbalance and allows triers of facts to hear and consider relevant evidence currently admissible in federal court.

One example of relevant evidence being excluded in state court when it would be admissible in federal court involves evidence obtained from "walk and talk" or "knock and talk" encounters. Based upon a Hawaii supreme court case, State v. Trainor, 83 Haw. 250 (1996), the police cannot ask intrusive questions of suspected drug couriers or drug house operators even if the drug couriers or drug house operators consent to talk to the police. Thus, if neighbors call the police to complain of a possible drug house because of heavy vehicular traffic at odd hours, the police cannot approach the occupants of the home, tell them they are investigating a possible drug dealing, and talk to the occupants *even if the occupants consent*. If the police do approach

the occupants and ask them about possible drug dealing, all evidence from this encounter must be suppressed, even though the occupants have consented to talk to the police. Under the current law, the police must somehow obtain more evidence that is often extremely difficult and time-consuming.

Use of consensual encounters, such as “knock and talk” and “walk and talk”, where the citizen agrees to talk to the police are permitted in almost every other state and federal jurisdiction of the United States. However, since the Hawaii Supreme Court has ruled that these encounters are illegal seizures of the person even if the person has assented to participate, state law enforcement is denied this important tool. It seems illogical that federal law enforcement in Hawaii can conduct “walk and talks” and “knock and talks” but county and state law enforcement officers, who shoulder the bulk of Hawaii’s drug enforcement cannot.

Another example of relevant evidence being excluded in state court when it would not be excluded in federal court involves a defendant whom the Maui police had information was taking over a heroin distribution operation on Maui. The Maui police also knew the defendant might be carrying heroin. After attempts to follow and talk to the defendant, officers finally stopped the defendant and told him that they were going to detain defendant’s hand-carried bag for narcotic canine screening. The defendant told one of the officers that if the officers wanted the bag, they could have it and gave the bag to the police. The defendant then left with two officers following him. One officer later left after he had been paged, while the remaining officer hid behind a pillar so he could observe the defendant without the defendant seeing him. From this vantage point, the officer saw the defendant remove something from his pocket and throw it away in a planter. The officer approached the defendant and asked him what he had thrown into the bushes and the defendant answered that he had not thrown anything into the bushes. The object was recovered and found to be two packets of black tar heroin.

The Intermediate Court of Appeals, following case law established by the Hawaii Supreme Court, struck down the seizure of defendant’s bag because it was the product of the seizure of defendant which violated the Hawaii Supreme Court’s ruling in Trainor discussed above. But what makes this case even more egregious is that the Intermediate Court of Appeals held that even though the defendant did not know he was still being watched by the police or that the police were anywhere near him at the time he threw the packets of heroin in the planter, he was still “illegally seized” and therefore the packets of heroin were inadmissible at trial.

One final example of the state’s appellate courts excluding evidence based upon a more expansive reading of a state constitutional provision involves a drunk driving case. In this particular case, the police had set up a DUI roadblock one evening. A motorist passed the signage announcing the roadblock and right before reaching a uniformed officer directing vehicles through the roadblock, the motorist made a legal U turn and turned right down a street which led to a closed metal gate and had only one structure on it, an animal shelter that was closed for the night. An officer who observed the motorist turn around before the roadblock followed the motorist down the side street. In the officer’s experience with 40 similar stops on cars that had avoided an intoxication roadblock, every one of the 40 motorists was either intoxicated or was violating the law in some other way such as not having a driver’s license or insurance or had an outstanding warrant. The officer watched the motorist drive past the entrance to the animal shelter without making any attempt to turn and continue driving to the metal gate. At this point the officer activated his lights and stopped the vehicle and the motorist

was subsequently arrested for drunk driving.

In suppressing the evidence of drunken driving, the Hawaii supreme court noted that they could provide broader protections for criminal defendants than that provided by the Fourth Amendment of the United States Constitution. The Hawaii court found that the officer in this case had no basis to stop the motorist despite the motorist turning around right before the roadblock and turning onto a street which essentially went nowhere.

We believe departures such as these by the state appellate courts from federal case law not only results in discrepancies on how evidence is presented in state court as opposed to federal court, it also makes it extremely difficult to properly enforce the law. State and county law enforcement officials who dutifully learn and follow the dictates of federal law in investigating and prosecuting cases often find their cases found deficient and the associated convictions overturned due to a new ruling by state appellate courts announcing out of the blue that new and different standards apply in state prosecutions. We do not believe this uncertainty promotes justice for crime victims and society or effective law enforcement.

For these reasons, we respectfully request that you pass HB 1644 but would ask that you insert the contents of HB 839 whose language we prefer.

Thank you for this opportunity to testify.

