DEPARTMENT OF THE PROSECUTING ATTORNEY

**CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE KARL RHOADS, CHAIR**
**HOUSE COMMITTEE ON JUDICIARY**
**Twenty-Eighth State Legislature**
**Regular Session of 2015**
**State of Hawai`i**

March 24, 2015

**RE: S.B. 213, S.D. 2, H.D. 1; RELATING TO THE HAWAII PENAL CODE.**

Chair Rhoads, Vice Chair San Buenaventura and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of S.B. 213, S.D. 2, H.D. 1.

The purpose of this bill is to require the Department of Public Safety to post written notice for defendants sentenced to multiple terms of imprisonment prior to June 18, 2008, to inform them that their sentences may be recalculated by the Department of Public Safety, and that they may petition the court for clarification or correction of their sentences for good cause. The Department appreciates the reasonable approach and revisions that were previously made to this bill by prior Committees. We believe that this requirement will provide sufficient notice to the relevant individuals.

For all of the foregoing reasons, the Honolulu Prosecuting Attorney supports the passage of S.B. 213, S.D. 2, H.D. 1. Thank you for the opportunity to testify on this matter.

# COMMUNITY ALLIANCE ON PRISONS

## P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com

**COMMITTEE ON JUDICIARY**
Rep. Karl Rhoads, Chair
Rep. Joy Sanbuenaventura, Vice Chair
Tuesday, March 24, 2015
2:00 p.m.
Room 325

**SUPPORT for SD1 VERSION OF SB 213 SENTENCING**

Aloha Chair Rhoads, Vice Chair Sanbuenaventura and Members of the Committee!

My name is Kat Brady and I am a Community Justice Advocate. I am also the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai`i individuals living behind bars and the thousands of people on probation and parole. We are always mindful that more than 1,600 of Hawai`i individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

SB 213 requires multiple terms of imprisonment imposed on a defendant who is already subject to an unexpired term of imprisonment that was imposed prior to 6/18/2008 to run concurrently unless the terms are mandated by the court or statute to run consecutively. The **SD1** amended the bill : "3) For terms of imprisonment imposed prior to June 18, 2008, the department of public safety shall send **written notice to the defendant no later than six months prior to the defendant's scheduled date of release**. The written notice shall include but not be limited to: (a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the defendant; and (b) Notice of the defendant's right to have the court review the defendant's sentence."

The **SD2 deleted the 6-month notification and inserted** this language: "3) For defendants serving a term of imprisonment imposed prior to June 18, 2008, the department of public safety **shall post, in all inmate housing units and the facility library at each facility for a period of two months, a written notice** that shall include but not be limited to: (a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the **defendant; and (b) Notice that defendant may petition the court for clarification or correction of their sentence or sentences when good cause exists."**

Community Alliance on Prisons is in support of SD1 version of this measure because the imprisoned person has received written notification at least 6 months prior to release, rather than the precarious 2-month facility posting proposed in the SD2 and HD1 versions.

How can the department be sure that a person's rights are protected if they cannot prove that the person received notification? Why would the state incur more risk of lawsuits when this process has already cost the state taxpayers too much? This seems like a liability for the state to assume and the taxpayers to bear.

Community Alliance on Prisons respectfully asks the committee to restore the SD1 version of this bill because this process of recalculation started in 2005 and duplicated the work already being done at each facility. Many, many people are and have been over-detained, some by as much as 7 years. This error was caused by the state; therefore, we believe that every person has a right to receive a personal notification of their rights.

The state wrote individual letters when the process started in 2005, it is only fair and just that they write individual letters fixing the problems they caused and the burden we have all had to bear

That is why we ask that each person receive (a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the defendant; and (b) Notice of the defendant's right to have the court review the defendant's sentence", as stated in SD1.

We would not object to the committee's inclusion of the 2-month posting at facilities as long as it is IN ADDITION to the letter sent to the imprisoned individual. The department must ensure that each person has a right to know that his sentence may be re-calculated and that he/she has the right to petition the court.

