



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2010**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1756, RELATING TO CRIMINAL PROCEDURE.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Tuesday, February 16, 2010 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325

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

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Chair Karamatsu and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

This bill would require courts to order expungement of criminal conviction records, upon application made at least five years after the conviction, for all offenses not specifically excluded by the bill. This would drastically alter Hawaii's current expungement law, to the detriment of public safety, by allowing convicted offenders to hide their history of criminal conduct. There is no reasonable justification for this change.

Section 831-3.2, Hawaii Revised Statutes, sets out Hawaii's current law on expungements. It limits expungements to arrest records in matters that have not resulted in convictions. The current system allows citizens to clear such arrest information from their records, to avoid misunderstanding or confusion by potential employers or others who might have an interest in their criminal history.

In contrast, this bill would allow the expungement of conviction records. Furthermore, it would mandate that courts grant expungement requests made five years after conviction. Courts would have no discretion or ability to reject expungement requests.

Expungement of conviction records would undermine one of the most fundamental principles of the criminal justice system - that is, repeat offenders should be treated differently than first-time offenders. This bill would allow expungement of an unlimited number of convictions, as long as the convictions are more than five years old; thus, a repeat or habitual offender, or a career criminal, could appear to have a clean record. And the bill would allow offenders serving sentences longer than five years to expunge the convictions while still serving the sentences. The resulting incompleteness and inaccuracy of conviction records would impede the ability of courts to make appropriate decisions regarding sentencing, bail, protective orders, and treatment programs.

Moreover, the provisions in this bill would conflict with many important state and national systems and programs that require accurate and comprehensive criminal history records - for example, homeland security programs, immigration and deportation systems, sex offender registration programs, DNA database programs, criminal justice and corrections programs, and national criminal history records systems.

Government agencies, nonprofit organizations, private businesses, and individual citizens rely on criminal history records to make important decisions that may have a profound effect on safety and security. Complete and accurate criminal history information is essential to schools, hospitals, financial institutions, industries that employ drivers and operators of dangerous equipment, social service and adoption agencies, and caregivers for children, the elderly, and the disabled - as well as other employers, business and professional licensing agencies, and parents.

Although this bill precludes expungement for certain offenses, in reality all conviction records may be significant and relevant for some purpose and, therefore, none should be expunged. This bill would allow expungement of convictions for offenses often associated with organized crime, such as theft, money laundering, gambling, car theft, and drug dealing; offenses often associated with human trafficking, such as extortion and promoting prostitution; and offenses legislated to protect children, such as child abuse involving the production and dissemination of child pornography, and electronic enticement of children by Internet predators. The bill would also allow expungement of convictions for driving under the influence of drugs or alcohol, which are known to cause devastating injuries and death; environmental crimes involving the dumping of wastes and contaminants on land and in water, which threaten public health; and importation, propagation, and distribution of illegal animals and pests, some of which are prohibited because of their potential to cause widespread damage to the activities that sustain Hawaii's economy.

We respectfully ask that this bill be held.

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

**February 16, 2010**

**H.B. 1756: Relating to Criminal Procedure.**

Representative Karamatsu and Members of the Committee:

This bill proposes to create a statute allowing expungement of some criminal convictions under certain specified conditions. To receive an expungement under this proposal, the conviction has to be over 5 years old, the person has to have had no convictions in the 5 years before the application for expungement and the conviction for which expungement is sought cannot be on a list of enumerated offenses.

We support allowing expungement of a criminal record under appropriate circumstances because it recognizes that people often deserve and can benefit from a second chance. Currently, if a defendant in Hawaii is convicted of a an offense, any offense, that person will carry the stigma of a criminal conviction on his or her record for the rest of their life. Every time that person applies for a job or a mortgage, for example, he or she will have to disclose a felony conviction. Any person with access to the internet is able to learn of a misdemeanor or felony conviction. It affects the ability of persons to enter the military, for example, and other aspects of life that can significantly affect an entire lifetime. Essentially, the conviction becomes a sort of scarlet letter that must be borne for life.

We do offer some comments on this bill. We would suggest that Criminal Property Damage in the First Degree (CPD 1) (HRS §708-8) and Robbery in the Second Degree (HRS §708-841) 20), for example, not be included in the list of enumerated offenses that would be ineligible for expungement.

CPD 1 is often charged out of what would otherwise be a misdemeanor case. For example, throwing a vase against the wall which shatters and cuts, or could have cut, the complainant (subsection (1)(a) only requires that the person act "recklessly" and place another person in danger of "bodily injury", defined in §707-700 as "physical pain, illness or any impairment of physical condition") means that a conviction for CPD 1 could result because the complainant was in the vicinity of the thrown object and could have suffered pain (cuts, etc).