CHARMAINE TAVARES
Mayor



BENJAMIN M. ACOB
Prosecuting Attorney

PETER A. HANANO
First Deputy Prosecuting Attorney

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February 14, 2009

HONORABLE JON RIKI KARAMATSU, CHAIR
HONORABLE KEN ITO, VICE CHAIR
COMMITTEE ON JUDICIARY

HOUSE OF REPRESENTATIVES
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009
STATE OF HAWAII

TESTIMONY OF BENJAMIN M. ACOB,
PROSECUTING ATTORNEY FOR THE COUNTY OF MAUI,
IN SUPPORT OF H.B. NO. 1644
PROPOSING AN AMENDMENT TO ARTICLE I OF THE HAWAII STATE
CONSTITUTION TO REQUIRE THE ADMISSION OF RELEVANT EVIDENCE IN
CRIMINAL CASES UNLESS EXCLUDED BY LAW.

The Honorable Chairpersons and Committee Members:

The Department of the Prosecuting Attorney for the County of Maui supports H.B. 1644 Proposing an Amendment to Article I of the Hawaii State Constitution to Require the Admission of Relevant Evidence in Criminal Cases Unless Excluded by Law.

As stated in Hawaii Rules of Evidence, Rule, 102, the purpose of the Hawaii Rules of Evidence is as follows:

"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

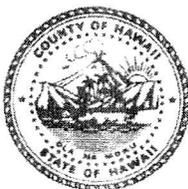
However, in some cases, Hawaii appellate courts have excluded relevant evidence based upon a broad interpretation of Hawaii's constitution. This occurs even where both the applicable State rules of evidence have been followed as well as the provisions of the federal constitution. Clearly, this type of broad exclusion of relevant evidence impedes the fact finder's ability to ascertain the truth.

This proposed constitutional amendment will allow the people of the State of Hawaii to decide whether these types of situations should continue. Of course, if a State rule or statute is not followed, or the federal constitution is violated, even relevant evidence will be inadmissible. Our Department believes that this proposal is not only fair and just, but will also promote confidence in Hawaii's criminal justice system.

Accordingly, our Department supports H.B. 1644. Thank you for the opportunity to testify.

(H.B. 1644, Proposing an Amendment to Article I of the Hawaii State Constitution to Require the Admission of Relevant Evidence in Criminal Cases Unless Excluded by Law)

William P. Kenoi
Mayor



Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawaii

POLICE DEPARTMENT

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February 13, 2009

Representative Jon Karamatsu, Chair
And Members
Committee on Judiciary
State Capitol
415 Beretania Street, Room 06
Honolulu, Hawai'i 96813

**Re: House Bill 1644, Proposing An Amendment To Article I Of The Hawai'i State Constitution
To Require The Admission Of Relevant Evidence In Criminal Cases Unless Excluded By Law**

Dear Representative Karamatsu and members of the committee:

The Hawai'i Police Department supports the passage of H.B. 1644, proposing an amendment to article I, of the Hawai'i State Constitution to require the admission of relevant evidence in criminal cases unless excluded by law.

The Hawai'i State Supreme Court and the Intermediate Court of Appeals, as the interpreters of the state constitution have not hesitated to read into the State Constitution, that provide far greater protections for defendants than those provided under interpretations by the United States Supreme Court of similar provisions in the United States Constitution.

By providing greater protections to criminal defendants, we believe our state Supreme Court has unfairly tipped the scales in favor of the constitutional rights of the criminal defendant at the expense of rights of victims and the public to have relevant evidence presented to judges and juries. We believe this amendment will address this imbalance and provide an equal and fair balance between these rights.

For these reasons, we urge this committee to support this legislation. Thank you for allowing the Hawai'i Police Department to testify on H.B. 1644.

Sincerely,


HARRY S. KUBOJIRI
POLICE CHIEF



CHARMAINE TAVARES
MAYOR

OUR REFERENCE
YOUR REFERENCE

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THOMAS M. PHILLIPS
CHIEF OF POLICE

GARY A. YABUTA
DEPUTY CHIEF OF POLICE

February 13, 2009

The Honorable Jon Riki Karamatsu, Chair
and Members of the Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Karamatsu and Members of the Committee:

SUBJECT: House Bill No. 1644, Relating to Proposing an Amendment to Article I of the Hawaii State Constitution to Require the Admission of Relevant Evidence in Criminal Cases Unless Excluded by Law

This bill proposes to amend Hawaii's Constitution to provide that relevant evidence shall never be excluded in criminal cases except pursuant to the laws or Constitution of the United States or a State of Hawaii Statute.

The Hawaii Supreme Court has broadly interpreted Hawaii's Constitution to require the exclusion of relevant evidence in state criminal trials that would be admissible in any federal court and in the courts of many states. By requiring that relevant evidence shall never be excluded in criminal cases, except pursuant to laws or Constitution of the United States or a State of Hawaii Statute, it will provide direction to law enforcement investigations, whereby, law enforcement will not be required to pick and choose whether the United States Constitution or the State Constitution will apply in any specific investigation.