This bill codifies what has been the practice in Hawai`i for decades and applies to those sentenced *before* June 18, 2008.

Community Alliance on Prisons respectfully asks the committee to pass this measure.

Mahalo for this opportunity to testify.

Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, March 24, 2015, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii **in Support** of S.B. 213, S.D. 2, H.D. 1, Relating to the Hawaii Penal Code

Dear Chair Rhoads and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes **in support** of S.B. 213, S.D. 2, H.D. 1, relating to the Hawaii Penal Code, which seeks to inform currently incarcerated individuals of potential recalculation of their sentences.

S.B. 213, S.D. 2, H.D. 1 would require the Department of Public Safety to inform inmates of the possibility of sentence recalculation as a result of retroactive changes made to HRS § 706-668.5. This bill will allow release of those inmates who do not pose a threat to public safety – saving the State significant amounts of money while freeing up bed space to further the goal of bringing inmates back to Hawaii from the problematic for-profit mainland prison.

As the Legislature is aware, many of Hawaii's prisons are overcrowded. The Legislature should take proactive steps to manage its prison population; S.B. 213, S.D. 2, H.D. 1, is one way to start working toward that goal.

Thank you for this opportunity to testify.

Sincerely,

Lois K. Perrin
Of Counsel
ACLU of Hawaii

*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 50 years.*

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TRANSMITTED BY FACSIMILE TO 808-586-6531

March 23, 2015

Representative Karl Rhoads
Chairman, Committee on Judiciary
Hawaii House of Representatives
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

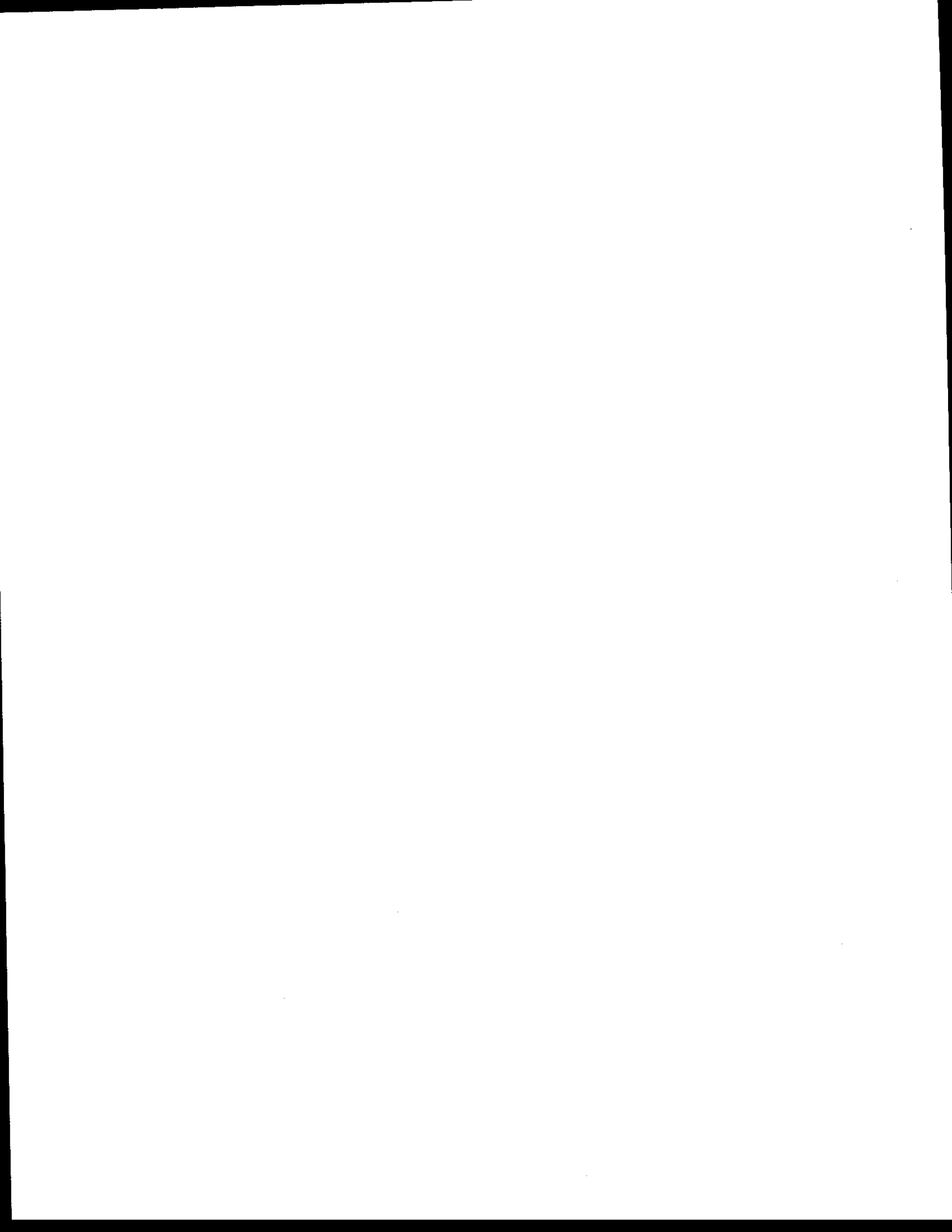
Re: Senate Bill No. 213 (SD2, HD1), "Relating To The Hawaii Penal Code"

