TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
H.B. NO. 1155, RELATING TO REPEAT OFFENDERS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 22, 2011 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair **Keith-Agaran** and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

The purpose of the bill is to significantly limit the application of the repeat offender law by specifying only certain applicable violent offenses, and eliminating all other offenses from the law, including some serious crimes against persons, property crimes, firearm and drug offenses, and such serious crimes as promoting prostitution and promoting gambling. Although not expressly stated as the intent, the result of this bill would be to get career criminals and repeat offenders out of prison and back into our communities more quickly.

This bill would undo years of legislative efforts of many people. The repeat offender law set out in section 706-606.5, Hawaii Revised Statutes, was enacted in 1976 and has been in place for almost thirty-four years to address the serious problem of repeat and habitual offenders and career criminals who have no regard for the law or the legal system. The crimes addressed by this law are serious and deserve serious consequences. This law helps protect Hawaii's people and communities from the relatively small group of criminals who

commit so many of the crimes that occur in Hawaii. These individuals can have a tremendous impact on our communities and the entire criminal justice system.

The Commentary on section 706-606.5, citing 1976 House Conference Committee Report No. 32 and Senate Conference Committee Report No. 33, states:

> Finding a clear danger to the people of Hawaii in the high incidence of offenses being committed by repeat offenders, the legislature felt it necessary to provide for mandatory terms of imprisonment without the possibility of parole in cases of repeated offenses by prior offenders.

Since 1976, the Legislature has refined and enhanced the repeat offender law and, recognizing its value and importance, added more offenses to the list of offenses subject to repeat offender sentencing. This bill would seriously undermine the repeat offender law, disregarding the years of legislation, experience, and practice that have led to the development of this important law.

The following is a list of some of the many serious offenses that would be eliminated from the repeat offender law by this bill:

FELONY	SECTION	OFFENSE
A	707-733.6	Continuous Sexual Assault of Minor Under 14
A	707-750	Promoting Child Abuse 1
B	707-751	Promoting Child Abuse 2
B	707-756	Electronic Enticement of a Child 1
C	707-757	Electronic Enticement of a Child 2
B	707-765	Extortion 1
C	708-811	Burglary 2
C	708-821	Criminal Property Damage 2
B	708-830.5	Theft 1

C	708-831	Theft 2
C	708-836	Unauthorized Control of a Propelled Vehicle
A	708-839.6	Identity Theft 1
B	708-839.7	Identity Theft 2
C	708-839.8	Identity Theft 3
A	708-840	Robbery 1
B	708-851	Forgery 1
C	708-875	Trademark Counterfeiting
B	708-891	Computer Fraud 1
B	708-892	Computer Damage 1
___	708-893	Use of a Computer in the Commission of a Separate Crime
B	708-895.5	Unauthorized Computer Access 1
B	708A-3(5)b	Money Laundering
B	710-1040	Bribery
B	712-1202	Promoting Prostitution 1
C	712-1203	Promoting Prostitution 2
C	712-1221	Promoting Gambling 1

The bill would also make the repeat offender law inapplicable to all drug, firearm, and insurance fraud offenses.

It is important to note that the bill would eliminate felony convictions of other jurisdictions from the repeat offender law. This means that a career criminal from California could come to Hawaii with a record of multiple convictions for violent felony crimes, commit a violent felony here, and not be subject to repeat offender sentencing.

Two troubling inconsistencies should be noted. The bill includes Robbery in the Second Degree in the list of offenses subject to repeat offender sentencing, but omits Robbery in the First Degree, the more serious class A felony. It includes

Promoting Child Abuse in the Third Degree, but omits the more serious offenses of Promoting Child Abuse in the First and Second Degree.