Investigators will not have to pick and chose a method of investigations because of interpreted exclusions of relevant evidence in Hawaii. Consistency with the United States Constitution will create a more balanced investigatory process and insure a fair balance between the rights of the defendants in criminal cases and the rights of victims and the public.

The Honorable Jon Riki Karamatsu, Chair
February 13, 2009
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Therefore, as a member of the Law Enforcement Coalition, I respectfully urge the Committee to pass this bill.

Thank you for the opportunity to testify.

Sincerely,



THOMAS M. PHILLIPS
Chief of Police



BY EMAIL: JUDtestimony@capitol.hawaii.gov

Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, February 17, 2009, 2:00 p.m.
Place: Room 325
Re: *Testimony of the ACLU of Hawaii in Opposition to H.B. 1644*

Dear Chair Karamitsu and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1644, which proposes an amendment to Article I of the Hawaii State Constitution to require the admission of relevant evidence in criminal cases unless excluded by law.

This bill seeks to erode the Hawaii Constitution and the ability of the Hawaii Supreme Court to interpret its provisions, by taking away their role in determining the admissibility of evidence. This bill will result in a significantly diminished "exclusionary rule" – the century-old principle that evidence obtained in violation of the Fourth Amendment is inadmissible when that evidence was obtained as the result of the misconduct of law enforcement officials. Since the Supreme Court first announced the exclusionary rule almost one hundred years ago in *Weeks v. United States*, 232 U.S. 383 (1914), it has been a bedrock principle of Fourth Amendment law that the government may not rely on evidence that was obtained through unlawful means. The decades of important caselaw developed by the Hawaii Supreme Court interpreting the provisions of our state Constitution in light of the exclusionary rule should not be discarded in favor of weakening our protections against police misconduct and diminishing the power of our distinguished Hawaii Supreme Court.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii 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 Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple

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Hon. Rep. Karo [unclear], Chair, H.D. Committee
and Members thereof

February 17, 2011

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Staff Attorney
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INTERNATIONAL LONGSHORE & WAREHOUSE UNION
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HAWAII DIVISION: 100 West Lanikaula Street, Hilo, Hawaii 96720 • **OAHU DIVISION:** 451 Atkinson Drive, Honolulu, Hawaii 96814
MAUI COUNTY DIVISION: 896 Lower Main Street, Wailuku, Hawaii 96793 • **KAUAI DIVISION:** 4154 Hardy Street, Lihue, Hawaii 96766

LOCAL 142

The House of Representatives
The Twenty-Fifth Legislature
Regular Session of 2009

Committee on Judiciary

Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair

DATE: Tuesday, February 17, 2009
TIME: 2:00 p.m.
PLACE: Conference Room 325
State Capitol
415 South Beretania Street

**TESTIMONY OF THE INTERNATIONAL LONGSHORE & WAREHOUSE UNION
LOCAL 142, AFL-CIO ON H.B. 1644 PROPOSING AN AMENDMENT
TO ARTICLE I OF THE HAWAII STATE CONSTITUTION**

My name is Fred Galdones and I am the president of the International Longshore and Warehouse Union, Local 142, AFL-CIO (ILWU). The ILWU represents approximately 20,000 private sector employees for the purpose of collective bargaining in a number of industries including agriculture, tourism and resorts, health care, and the general trades. We strongly oppose and urge you to reject House Bill No. 1644. This bill eliminates rights of our citizens as protected by our State Constitution as enforced by the highest court in our State. This bill is an affront to every citizen, not just those forced to defend themselves against evidence that was obtained in violation of rights afforded the person under Hawaii's constitution.

Our constitution, like with all constitutions, sets broad policies of imperative or fundamental public importance as adopted by its people. Our separation of powers among the

“AN INJURY TO ONE IS AN INJURY TO ALL”

judiciary, legislative and administrative branch reflects a rule-of-law tradition that recognizes the role of each branch of government in achieving a government of the people. Our constitution prescribes social and economic policies, expressed in the language of positive rights, while according the other two branches to carry out the constitutional mandate. See Helen Hershkoff, Positive Rights And State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1156 (1999). This bill is designed to undermine all of these fundamental concepts.

The bill would preclude our trial courts, when considering whether certain evidence is admissible, to consider whether the individual's state constitutional rights were fundamentally violated. It would preclude our highest court, in reviewing those evidentiary rulings, from enforcing rights under the state constitution which it is held to enforce.

The exclusion of evidence to deter violations of fundamental constitutional rights is well established in our laws going back to the early 1900s. See McCabb v. U.S., 318 U.S. 332, 339-40 (1943) (citing precedent cases that held that a conviction in the courts, "the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."). In 1966 the U.S. Supreme Court in Miranda v. Arizona, 384 U.S. 436, 467, while noting the "laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws," excluded evidence in order to uphold the safeguards that must be observed to protect constitutionally protected rights.