Dear Chairman Rhoads and Committee Members:

I am a private practice attorney based in Honolulu and concentrating in criminal defense law. I have been a member of the Hawaii bar since 1968. Additionally, I have served as a Lecturer in Law at the William S. Richardson School of Law since 2005, co-teaching (as a founding member) the Hawaii Innocence Project courses, along with William Harrison, Esq., Susan Arnett, Esq., and Professor Virginia Hench.

This letter constitutes my written testimony (also submitted on behalf of the Hawaii Innocence Project) in strong support of the intent of the original version of Senate Bill No. 213. The current Senate Bill No. 213 (SD2, HD1), which in my view is seriously deficient, is scheduled to be heard by the House Judiciary Committee in conference room 325 at 2:00 p.m. on Tuesday, March 24, 2015.

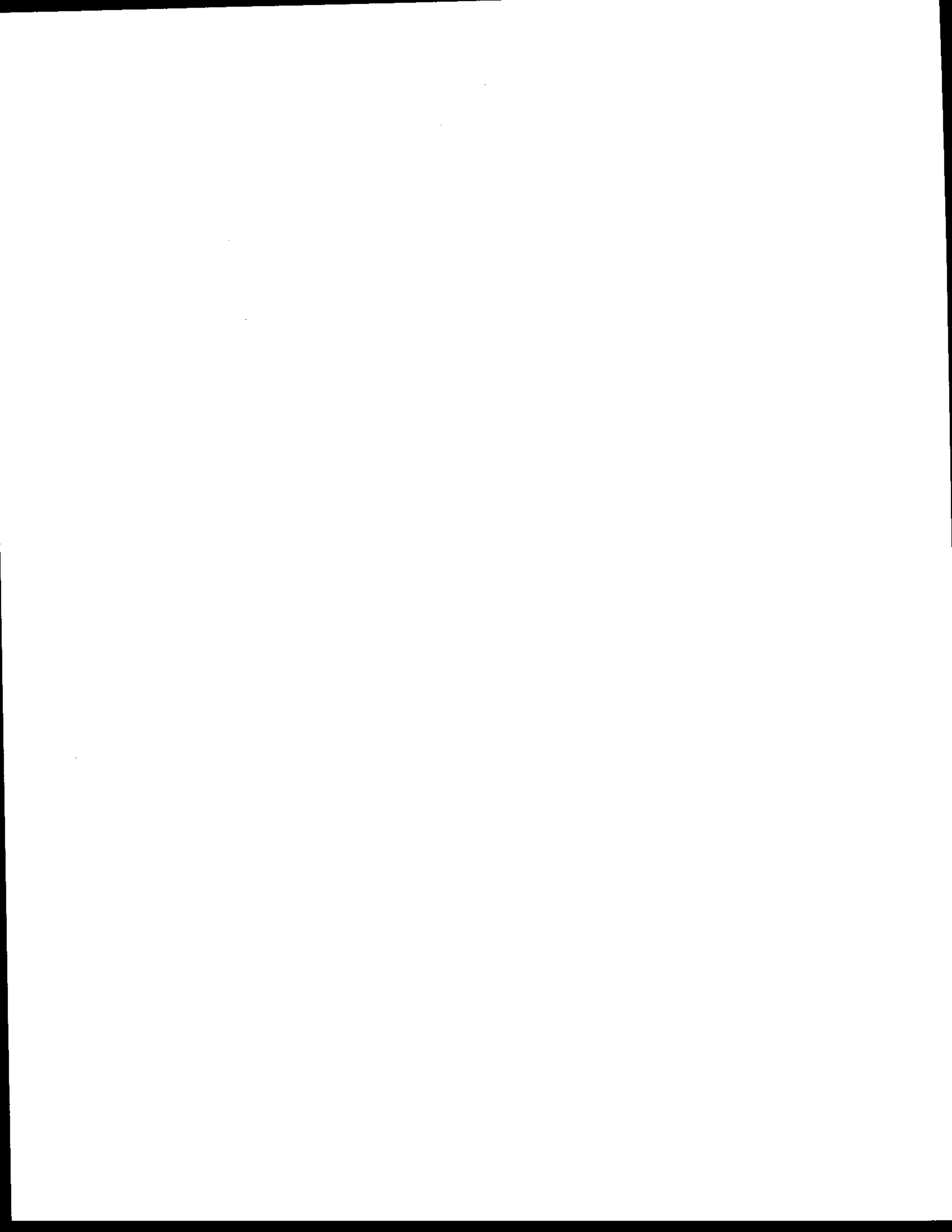
To avoid needless repetition, this written testimony incorporates by reference the written testimony that I submitted to the Senate Committee on Judiciary and Labor (and the House Committee on Public Safety) on February 10, 2015, in support of the original version of Senate Bill No. 213, plus the written testimonies that were previously submitted by the State Office of the Public Defender, the Hawaii Association of



Criminal Defense Lawyers, the Community Alliance on Prisons, and Hoomana Pono, LLC.

The original version of Senate Bill No. 213 addressed the fundamentally unfair disparity in treatment between offenders with terms of incarceration imposed before June 18, 2008, and those without such terms of incarceration, by amending the language of H.R.S. § 706-668.5(1) to read in pertinent part: "If multiple terms of imprisonment are imposed on a defendant, whether at the same time or at different times, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment that was imposed prior to June 18, 2008, the terms shall run concurrently unless the court has ordered or the statute mandates that the terms run consecutively." [Underlining added.] That key statutory amendment has been deleted from the current Senate Bill No. 213 (SD2, HD1), but in my professional opinion it should be restored.

In written testimony submitted for a February 12, 2015, hearing on the original version of Senate Bill No. 213, the State Department of the Attorney General claimed: "This bill, which would effectively make Act 193 apply retroactively, is unconstitutional as it violates the doctrine of separation of powers." In my view, that claim is inaccurate. The original bill stated that "the terms shall run concurrently unless the court has ordered or the statute mandates that the terms run consecutively." [Underlining added.] Thus, the original version of the bill did not unconstitutionally encroach upon the sentencing authority of the judicial branch of government. Significantly, the written testimony submitted by the State Office of the Public Defender for the same hearing emphasized: "In order to rectify the situation, our office would have to file a Motion to Correct Sentence and/or a Rule 40, HRPP petition. Either motion was time consuming and depending on the court's schedule, could take several months to complete. Reviewing the court's minutes and ordering transcripts of the sentencing hearing allowed us to prove, in every single instance, that the court intended the sentences to be served concurrently. There was not one single case where a judgment did not specify concurrent or consecutive terms that the



minutes and transcripts proved that the court intended to impose consecutive terms." [Underlining added.]