Robbery 2 can and is charged when someone has shoplifted a misdemeanor amount of merchandise but shoved a security guard or loss prevention officer when confronted outside the store. Our Robbery 2 statute only requires that the complainant claim that force or the threat of force was used. A security guard can say "I was

shoved”; there is no requirement for any type of corroborating evidence such as redness, a bruise, etc.

We believe offenses such as these should not be automatically ineligible for expungement. We propose that there be a discretionary provision in the law to allow a court to review the circumstances of certain cases (other than class “A” crimes or any offenses under §707, Part V (Sexual Offenses) and §707, Part VI (Child Abuse) so that a judge could decide if expungement was warranted.

We also do not believe that every misdemeanor offense under Chapter 707 should be excluded for consideration of expungement. A fistfight which results in a conviction for Assault 3, for example, may reflect circumstances that would make expungement appropriate. Likewise, Terroristic Threatening in the Second Degree (TT2) only requires that the complainant allege that the other person threatened, by words or conduct, to cause “bodily injury” to another person, or seriously damage the property of another “with the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person”. The complainant alleges that the defendant said or did something and the complainant felt threatened and that can result in conviction. At the very least, we believe that judges should have the discretion to grant expungement in these cases, where appropriate.

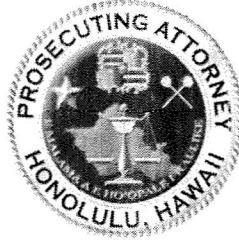
We support H.B. 1756. We believe it would be improved with the suggestions outlined above. Thank you for the opportunity to comment on this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE JON RIKI KARAMATSU, CHAIR  
HOUSE COMMITTEE ON JUDICIARY**

**THE HONORABLE KEN ITO, VICE CHAIR  
HOUSE COMMITTEE ON JUDICIARY**

**TWENTY-FIFTH STATE LEGISLATURE  
REGULAR SESSION OF 2010**

February 16, 2010

**RE: HOUSE BILL 1756; RELATING TO CRIMINAL PROCEDURE**

Good afternoon Chair Karamatsu, Vice Chair Ito, and members of the Judiciary Committee, the Department of the Prosecuting Attorney provides the following testimony **in strong opposition to H.B. 1756**, which proposes to amend Hawaii Revised Statutes Chapter 831 to create a new Section which would permit the expungement of numerous felony and misdemeanor offenses in the Hawaii Penal Code.

While we are uncertain of the motivating factors behind the introduction of H.B. 1756, we are very certain that it is a bad idea. Currently Hawaii law only permits expungement of arrest records for offenses that do not result in a conviction. In addition, expungement is not permitted where the lack of a conviction is the result of a bail forfeiture or flight from the jurisdiction to avoid prosecution. It is also not permitted in cases where the defendant has been acquitted based on a mental or physical defect under H.R.S. Chapter 704, or granted a deferred acceptance of a guilty or no contest plea.

The proposal in this bill would open up the floodgates of expungement to many felony and misdemeanor offenses. While appearing to exempt many "violent" offenses the measure neglects to exclude many serious offenses including Abuse of a Family or Household Member (both misdemeanor and felony), Harassment by Stalking (both misdemeanor and felony), and Continuous Sexual Assault of a Minor, to name just a few. Clearly this bill marks a radical departure from the current provisions of Chapter 831 (in effect since the current Penal Code was instituted in 1974) which quite rightly exclude all convictions from expungement. Under this

bill many individuals with extensive criminal histories would escape detection by utilizing the expungement provisions of this bill to hide their nefarious criminal past by staying conviction free for five years, something that is not too difficult for criminals skilled at intimidating witnesses. While excluding time periods during which someone is incarcerated from the five year conviction-free period, it does not provide similar exemptions for time served on probation and parole during which close supervision may repress criminal tendencies.

Finally, the ultimate shortcoming of H.B. 1756, even if you somehow would consider this vast expansion of expungement to be a good idea, is the logistical nightmare that would be created by the extensive research that would be required to determine eligibility under this complex scheme. We would estimate that such a measure would undoubtedly generate hundreds of thousands of dollars in costs to process the increased number of expungement applications. Even worse would be the costs resulting from being unable to adequately determine an individuals true criminal history after their past convictions had been expunged. The myriad risks to public safety created by the passage of this measure hopefully can easily be perceived by this Committee.

For the reasons cited above, we urge you to hold H.B. 1756, as it poses a serious threat to public safety. Thank you for your time and consideration.