The requirement that those in the enforcement of our criminal laws perform their jobs without violating constitutional protections and privileges afforded to all our

citizens is fundamental to the criminal legal system. Our Constitution has prescribed the rights of the individual when confronted with the power of government. See Miranda v. Arizona, 384 U.S. 436, 479 (1966). The *Miranda* court cited Justice Brandeis which is worth repeating here:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

384 U.S. at 479-80 (quoting Olmstead v. U.S., 277 U.S. 438, 485 (1928) (J. Brandeis, dissenting)).

While this bill would still provide our citizens protection under the U.S. Constitution and state statutes, the Hawaii people have adopted a constitution unique to their sense of what protections are needed beyond those afforded under the United States Constitution. Our constitution protects the freedoms of minorities from the tyranny of the majority in the area of privacy, beyond federal constitutional protection.

With that in mind and by way of example, we suspect one Hawaii case underlying to the intent of this bill was State v. Heapy, 113 Hawai'i 283 (2007). Our Hawaii Supreme Court held that the "right to privacy in our constitution should be afforded to all citizens. Unlike the exclusionary rule on the federal level, Hawaii's exclusionary rule serves not only to deter illegal police conduct, but to protect the privacy rights

of our people." Id. at 299. This holding should not be undermined by the bill being considered today. A conviction in our state courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by our Hawaii Constitution, cannot stand. See McNabb v. U.S., 318 U.S. 332, 339 (1943).

Proponents of this bill will argue that exclusion of evidence frustrates the truth-seeking function in any criminal trial. As stated above, however, an equally strong policy requires our law enforcement officers to work within the constitutional rights of individuals. The exclusionary rule is applied primarily to deter constitutional violations. Exclusion of the evidence is the only effective way to achieve deterrence of straying from that mandate placed on the officers.

Our supreme court has applied reasonable and appropriate steps to limit the exclusion of evidence based on challenges to violations of rights afforded by our constitution. The proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that the proponent's own constitutional rights were violated by the conduct of the enforcement officer. The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence. See State v. Perez, 111 Hawai'i 392, 395 (2006).

The ILWU strongly urges against passage of H.B. 1644. Thank you for this opportunity share our comments and express our opposition to this unnecessary and inherently destructive bill.

From: PBStestimony
Sent: Monday, February 16, 2009 9:27 PM
To: JUDtestimony
Subject: FW: H.B. No. 1644 Proposing Amendment to Art I of the Hawaii State Const. to require admission of relevant evid in crim cases unless excluded by law

From: Myles Breiner [mbreiner@hawaii.rr.com]
Sent: Monday, February 16, 2009 4:05 PM
To: PBStestimony
Subject: H.B. No. 1644 Proposing Amendment to Art I of the Hawaii State Const. to require admission of relevant evid in crim cases unless excluded by law

Testimony of Myles S. Breiner, President of the Hawaii Association of Criminal Defense Lawyers (HACDL)

Chair Karamatsu and Members of the Committee

HB No. 1644 proposes a constitutional amendment to remove the Hawaii State Constitution and the Hawaii State Supreme Court from any role in deciding the admissibility of evidence in criminal cases. The Hawaii Association of Criminal Defense Lawyers (HACDL) vigorously opposes this Bill insofar as it undermines our State Constitution and effectively “federalizes” our State criminal justice system by eliminating the discretionary role of trial judges and the State appellate courts.

Under the guise of “seeking to find the truth” proponents of this amendment misconstrue the nature of the criminal justice system. Unless proponents of this amendment also intend to re-write the 4th amendment and Bill of Rights, the criminal justice system is founded on the notion that the defendant is presumed innocent and the sole burden is on the government to prove the defendant’s guilt beyond a reasonable doubt. A criminal trial has

only one function, to determine if the government has proven a case beyond a reasonable doubt. In this constitutional context “the search for truth” is about as relevant as the search for intelligent life in the universe. Interesting - but not relevant to the determination of criminal culpability “beyond a reasonable doubt”. In order for a jury to carry out its function, the trial court determines what relevant evidence will be presented. Hence, the rules of evidence provide both guidelines and exceptions that court and counsel must apply in reaching a just and reasonable decision. This is the province of judges and juries, not legislative mandates.

H.B. No. 1644 amounts to an unjustified attack on the our State Constitution and system of appellate review. There is no reasonable justification to warrant the dismantling of our State Constitution because proponents of this amendment take umbrage with various decisions of the Hawaii Supreme Court. Nor is there any reasonable justification to abdicate our State rights in order to align ourselves with the Federal government. What has not been achieved through the State electoral system, should be not surreptitiously accomplished by legislative fiat. The Hawaii State Constitution must be protected and preserved - not amended to suit parochial interests.