Over the years, the Legislature has amended the repeat offender law to address crimes that had become serious problems in our communities. This bill ignores the concerns that prompted the changes in the law and undermines all of the efforts to address the problems. The following are just a few of the numerous examples of these efforts. The Commentary on section 706-606.5, citing legislative committee reports, includes the following excerpts:

> Act 87, Session Laws 1996, added the crime of unauthorized control of propelled vehicle to the class C felonies subject to repeat offender sentencing. The legislature found that vehicle thefts and property taken from the vehicles was a serious problem in this State, and that this kind of theft affected a significant number of visitors and residents.
>
> Act 277, Session Laws 1997, amended this section by including the offense of trademark counterfeiting in the list of offenses for repeat offenders. The legislature found that trademark counterfeiting was a recurring problem in Hawaii for retail boutiques and trademark products of the University of Hawaii, and that tourists are often the target for the scams.
>
> Act 80, Session Laws 2006, added electronic enticement of a child in the second degree to the list of class C felonies subject to repeat offender sentencing. Act 80 provides a means to ensure the safety of Hawaii's children, enhance enforcement efforts, and impose significant penalties against those who prey on the most vulnerable members of the community.
>
> Act 49, Session Laws 2007, amended this section to deter insurance fraud by including felony insurance fraud relating to worker's compensation, accident and health or sickness, and motor vehicle insurance, and insurance provided by mutual benefit societies and health maintenance organizations, among the offenses subject to repeat

> offender sentencing. The legislature found that while insurance [fraud] is often perceived as a nonviolent and victimless crime, the ramifications of insurance fraud affect everyone through higher insurance premiums.

This bill will reduce the potential punishment for many repeat offenders and career criminals. It will reduce the deterrent impact of the law. And it may allow many of these criminals back into our community more quickly at the expense of residents and visitors, and at great cost to law enforcement, prosecutors, courts, and the rest of the criminal justice system when these criminals commit new crimes.

We respectfully urge that this bill be held.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Sixth State Legislature
Regular Session of 2011
State of Hawai`i

February 22, 2011

RE: H.B. 1155; RELATING TO REPEAT OFFENDERS.

Chair Keith-Agaran, Vice-Chair Rhoads and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony in opposition to House Bill 1155.

The purpose of House Bill 1155 is to amend Section 706-606.5, Hawaii Revised Statutes ("HRS"), such that repeat offenses of "non-violent" felonies would no longer be subject to enhanced/mandatory sentencing.

HRS §706-606.5 was first enacted by the Hawaii State Legislature in 1976, in recognition that "high incidence of repeated offense by previously convicted persons within the State of Hawaii presents a clear danger to its citizens." See 1976 Conf. Com. Rep. No. 32 on H.B. No. 2932-76, attached. For those who repeatedly commit "some of the most serious and reprehensible felonies as defined by the Hawaii Penal Code," the Legislature resolved that mandatory sentencing is a necessary deterrent and/or punishment; thus, a very specific list of such felonies has been crafted and refined by the Legislature over the past 35 years. Id.

The Department has no reason to believe that offenses which do not involve physical violence are any less serious or dangerous to society than those that do involve physical violence. Indeed, "non-violent" crimes such as fraud, extortion, identity theft, promotion of prostitution and promotion of dangerous/harmful drugs are often just as painful and life-altering for its victims as "violent" crimes such as assault or terroristic threatening. Moreover, such "nonviolent" crimes pose just as much of a threat to our community's safety and well-being.

To create a "blanket" exclusion of all "nonviolent" crimes not only discounts the effect that these felony crimes have on their victims and on society, but also reduces the message to perpetrators that these types of repeat offenses will not be tolerated. In addition, removing language that addresses "felony conviction[s] of another jurisdiction[s]" likely means that this sentencing structure would no longer apply to perpetrators who previously committed felonies in other states, regardless of whether they were "violent" or "non-violent" felonies.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes House Bill 1155. Thank you for the opportunity to testify on this matter.

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

February 22, 2011

H.B. No. 1155: RELATING TO REPEAT OFFENDERS

Chair Keith-Agaran and Members of the Committee:

We support passage of H.B. No. 1155. The intent of this bill is to remove many of the "property," "morals," and "drug" offenses from the repeat offender law -- H.R.S. § 706-606.5. That law subjects persons who commit certain offenses enumerated under the section, and who have a prior conviction enumerated under the section, to a non-probationable, indeterminate term of imprisonment accompanied by a mandatory minimum term of imprisonment.

§ 706-606.5 has been criticized for taking sentencing out of the hands of the trial judges who many would argue are in the best position to fashion an appropriate sentence in each case. Passage of this measure will not prevent a judge from doling out harsh sentences such as the five, ten and twenty year indeterminate terms which can accompany Class C, B and A felonies respectively. However, it will allow judges in current repeat offender cases to decide what is most appropriate for the offender that is currently before them rather than to have their "hands tied" by § 706-606.5.

