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

January 25, 2013

H.B. NO. 232 RELATING TO SENTENCE OF IMPRISONMENT FOR SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF TWELVE YEARS

Chair Rhoads and Members of the Committee:

H. B. 232 seeks to create mandatory minimum terms for Class "A" (currently carries a mandatory 20 year prison term, Class "B" (currently carries a 10 year prison term or a possible term of 5 years' probation with up to 18 months prison) and Class "C" (currently carries a 5 year prison term or a possible term of 5 years' probation with up to 12 months prison) sexual assault offenses as follows.

The new law would mandate a mandatory minimum term of six years and eight months of a twenty year prison term for:

- knowing penetration with "strong compulsion" (defined as use of threat, physical force or dangerous instrument) of a minor under the age of 12,
- knowing penetration of those persons defined as "mentally defective", and,
- knowing penetration of a person rendered mentally incapacitated or physically helpless by administration of a drug.

The new law would also mandate a mandatory minimum term of three **years and** four months of a ten year prison term for:

- knowing penetration with "compulsion" (defined as lack of consent or threat of humiliation, property damage or financial loss) of a minor under the age of 12,
- knowing penetration of minors under the age of 12 defined as "mentally incapacitated" or "physically helpless", and
- knowing penetration of a minor under the age of 12 who is in a public or private prison, detention facility, or is committed to the director of the department of public safety.

The new law would also mandate a mandatory minimum term of one year and eight months of a five year prison term for:

- reckless penetration with "compulsion" (defined as lack of consent or threat of humiliation, property damage or financial loss) of a minor under the age of 12.

We acknowledge the good intentions supporting this proposed legislation. However, in application, it has the very real prospect of forcing more child victims to have to go through a trial where they will have to re-live the assault upon their bodies and psyche in a public setting in the presence of their perpetrator. It will also result in more

costs to already overburdened court and corrections systems. Finally, it reflects a real distrust of the Hawaii Paroling Authority that cannot be justified.

As noted above, Class "A" offenses carry a mandatory 20 year prison term. Our parole board is then tasked with setting a minimum term which the defendant must serve before being eligible to be considered for parole. When that minimum term is completed, the parole board may grant parole or may determine that the defendant must do additional programming and time of incarceration before parole will be considered. The parole board has the option of requiring a defendant to serve the entire term of 20 years.

In Class "B" and "C" offenses, if the defendant is sentenced to a prison term of 10 years and 5 years, respectively, the parole board will act as described above.

We believe that the Hawaii Paroling Authority should continue to bear the responsibility to assess each case and determine the minimum and maximum terms to be served. From a cost analysis alone, this is important because there are times that the circumstances of a defendant may change. The parole board has the ability to react to such changes. For example, when defendants suffer significant health events (stroke, or other debilitating condition) or require particular levels of care that are prohibitively expensive to provide in a prison setting, the parole board can consider parole for a person who is certainly no longer a threat to the community but would be a serious drain on taxpayers to keep in prison. If the person is serving <u>mandatory</u> time, such options are not available.

More importantly, the addition of these significant mandatory minimum terms will be a real burden on the resolution of these cases. Currently, the idea of a so-called "open" term (one without a mandatory minimum) allows a defendant to think, however unrealistic it may be, that if he or she does well in the prison setting, they will have a chance to be out in a few years. That kind of thinking can fuel a decision to plead to a Class "A" offense, rather than go to trial.

However, if there is a mandatory minimum in place for essentially one third of the maximum term, counsel for the defendant will have to inform him or her that they may not only have to serve that six year, eight month term, but additional years on top of that. That is because there is certain programming that the parole board requires before approving parole, such as the Sex Offender Treatment Program, which normally takes two years. We would have to inform our client that they might not be eligible for the program until their mandatory term was completed, then they might be on a waiting list, then they would have to do the program, all adding up to additional years of prison.

Under this scenario, clients are much more likely to demand trial than agree to such a long sentence. Likewise, in the case of Class "B" and "C" cases, clients sometimes agree to plead under an agreement with the State that the prosecution could ask for the prison term but the defendant could still argue for probation. Again, however unlikely, it is the opportunity to ask for probation that persuades a defendant to enter a plea. With that possibility gone, those defendants will often feel they have nothing to gain from a plea, so will go to trial.