Thank you for the opportunity to comment on this measure

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February 16, 2009

Representative Jon Riki Karamatsu
Chair, Judiciary Committee
Hawaii House Of Representatives
Hawaii State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill No. 1644

Dear Rep. Karamatsu and Judiciary Committee Members:

The following is my written testimony concerning House Bill No. 1644, which is scheduled to be heard by the Judiciary Committee at 2:00 p.m. on Tuesday, February 17, 2009. Based upon my many years of experience as a Hawaii attorney specializing in criminal law and constitutional law, I strongly oppose enactment of H.B. No. 1644. The reasons for my opposition are summarized below.

My threshold objection to House Bill No. 1644 is that the question it would place on the ballot for consideration by the Hawaii electorate is worded in a biased and misleading manner. That question states: "Shall relevant evidence not be excluded in criminal cases except pursuant to the laws or Constitution of the United States or a State of Hawaii statute?" That question makes no mention of the Hawaii Constitution, and completely fails to inform voters that a "yes" vote would effectively eliminate any and all provisions of the Hawaii Constitution as an independent basis to exclude evidence in criminal cases.

Regardless of the particular manner in which the ballot question is worded, however, House Bill No. 1644 is based upon fundamentally flawed and illogical premises.

House Bill No. 1644 categorically claims in its section 1 that admission of relevant evidence promotes the goal of finding the truth in criminal trials. That broad assertion ignores the fact that some evidence, although meeting the minimum standard of relevance, will actually impede determination of the truth unless it is excluded from a criminal trial. Such evidence includes, for example, confessions and other admissions that are not voluntary (see State v. Bowe, 77 Hawaii 51, 881 P.2d 538 (1994) (recognizing the principle that an "involuntary confession is inherently untrustworthy")), and evidence of prior convictions used to impeach the credibility of a testifying defendant (see State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (emphasizing that "when the witness to be impeached is also the defendant in a criminal case, the introduction of prior convictions on the issue of whether the defendant's testimony is credible creates a substantial danger that the jury will conclude from the prior convictions that the defendant is likely to have committed the crime charged"))).

In addition, House Bill No. 1644 entirely disregards the valuable societal interests that are served by the exclusion of evidence that has been obtained by the government in violation of the Hawaii Constitution. Exclusion of such evidence from criminal trials "serves the valuable purpose of deterring governmental officials from circumventing [constitutional] protections," and the "equally valuable purpose" of "protect[ing] the privacy rights of our citizens." State v. Lopez, 78 Hawaii 433, 896 P.2d 889 (1995). Additionally, exclusion of evidence that has been illegally obtained by the government helps in "safeguarding the integrity" of Hawaii's judicial system by ensuring "that evidence illegally obtained by government officials or their agents is not utilized in the administration of criminal justice through the courts." State v. Pattioay, 78 Hawaii 455, 896 P.2d 911 (1995).

The following is a specific example of how the ill-advised amendment to the Hawaii Constitution proposed by House Bill No. 1644 would clearly harm the overwhelming majority of Hawaii residents who are not criminals. That constitutional amendment would eliminate the critically important protections provided to our community by Hawaii Supreme Court decisions in walk-and-talk cases such as State v. Quino, 74 Haw. 161, 840

P.2d 358 (1992), cert. denied, 507 U.S. 1031 (1993); State v. Kearns, 75 Haw. 558, 867 P.2d 903 (1994); and State v. Trainor, 83 Hawaii 250, 925 P.2d 818 (1996).

As recognized in State v. Quino, the police walk-and-talk program did not "require the officers to have a reasonable suspicion that a person may be in possession of illegal drugs, or may be engaging in criminal activity." 74 Haw. at 164. Without any such reasonable suspicion, travelers at airports were confronted by law enforcement officers and intimidated into purportedly "consenting" to searches of their luggage and their persons by a show of authority and the use of coercive, intrusive and accusatory statements and conduct. Id. at 164-65, 172-73. Under such circumstances, "a reasonable person" would "not have believed he was free to ignore the officer's inquiries and walk away," and consequently travelers were being unlawfully "seized" by law enforcement officers in Hawaii. Id. at 173. As the Hawaii Supreme Court emphasized: "This investigative technique is based on the proposition that an otherwise innocent person, who comes under police scrutiny for no good reason, is not innocent unless he or she convinces the police that he or she is. Such a procedure is anathema to our constitutional freedoms." Id. at 175-76 (underlining added).

Furthermore, in State v. Trainor a police officer testified that she "guessed" that of the "several hundred" individuals she had subjected to walk-and-talk confrontations, only "about ten percent" possessed illegal drugs. 83 Hawaii at 252-53. Of course, that means that no illegal drugs were found for approximately ninety percent of those individuals. Id. at 259. The police officer also testified that the police regarded "many of the major cities" in the United States and all of the west coast cities from which airline flights arrived in Hawaii as drug source cities." Id. at 253. That subjected thousands of travelers every week to the possibility of becoming the target of a police walk-and-talk confrontation initiated merely upon the basis of an officer's subjective observation of their "physical appearance and demeanor" -- an "inquisitorial and coercive" encounter in which they would be the object of "a focused and intrusive quest for evidence of criminal wrongdoing" by the police. Id. at 256-59. Do the people of Hawaii really want to abandon the protection provided by the Hawaii Constitution against that type of

governmental misconduct? I think not.