Similar criticisms previously were directed at the Federal Sentencing Guidelines until the U.S. Supreme Court struck them down as unconstitutional in the manner in which they were being applied. Many federal judges complained about the "cookie cutter" approach to justice which the guidelines took by relegating sentencing to a variety of mathematical formulas designed to take into account the various aggravating factors and mitigating factors which accompany individual offenders. Because of our repeat offender law, it is not uncommon locally for judges to tell defendants who appear before them that, if it were in the discretion of that judge and not set out by law under §706-606.5, the sentence would be different.

Alternative sentencing programs such as Hawaii's Opportunity for Probation with Enforcement ("HOPE"), drug court and mental health court have proved that alternatives to imprisonment can have success even with the most risky offenders. We realize that the bill in its present form may not be acceptable to all criminal justice agencies and we are willing to work toward a more palatable compromise. However, it is our hope that this measure will be the first step in sentencing reform which is seriously necessary for the social and economic welfare of our state.

Thank for the opportunity to comment on this measure.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary
Hearing Date/Time:	Tuesday, February 22, 2011, 2:00 p.m.
Place:	Room 325
Re:	*Testimony of the ACLU of Hawaii in Support of H.B. 1155, Relating to Repeat Offenders*

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of H.B. 1155

Mandatory minimums should be abolished because they add to Hawaii's drastic over-incarceration problem without increasing public safety or deterring crime by:

1) generating unnecessarily harsh sentences;
2) tying judges' hands in considering individual circumstances;
3) creating racial disparities in sentencing; and
4) empowering prosecutors to force defendants to bargain away their constitutional rights.

Almost twenty years ago, the United States Sentencing Commission delivered a report to the U.S. Congress denouncing mandatory minimums for a series of flaws that have practically become common knowledge among policymakers, judges, and practitioners in the field of federal sentencing.[1] As the Commission explained in its 1991 report to Congress, mandatory minimums create sentencing disparities that correlate with race,[2] disparities among similarly-situated offenders,[3] sentencing "cliffs" for drug offenses (that is, quantity thresholds at which sentences increase dramatically),[4] formalism in sentencing based on charging decisions and not offense conduct,[5] and inflexibility to consider an individual offender's personal culpability.[6] Mandatory minimums add to the United States' drastic over-incarceration problem[7] without increasing public safety or deterring crime.[8]

Mandatory minimums create excessive prosecutorial discretion, which is exercised in an arbitrary manner and used to coerce defendants into relinquishing their constitutional rights and punish defendants when they exercise those rights.[9]

One other unfortunate by-product of mandatory minimums has become particularly salient in these troubled economic times: by requiring long prison sentences for

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individuals who would not otherwise receive them, the law commits precious state dollars to paying for years' worth of unnecessary incarceration.[10]

The policy of the U.S. Attorney's Office for the Northern District of California illustrates how mandatory minimums can be used to compromise constitutional rights and dramatically intensify sentences. In that district, until recently, prosecutors as a matter of policy threatened to file informations under 21 U.S.C. § 851 against defendants with prior convictions; the effect of such an information is to double the mandatory minimum or require a mandatory life sentence. Then prosecutors used that threat to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury — all as the price for not being exposed to the higher minimum.[11]

Prosecutors' use of mandatory minimums as coercive bargaining tools is at odds with the purpose that the U.S. Congress expressed in creating the guideline system. Congress sought to create a uniform baseline for sentencing that reflects all relevant factors, including offense conduct, actual social harms of the offense, and offender role and circumstances[12] — not to make prosecutors' jobs easier and facilitate the abrogation of defendants' rights.

All of these flaws with mandatory minimums are well known and well documented. It is unsurprising, therefore, that a majority of Americans oppose mandatory minimums.[13]

Many in the judiciary, too, have come to see mandatory minimums as antithetical to fair sentencing. Judges across the country and across the ideological spectrum have decried determinate sentencing schemes like mandatory minimums that tie judges' hands and force them to impose harsher-than-necessary sentences.[14] The United States Supreme Court in *United States v. Booker*[15] and subsequent cases[16] has emphasized the importance of judicial discretion in sentencing — the very opposite of the approach required under a mandatory minimum. Today, in the wake of *Booker*, mandatory minimums are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.