All these scenarios mean that children, the real victims in these cases, the persons who are "minors under the age of 12" will have to get up in a public courtroom, in front of jurors and a judge, with the defendant present, and not only recount the specifics of the assault, but be subject to cross-examination.

We oppose H.B. No. 232 for these reasons. We are aware of no compelling reasons that require this change in the law and believe it will cause far more problems than it might solve.

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 KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-sixth State Legislature
Regular Session of 2012
State of Hawai`i

January 25, 2012

RE: H.B. 232; RELATING TO SENTENCE OF IMPRISONMENT FOR SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF TWELVE YEARS.

Chair Rhoads, Vice Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in support of H.B. 232, which is part of the 2013 Honolulu Prosecuting Attorney Legislative Package.

In the 2011 Uniform Crime Reporting Program (UCR) that is administered by the Federal Bureau of Investigation (FBI), there were 353 forcible rapes reported in the State of Hawaii in 2011 with a rate of 25.7 forcible rapes per a population of 100,000. [Pursuant to the UCR, "forcible rape" is defined as: The carnal knowledge of a female forcibly and against her will. Assaults or attempts to commit rape by force or threat of force is also included. Statutory rape (without force), any sexual assaults against males, and other sex offenses are not included in this category].

According to "Sexual Assault Victims in Honolulu, A Statistical Profile" that was put together by the Department of the Attorney General of the State of Hawaii in partnership with the Sex Abuse Treatment Center (SATC), in the eleven-year period between 1990 and 2001, the SATC has assisted an average of 460 victims per year in Honolulu, with as many as 541 in 1994 to 368 in 1999. We would like to note that 32.5% or almost one-third of the victims getting treatment from SATC had been under the age of 12. Specifically 18.8% of the victims were ages 0 to 5 and 13.7% of the victims were ages 6 to 11.

To help curb the amount of sexual assault on minors in Hawaii, the Department of the Honolulu Prosecuting Attorney of the City and County of Honolulu introduced this bill to amend Chapter 706 of the Hawaii Revised Statutes by adding a new section that creates mandatory

minimum terms of imprisonment for any person convicted of sexual assault in the first degree, sexual assault in the second degree, and sexual assault in the third degree where the victim was subjected to sexual penetration.

At least 25 states have enacted mandatory 25 year minimum sentences for various types of first time child sex crime offenders. Our bill is narrowly focused by creating mandatory minimum imprisonment for offenders who are convicted of certain sexual offenses that involve sexual penetration of a minor under the age of 12. We excluded statutory sexual offenses and sexual offenses solely involving sexual contact.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu is in support of H.B. 232. Thank for you the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy

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Second Deputy

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TESTIMONY IN SUPPORT OF
H.B. NO. 232
A BILL FOR AN ACT RELATING TO SENTENCE OF IMPRISONMENT FOR SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF TWELVE YEARS

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

House Committee on Judiciary

Friday, January 25, 2013
2:00 p.m., Room 325

Honorable Chair Rhoads, Vice-Chair Har, and Members of the House Committee on Judiciary, the Office of the Prosecuting Attorney, County of Kaua'i submits the following testimony in support of House Bill No. 232.

The purpose of House Bill No. 232 is to add a section to Chapter 706 of the Hawai'i Revised Statutes designated as "Sentence of imprisonment for sexual assault of a minor under the age of twelve years."

House Bill No. 232 would impose a mandatory minimum term of imprisonment for defendants charged with Sex Assault 1, 2, or 3 of a minor under the age of twelve years. This ensures that sex offenders of minors are mandated to serve a minimum jail sentence without possibility of parole or probation as stated, with the hope to minimize the sex offender's ability to re-offend. We are also in support of House Bill No. 232 as it will set the precedent for more severe sentencing towards sex offenders of minors.

Thank you for the opportunity to testify on this matter.

Respectfully,

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

An Equal Opportunity Employer

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

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OUR REFERENCE LM-NTK

January 25, 2013

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State Senate
Hawaii State Capitol
514 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill No. 232, Relating to the Sentence of Imprisonment for Sexual Assault of a Minor Under the Age of Twelve Years

I am Lisa Mann, Acting Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports House Bill No. 232, Relating to the Sentence of Imprisonment for Sexual Assault of a Minor Under the Age of Twelve Years.

The protection of our children is vital to the well-being of our community. Mandatory sentencing will reduce a sexual offender's ability to re-offend, thus protecting our community.