The supporters of House Bill No. 1644 apparently believe that in the context of criminal law the protections afforded by the Hawaii Constitution should be no greater than those of the United States Constitution, as interpreted by the United States Supreme Court. However, one of the most vital reasons that each of the fifty states has its own state constitution is to enable the residents of each state to guarantee themselves greater protection from their state government than is granted by the minimum standards of the United States Constitution. State v. Beltran, 116 Hawaii 146, 172 P.3d 458 (2007) (the Hawaii Supreme Court is "free to give broader protection under the Hawaii Constitution than that given by the federal constitution"). If the protections of the Hawaii Constitution were always to be applied identically to those of the United States Constitution, there would be no reason to have the separate and independent Bill of Rights that is embodied in the Hawaii Constitution, including the special recognition of the "Right to Privacy" contained in article I, section 6.

The Hawaii Constitution is an enduring and solemn document that preserves our most essential and fundamental rights. The Hawaii Constitution is not mere statutory law. Proposed amendments to the Hawaii Constitution should be few and far between -- reserved for matters of the utmost importance. The Hawaii Constitution should not be subject to a proposed amendment whenever prosecutors and other law enforcement officials are disappointed with a ruling of the Hawaii Supreme Court or the Hawaii Intermediate Court of Appeals. Each branch of our state government is bound to respect the principle of separation of powers. The Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals are our state's two highest courts. If prosecutors and other law enforcement officials attempt to enact amendments to the Hawaii Constitution in order to negate the constitutional rulings of those courts, they are in effect attempting to improperly arrogate themselves to positions as super-judges.

Hawaii is a special and unique state: geographically, sociologically, culturally, ethnically, and historically. Hawaii's own judges are best qualified to interpret and apply constitutional protections for their fellow Hawaii residents.

The United States Supreme Court, by comparison, is located about five-thousand miles away from the islands of Hawaii. Indeed, the United States Supreme Court has never had a justice appointed from Hawaii. Hawaii's appellate and trial court judges reflect the rich diversity of Hawaii and have included judges of Japanese-American, Chinese-American, Korean-American, Filipino-American, Native Hawaiian and Samoan heritage. By contrast, eight of the nine justices of the United States Supreme Court are mainland Caucasians.

Hawaii's state-court judges are not imposed on the residents of Hawaii by outside forces. Rather, they are appointed and retained by a local process that is open to participation by all Hawaii residents, including prosecutors and law enforcement officials. Prosecutors, law enforcement officials, and all other Hawaii residents have a full and fair opportunity to encourage lawyers who share their views to apply to become judges; to testify in support of or in opposition to legislative confirmation of individuals nominated as judges; and to submit information to the Judicial Selection Commission supporting or opposing retention of particular judges. In fact, six of Hawaii's ten current state appellate court judges have experience as prosecutors. Ironically, those former prosecutors are among the judges who would be stripped of the freedom to interpret and apply various provisions of the Hawaii Constitution by the restrictive constitutional amendment that is proposed by H.B. No. 1644.

For all of the foregoing reasons, I strongly urge the Hawaii House of Representatives' Judiciary Committee to reject the unwise amendment to the Hawaii Constitution that is proposed by H.B. No. 1644.

Very truly yours,

IN OFFICES OF BROOK HART
A Law Corporation

Brook Hart

BROOK HART



SHOPO

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS

"A Police Organization for Police Officers Only"

February 15, 2009

House of Representative
State of Hawaii
Committee on Labor
Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair

Date: Tuesday, February 17, 2009
Time: 2:00 pm
Place: Room 325 State Capitol

Re: Testimony on House Bill 1644 relating to Evidence; Admissibility

My name is Tenari Ma'afala and I am the President of The State of Hawaii Organization of Police Officers ("SHOPO"). We represent over 2700 police officers in the State of Hawaii. SHOPO supports House Bill 1644 relating to Evidence and Admissibility. This measure proposes a constitutional amendment to provide that relevant evidence may never be excluded in criminal cases, except pursuant to law.

The intent of criminal trials in the State of Hawaii is to seek the truth, to convict the guilty, and to free the innocent. Admission, not exclusion, of relevant evidence furthers these goals. The constitution and laws of the United States, and statutes of the State of Hawaii enacted by the legislature, restrict the admission of relevant evidence in some circumstances. The supreme court of Hawaii has broadly interpreted Hawaii's constitution to require the exclusion of relevant evidence in criminal cases in ways that impede the truth-finding function of criminal trials. This amendment prevents that type of exclusion of evidence, and makes clear that relevant evidence is always admissible in criminal trials unless exclusion of that evidence is pursuant to the United States Constitution or the laws of the United States or the State of Hawaii.