Next, I will address the important notice requirement. A prior version of the bill, Senate Bill No. 213 (SD1), added an individual notice requirement to H.R.S. § 706-668.5: "For terms of imprisonment imposed prior to June 18, 2008, the department of public safety shall send written notice to the defendant no later than six months prior to the defendant's scheduled date of release. The written notice shall include but not be limited to: (a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the defendant; and (b) Notice of the defendant's right to have the court review the defendant's sentence." [Underlining added.]

However, in the current Senate Bill No. 213 (SD2, HD1), individual notice has been deleted in favor of only posting in housing units and facility libraries a general notice for merely two months: "For defendants serving a term of imprisonment imposed prior to June 18, 2008, the department of public safety shall post, in all inmate housing units and the facility library at each facility for a period of two months, a written notice that shall include but not be limited to: (a) Notice that the department of public safety may recalculate the multiple terms of imprisonment imposed on the defendant; and (b) Notice that defendant may petition the court for clarification or correction of their sentence or sentences when good cause exists."

The Hawaii Innocence Project and I request the Judiciary Committee to require a more effective individual notice that is personally received by defendants.[1] Merely posting a

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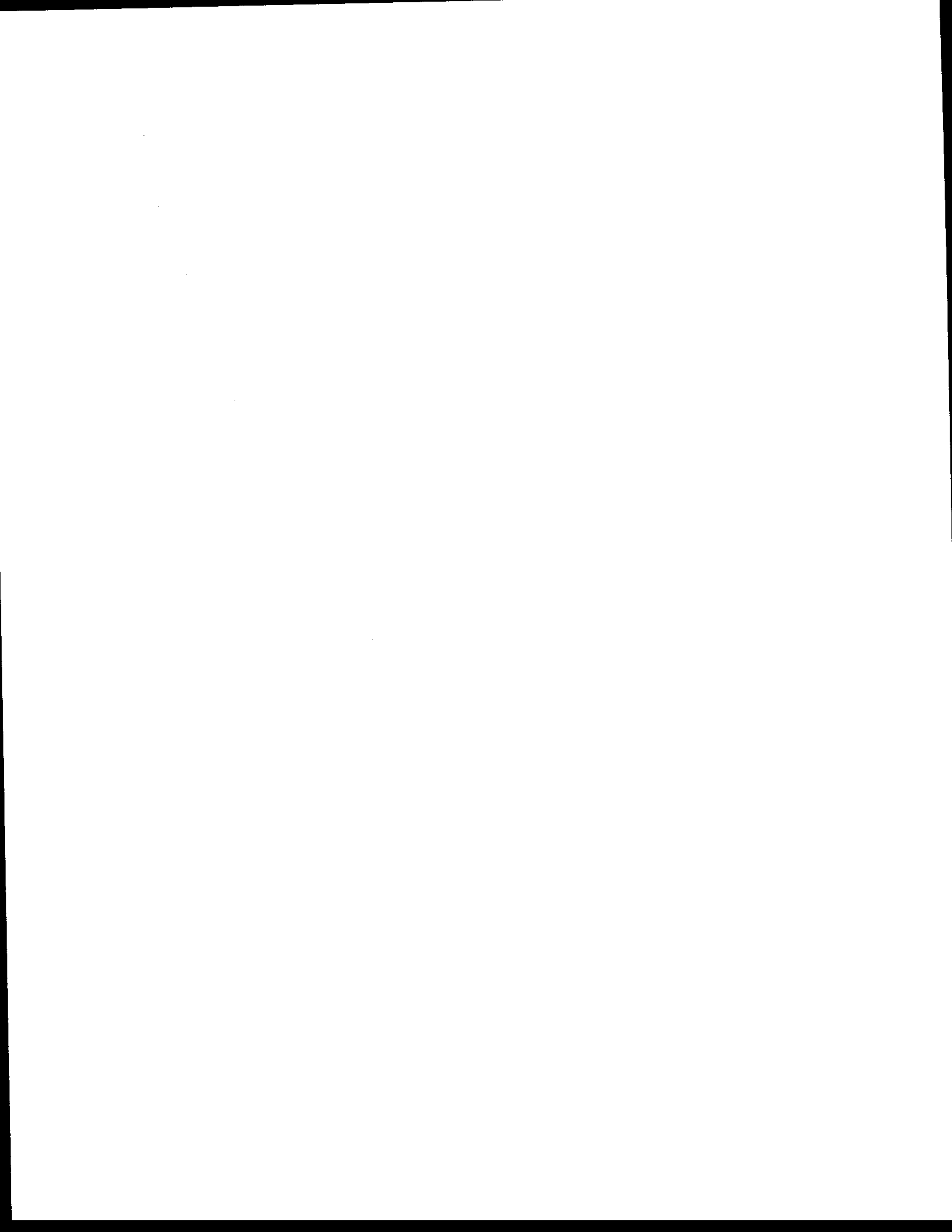
[1] Note that Senate Bill No. 213 (SD2, HD1) requires effective and specific notice of the petitions of inmates, not just the posting of some general notice on a wall: "For defendants petitioning the court for clarification or correction of a recalculated sentence, the petitions shall be served on the department of public safety and the department of the attorney general as parties in interest,