The Honolulu Police Department urges you to support House Bill No. 232, Relating to the Sentence of Imprisonment for Sexual Assault of a Minor Under the Age of Twelve Years.

Thank you for the opportunity to testify.

Sincerely,

LISA MANN, Acting Captain
Criminal Investigation Division

APPROVED:

LOUIS M. KEALOHA
Chief of Police

Serving and Protecting With Aloha

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary
Hearing Date/Time:	January 25, 2013, 2:00 pm
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawaii in Opposition to H.B. 232, Relating to Sentencing*

Dear Chair Rhoads and Members of the Committee on Judiciary

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 232, which seeks to require the court to impose a mandatory minimum term of imprisonment without the possibility of parole or probation for a person convicted of certain acts of sexual assault against a minor under the age of 12 years.

Mandatory minimum sentences should be abolished or reformed because they generate unnecessarily harsh sentences, tie judges' hands in considering individual circumstances, create racial disparities in sentencing and empower prosecutors to force defendants to bargain away their constitutional rights.

Many in the judiciary have come to see mandatory minimum sentences as antithetical to fair sentencing. Judges across the country and across the ideological spectrum have decried determinate sentencing schemes like mandatory minimum sentences that tie judges' hands and force them to impose harsher-than-necessary sentences. The United States Supreme Court in *United States v. Booker*[1] and subsequent cases[2] 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 minimum sentences are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.

Mandatory minimum sentences 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. One other unfortunate by-product of mandatory minimums has become particularly salient in these troubled economic times: by requiring long prison sentences for individuals who would not otherwise receive them, the law

[1] 543 U.S. 220 (2005).
[2] *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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commits precious federal and state dollars to paying for years' worth of unnecessary incarceration.[3]

There is no simple fix to the devastating problem of sexual assault against minors. Instead of politically popular measures that make no difference or in fact make us less safe, we need to turn our attention and resources to ways of addressing the epidemic of sex abuse that, while perhaps not as politically popular, will actually work so that more potential victims can be spared. Rather than imposing mandatory minimum terms of imprisonment for a person convicted of sexual assault, we should focus resources on programs and policies that will actually reduce the likelihood of sex offenses occurring in the first place.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

The ACLU of Hawaii has been the state's guardian of liberty for 47 years, working daily in the courts, legislatures and communities to defend and preserve the individual rights and liberties equally guaranteed to all by the Constitutions and laws of the United States and Hawaii. The ACLU works to ensure that the government does not violate our constitutional rights, including, but not limited to, freedom of speech, association and assembly, freedom of the press, freedom of religion, fair and equal treatment, and privacy. The ACLU network of volunteers and staff works throughout the islands to defend these rights, often advocating on behalf of minority groups that are the target of government discrimination. If the rights of society's most vulnerable members are denied, everyone's rights are imperiled.

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[3] 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.

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IMUALLIANCE

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TESTIMONY FOR HOUSE BILL 232, RELATING TO SENTENCE OF IMPRISONMENT FOR SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF TWELVE YEARS

House Committee on Judiciary
Hon. Karl Rhoads, Chair
Hon. Sharon E. Har, Vice Chair

Friday, January 25, 2013, 2:00 PM
State Capitol, Conference Room 325

Honorable Chair Rhoads and committee members:

I am Kris Coffield, representing the IMUAlliance, a nonpartisan political advocacy organization that currently boasts over 150 local members. On behalf of our members, we offer this testimony in support of House Bill 232, relating to the sentence of imprisonment for sexual assault of a minor under the age of twelve years.

While this bill is not being advertised is not primarily anti-trafficking measure, IMUAlliance has encountered sex-trafficking victims as young as eleven-years-old during our outreach efforts. Sadly, victims this young are not given special consideration by pimps, sex traffickers, promoters of prostitution, and the sometimes pedophilic johns who solicit minors for sexual services. Such victims are, instead, subject to sexually abusive "breaking in" procedures prior to commercial exploitation, after which they are forced to provide sexual services to adult men as much as seven times their age. Accordingly, we view this measure as a strong deterrent and punitive stance against individuals who would take advantage of commercially and sexually exploited children.

Mahalo for the opportunity to testify in support of this bill.

Sincerely,
Kris Coffield
Legislative Director
IMUAlliance