The purpose of this measure is to propose an amendment to article I of the Constitution of the State of Hawaii to provide that all relevant evidence is not to be excluded in criminal cases, except as provided by law.

As police officers our work carries into the court room where we rely on the accurate presentation of fact relevant to acts of crime. We support this measure because

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it will allow the admissibility of all relevant facts to aid in the presentation to determine truth and justice.

SHOPO support HB 1644.

February 16, 2009

Submitted by: Karen Tooko Nakasone, Esq.

House Judiciary Committee
Hearing on HB 1644
Feb. 17, 2009 at 2:00 p.m.

Testimony AGAINST HB1644, Constitutional Amendment

Chairman Jon Riki Karamatsu, Vice Chair Ken Ito, and Members of the Committee,

My day job is as a deputy public defender for the State of Hawai'i, but today I write in an individual capacity and not on behalf of my Office. I echo all the concerns which I believe the Office of the Public Defender will be raising. I also share the concerns raised by the Japanese American Citizens League (JACL) Honolulu Chapter, a civil rights organization that I was privileged to lead as President from 2004 to 2006. JACL Honolulu has consistently opposed constitutional amendments such as HB1644, which erode the Bill of Rights of the Hawai'i Constitution.

I write separately because I feel very strongly that the Legislature must cease its constant capitulation to the proponents of these constitutional amendments on criminal law and procedure.

I STRONGLY OPPOSE this bill. The public discourse and awareness of the last three criminal constitutional amendments to the Bill of Rights (Art. I, §§ 10, 24, 25), as we have seen, were starkly one-sided. These constitutional criminal procedure issues are esoteric, and not capable of easy explanation to the general public. These amendments involve abstract legal doctrines, arcane rationales, difficult for even lawyers to understand. The huge legal ramifications of such amendments' passage is not easily comprehensible, even to lawyers. Yet we are going to put this on a ballot for public vote?

And when the public votes on it, what is going to be the primary method to influence and galvanize the public sentiment? It is the tool of FEAR. The politics of fear, has been deftly and disastrously employed on a national level, and the same tactic has been effectively used here in Hawai'i, and will be used again should this amendment make it onto the ballot. It is fear of being labeled soft on crime that forces legislators to put these amendments on the ballot, against their better judgment. And it is fear that fuels the public to approve them. Fear does not engender sound and rational decisionmaking. We saw fear lead to a wholesale incarceration of a vilified minority group during World War II, and fear has led our nation to wage a costly and disastrous war in Iraq.

I also raise the question of 'why now?' Previous generations of prosecutors have not asked for constitutional amendments every time the Hawai'i Supreme Court ruled against them on a big constitutional question. They did not run to the Legislature or to talk radio

shows, to urge that the rules of the contest be changed when they would lose. Prosecuting and convicting an individual of a crime is not, and was never meant to be, a piece of cake. If the current generation of prosecutors is having a difficult time prosecuting certain types of cases, perhaps more resources, more training, and/or better management is the answer, or a specific statutory amendment can be crafted to address their concerns – not more shortsighted, reactionary, tinkering with the Bill of Rights.

I believe most lawyers would agree that the Constitution is a sacred document, not to be toyed with lightly, especially by those who play the politics of fear. The Hawai`i Supreme Court is the sole interpreter of the Hawai`i Constitution. The proponents of these criminal-procedure constitutional amendments have allowed a dangerous habit to take root in Hawai`i – that of making end-runs around the Court, by amending the Constitution every time the Hawai`i Supreme Court issues a decision they strongly disagree with. This pattern is extremely alarming, as it evinces a disrespect toward the pronouncements of the judicial branch – as evidenced most recently by the end-run to the United States Supreme Court on the ceded lands case of OHA v. HCDCH, 117 Hawai`i 174, 177 P.3d 884 (2008), despite the Hawai`i Supreme Court having unanimously decided the issue.

The kind of constitutional evidentiary dispute which this amendment purports to “resolve”, is a matter best left to the courts. It is important for the Legislature to preserve and respect the power of the state courts. The judicial branch is the proper and sole interpreter of the law, and the other branches should not cavalierly override it. To emasculate the judicial branch’s authority through these serial end-run amendments undermines the very foundation of separation of powers through checks and balances, upon which our system of government depends.

Thank you for your time and consideration of my comments.

Sincerely,

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COMMITTEE ON JUDICIARY

Rep. Jon Riki Karamatsu, Chair

Rep. Ken Ito, Vice Chair

Tuesday, February 17,
Conference Room 325, Hawaii State Capitol

TESTIMONY in OPPOSITION to HB 1644

Bart Dame

710 West Hind Dr., Honolulu HI 96821

Aloha Chairman Karamatsu, Vice Chair Ito, and Members of the Judiciary Committee. Thank you for this opportunity to testify.