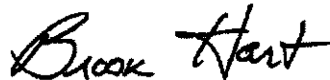
general notice would be especially insufficient for inmates who are functionally illiterate; currently unrepresented by counsel; undereducated; immigrants from non-English speaking countries; mentally deficient; or mentally ill. On August 16, 2009, KHNL News reported that "1 in 6 Hawaii adults are functionally illiterate," meaning that they "cannot read or write even at a basic level." (Presumably, such functional illiteracy is even more prevalent among those persons who are incarcerated.) If a functionally illiterate inmate receives a personal notice, at least he or she will be more likely to ask someone who is literate what is said in the notice.

Furthermore, according to Senate Bill No. 1190 (SD1) (2015), introduced by seven Hawaii senators: "Fifty-four percent of Hawaii's prisoners are incarcerated in private prisons on the mainland, the highest percentage among all other states." If those numerous Hawaii inmates on the mainland are not served with individual notices, it will be particularly difficult to verify that general notices were properly posted in mainland prison facilities. Thus, many of those inmates may not become aware of their right to file a petition for clarification or correction of a sentence.

In view of the foregoing, the Hawaii Innocence Project and I urge the Hawaii House of Representatives' Committee on Judiciary to amend Senate Bill No. 213 (SD2, HD1) as discussed above, and then approve the amended version of that bill.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation



BROOK HART
Hawaii Innocence Project,
William S. Richardson School of Law

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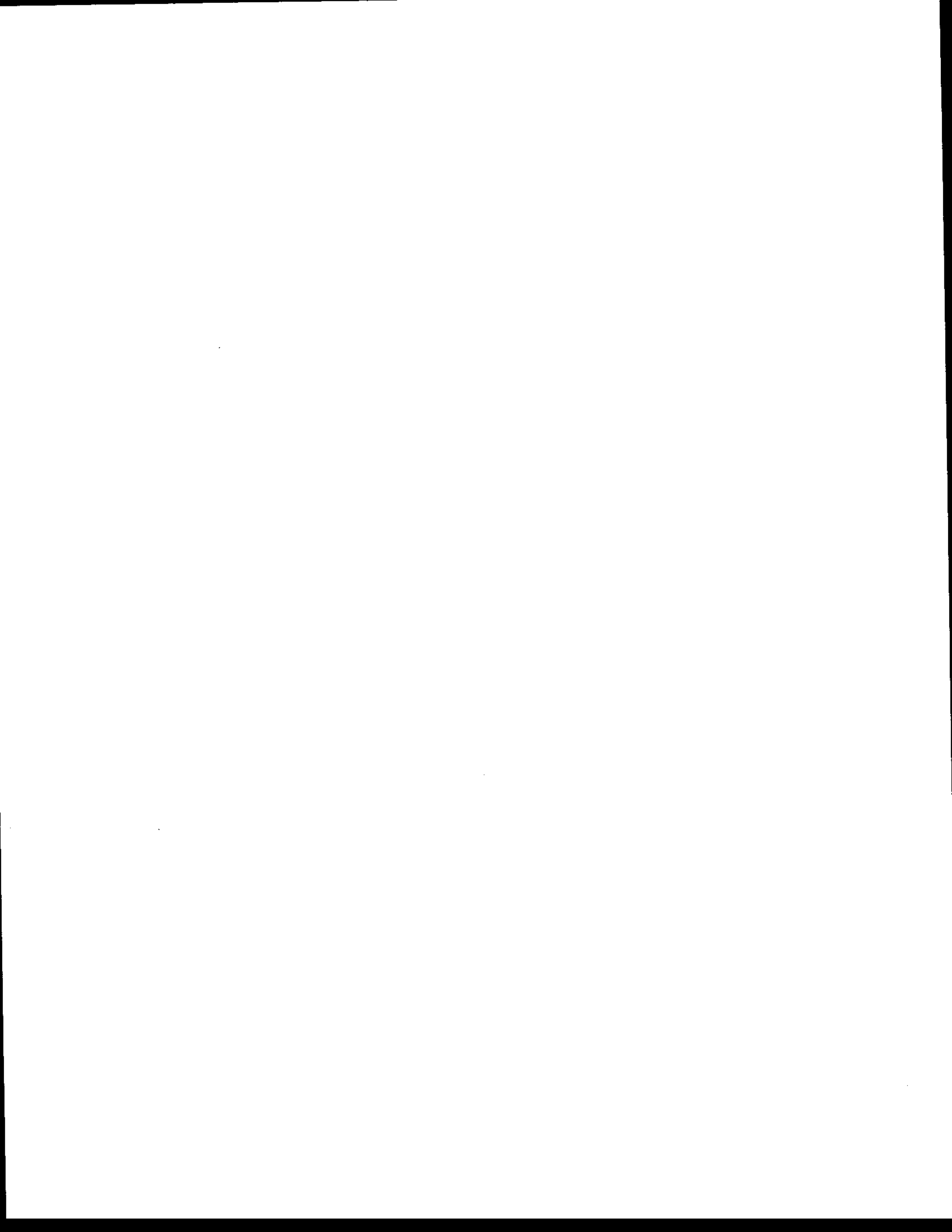
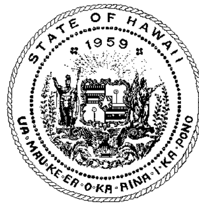
in addition to the appropriate prosecuting attorney."



**DAVID Y. IGE**
GOVERNOR

LATE




STATE OF HAWAII
**DEPARTMENT OF PUBLIC SAFETY**
919 Ala Moana Boulevard, 4th Floor
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**NOLAN P. ESPINDA**
DIRECTOR

**Cathy Ross**
Deputy Director
Administration

Deputy Director
Corrections

**Shawn H. Tsuha**
Deputy Director
Law Enforcement

No. ____________________

TESTIMONY ON SENATE BILL (SB) 213, SENATE DRAFT (SD) 2, HOUSE DRAFT (HD) 1
A BILL RELATING TO THE HAWAII PENAL CODE

Nolan P. Espinda, Director
Department of Public Safety

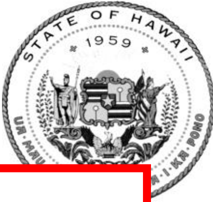
House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, March 24, 2015, 2:00 PM
State Capitol, Conference Room 325

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

The Department of Public Safety (PSD) **supports** SB 213, SD2, HD1, which would provide notice to incarcerated offenders in custody as to their options for appeal, when their sentences are recalculated. The current draft of the bill, HD1, sufficiently addresses the intended purpose of this measure to clarify the petition process for recalculated sentences.

Thank you for this opportunity to testify.



LATE

# Office of the Public Defender
# State of Hawaii

**Timothy Ho, Chief Deputy Public Defender**

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

March 24, 2015, 2:00 p.m.