We urge the Committee to send a strong and unequivocal condemnation of mandatory minimums. The abolition or reform of mandatory minimums would become the most significant step that this Legislature could take to reduce unfairness, racial disparities, and the abridgement of constitutional rights in sentencing. This Committee should urge the Legislature to eliminate mandatory minimum sentences entirely. This Committee should also recommend a series of corrective measures that, in the event the Legislature cannot muster the political will for abolition, would produce substantial and positive change; these measures include lowering mandatory minimum terms, eliminating the subset of mandatory minimums that apply to drugs, expanding the applicability of the "safety

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valve" exception for non-violent drug offenders, and replacing drug quantity-based criteria for mandatory minimums with role-based and harm-based criteria.

It is the ACLU's fervent hope that this Committee will take steps to reduce excessive incarceration and create a sentencing system that is both fair and effective. The necessary first step toward this goal is reforming or abolishing mandatory minimum sentences.

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
Staff Attorney
ACLU of Hawaii
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[1] See U.S. Sentencing Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991) [hereinafter "USSC 1991 Report"].
[2] *Id.* at 51, 52.
[3] One of the fundamental objectives of the Guidelines was to reduce disparity in sentences given to similarly-situated defendants. *See United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007); USSC 1991 Report 16.
[4] USSC 1991 Report 1.
[5] *Id.* at 25-26, 53.
[6] *Id.* at 26.
[7] U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 48 (Nov. 2004) [hereinafter "USSC Fifteen Year Review"]; U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 68-70 (June 18, 1987).
[8] All of the empirical evidence shows that mandatory minimums do not deter criminal conduct. *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 102 (2009). In fact, increased sentence length in general has no deterrent effect. *See generally* Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 23, 28 (2006); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).
[9] *See, e.g., United States v. Hungerford*, 465 F.3d 1113, 1118-22 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) ("Hungerford's case is a textbook example of how [18 U.S.C.] § 924(c) permits a

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prosecutor, but never a judge, to determine the appropriate sentence."); *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009); *United States v. Redondo-Lemos*, 754 F. Supp. 1401, 1406 (D. Ariz. 1990).

[10] *See, e.g.,* Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting, at 2 (Aug. 9, 2003) ("Our resources are misspent, our punishments too severe, our sentences too long."); Statement of Stephen R. Sady, *Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons Should Fully Implement Ameliorative Statuses To Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration* 1 (July 21, 2009), *at* http://judiciary.house.gov/hearings/pdf/Sady090721.pdf.

[11] *See, e.g., United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009).

[12] *See* 18 U.S.C. § 3553(a); 28 U.S.C. § 994(c)(1)-(7).

[13] *See* Amanda Paulson, *Poll: 60 Percent of Americans Oppose Mandatory Minimum Sentences*, C.S. Monitor, Sep. 25, 2008, *at* http://www.csmonitor.com/USA/Justice/2008/0925/p02s01-usju.html.

[14] *See, e.g., Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment); Remarks of Chief Justice William H. Rehnquist, Nat'l Symposium on Drugs and Violence in America 9-11 (June 18, 1993); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

[15] 543 U.S. 220 (2005).

[16] *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

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February 22, 2011

COMMITTEE ON THE JUDICIARY
Rep. Gilbert S. C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Tuesday February 22, 2011
2:00 PM
Room 325
HB 1155- RELATING TO REPEAT OFFENDERS

STRONG SUPPORT

My name is Andy Botts, and I am a non-violent repeat drug-related offender. I have been in and out of various prisons throughout the world, for a total of four times, and have been in treatment only once – the last time.

Non-violent drug offenders are at the greatest risk of recidivism due to the strong potential to relapse –especially ICE – and they spend as much, if not more time in prison than rapists and killers. These types of offenders are usually the ones who receive mandatory minimums, extended terms and etc.

It's repeatedly claimed that these types of offenders have been given numerous chances in treatment programs, which may be true in many cases, but not a fact for all. What's not taken into account is the older offender who has aged out of crime, but is still prone to relapse. For me, it wasn't until the 4th and last time that I was offered a drug program at Lompoc Federal Prison. Since then, I haven't fallen prey to relapse, nor am I on any type of supervision. Considering that there are possible mitigating circumstances, I strongly support this bill.

Mahalo,

Andy Botts