My name is Bart Dame. I am testifying as an individual in **strong opposition** to HB1644.

I should preface my remarks with an acknowledgement I am NOT an attorney. I HOPE I am misunderstanding the intent and potential impact of this proposed legislation. Having emphasized the lay nature of my understanding, let me share my concerns. I look forward to being shown the errors in my thinking as the hearing progresses.

As I read the bill, the prosecution in a criminal case would be allowed to introduce all evidence he (or she) believes to be "relevant" to a case unless excluded by the US Constitution or by Hawaii statute. Here I am confused.

The bill would amend the state constitution to say:

"Relevant evidence shall not be excluded from evidence in criminal cases except pursuant to the laws or Constitution of the United States or a State of Hawaii statute."

In HRS, Chap. 626, which codifies Hawaii Rules of Evidence into statute, I find this language:

Rule 402 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

What happened to the Constitution of the State of Hawaii? Why has it been omitted from this bill? Would state courts no longer be able to use the State Constitution as a basis to exclude evidence? Would the State Supreme Court have to yield in its determinations to the US Supreme Court and not exercise its own judgment regarding the admissibility of evidence under the State Constitution?

The proposed amendment permits exclusion by Hawaii statute. Well, as cited above, Hawaii statute recognizes the authority of the State Constitution in determining the admissibility of evidence. My understanding as a layperson is that, as statute the current Rules of Evidence would remain in effect. The past decisions of Hawaii's courts would continue to have force as established precedent, and the courts would continue in applying those precedents to new cases. Or is the author's intention different? Do the authors intend to propose future amendments HRS to remove the authority of the State Supreme Court and the current Rules of Evidence in order for this proposed amendment to have the desired effect?

Why would state and local officials want to cut out the authority of the state courts and the state constitution to govern our affairs? If the US Supreme Court were currently controlled by a liberal majority, instead of a reactionary one, would the prosecutor be so eager to undermine the authority of the state constitution?

It appears to me this bill is an effort to admit what is called "tainted evidence": evidence which may be currently excluded because it was acquired improperly or might prejudice the judgment of a jury. Apparently the authors believe the Hawaii State Constitution and courts provide stronger protections than the current conservative US Supreme Court and wishes to sacrifice our state constitution for the convenience of the county prosecutors.

I suggest the proponents of this bill should be asked to clarify which types of evidence currently excluded as inadmissible would be admitted if this amendment were to pass. While I am not an attorney, I have a great deal of respect for the constitutional system of checks and balances and the strong guarantees of due process and constitutional protections against improper prosecutorial or police conduct. I believe the Hawaii Rules of Evidence have evolved over the course of years and while we may disagree over particular court rulings in particular cases, I do not understand the eagerness of the prosecutor to gut our legal system in order exclude the protections of the State Constitution.

I assume this amendment would cut both ways? Under this bill, would defense attorneys also be allowed to submit evidence currently ruled "inadmissible? In a rape trial, the victim's previous sex life is excluded, would defense attorneys be able to present such evidence to a jury? Perhaps this bill would have major consequences not intended by its authors.

Frankly, this bill strikes me as the product of an ideological approach to law which reached its peak during the Alberto Gonzales /George Bush administration and is being rolled back across the country. It is a shame to see it expressed so nakedly here.

Thank you for this opportunity to testify on this important matter. Again, I confess to being a layperson and admit my understanding -- and outrage-- may be based upon a misunderstanding of the law. I look forward to being disabused of my misunderstanding by the attorneys on the committee.

Bart Dame
710 West Hind Drive
Honolulu, HI 96821
808-373-2771

TESTIMONY OF JAMES J. BICKERTON AGAINST HB 1644

I am a civil rights lawyer who has practiced in Hawaii for twenty seven years. I grew up here, went to Roosevelt High School and UH Manoa before attending law school in California.

This bill purports to amend the Bill of Rights of the Hawaii Constitution but does not grant any individual a new right. It actually does the opposite, since it destroys our locally created and recognized constitutional rights. It is a cynical ploy to suggest that this amendment would somehow enhance or improve the individual liberties we all have and which are protected by our State's Bill of Rights.

I challenge those offering this bill to identify a single state that has abdicated its own constitution in favor of federal statutes and the federal constitution. Let them explain why Hawaii should be the first to so.

For those of you whose parents and grandparents were born in Hawaii, they fought and literally gave blood so that Hawaii could be a state and stand equal with other states. The sponsors of this measure are asking us to go back to being a territory again, taking our directions from the US courts and Congress under laws that are made by people from places like Oklahoma and Arkansas, instead of applying our own standards.

Each sponsor of this Bill took an oath to uphold the Hawaii constitution. Each lawyer testifying for it did likewise. All of them are in violation of their oaths for seeking to remove from the constitution of Hawaii to make its own determination about our own freedoms and liberties.

Please reject this bill.

Sincerely

Jim Bickerton