RE: S.B. 213, HD1: Relating to the Hawaii Penal Code

Chair Rhoads and Members of the Committee:

The original version of this measure would have amended §706-668.5, HRS, by making the applicability of this section retroactive to sentences imposed prior to June 18, 2008.

The Office of the Public Defender supports the intent of S.B. 213, HD1, however, we ask that the original language making the application of this section retroactive be restored, and the amendment that would allow the Department of Public Safety to notify an inmate of a change of the calculation of his sentence by posting it in inmate housing and library units two months prior to the change in sentence be removed from this bill. Two months is insufficient notice to an inmate of a recalculation of his sentence. In many instances it may take longer for an inmate to contact his or her attorney about the recalculated sentence and have a Rule 40 HRPP hearing to correct the judgment to accurately reflect the court's intent to sentence the inmate to concurrent terms of imprisonment.

§706-668.5, HRS governs multiple sentences of imprisonment. Prior to the enactment of Act 193 in 2008, according to §706-668.5, HRS, if a defendant was sentenced to multiple sentences of imprisonment on different dates, the terms were to run consecutively, unless the court specifically ordered the terms to be served concurrently. In other words, if a judge wanted to sentence a defendant to a term concurrently to a term of imprisonment he was already serving, the court would need to state its intention on the record, which would be recorded on the official court judgment. Likewise, if the court did not affirmatively state on the record that it was imposing a concurrent sentence, the sentence would be served consecutively. In practice however, the opposite was occurring. If a judge imposed a concurrent sentence (stated on the record), the judgment would be silent as to whether or not the sentence were to be served concurrently or consecutively. Only if the court imposed a consecutive term was it reflected in the judgment. We believe this practice occurred because of the confusing and inconsistent wording of the statute. When defendants were being sentenced to multiple terms of imprisonment imposed on the same date, the sentences were presumed to be concurrent terms. When defendants were being sentenced to multiple terms of imprisonment imposed on different dates, the sentences were presumed to be consecutive terms.

This practice was also adopted by the Department of Public Safety, who would consider only those with judgments specifying consecutive terms to be serving consecutive sentences. If a judgment or judgments did not specify whether the sentence was to be served consecutively or concurrently, the inmate was presumed to be serving a concurrent sentence.

The Department of Public Safety changed their policy of determining multiple terms of imprisonment by interpreting the language in §706-668.5, HRS by treating inmates with judgments that did not specify concurrent or consecutive sentences to be serving consecutive sentences. Because concurrent terms were not being included in inmates' judgments, the end result was that all inmates serving multiple terms of imprisonment imposed at different times were deemed to be serving consecutive sentences. All of a sudden, inmates who were to be paroled in the near future were given recalculated sentences, which added five, ten and even twenty years or more to their minimum terms. Some of these inmates had been previously paroled by the Hawaii Paroling Authority, who had calculated their terms to be served concurrently. Many inmates were held beyond their original release date.

In order to rectify the situation, our office would have to file a Motion to Correct Sentence and/or a Rule 40, HRPP petition. Either motion was time consuming and depending on the court's schedule, could take several months to complete. Reviewing the court's minutes and ordering transcripts of the sentencing hearing allowed us to prove, in every single instance, that the court intended the sentences to be served concurrently. There was not one single case where a judgment did not specify concurrent or consecutive terms that the minutes and transcripts proved that the court intended to impose consecutive terms. The Department of Public safety testified in 2008 that if applied retroactively, they would have to review the sentences of all inmates, which would be time consuming, expensive, and open the department to litigation. They may argue that the proper procedure is for inmates to have a review of their sentence by filing a Rule 40, HRS petition, or ask the Office of the Public Defender to file a motion on their behalf.

Wrongful imprisonment is wrongful imprisonment. The longer it takes to discover an illegal sentence, the higher the price tag for wrongful incarceration. Almost seven years has passed since the enactment of Act 193. The Department of Public Safety would only have to review cases prior to June 18, 2008. Our office has only helped those inmates that contacted us for advice. There are other inmates who may be intellectually and/or mentally disabled, or simply too institutionalized to question the recalculation of their sentences.

Thank you for the opportunity to comment on this bill.