

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

S.B. NO. 213, RELATING TO THE HAWAII PENAL CODE.

BEFORE THE:

COMMITTEES ON JUDICIARY AND LABOR AND ON PUBLIC SAFETY,
INTERGOVERNMENTAL AND MILITARY AFFAIRS

DATE: Thursday, February 12, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Richard W. Stacey, Deputy Attorney General

Chair Keith-Agaran, Chair Espero and Members of the Committees:

The Department of the Attorney General strongly opposes this bill in its present form.

From 1986 through 2008, section 706-668.5, Hawaii Revised Statutes (HRS), provided “[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.” (Emphasis added). During that time period, judges in Hawaii imposed thousands of prison sentences. On June 18, 2008, the law was amended by Act 193, Session Laws of Hawaii 2008, to read “[m]ultiple terms of imprisonment run concurrently unless the court orders or the statute mandates that the terms run consecutively.” (Emphasis added). This bill, which would effectively make Act 193 apply retroactively, is unconstitutional as it violates the doctrine of separation of powers. This bill automatically, and therefore unconstitutionally, would change criminal sentences imposed by judges from 1986 through 2008 on inmates sentenced to multiple terms of imprisonment, to run concurrently instead of consecutively, unless the order specified that sentences were to be served consecutively or the law required consecutive sentencing. This blanket alteration of sentences without any hearing by the court infringes upon the judicial function.

For purposes of constitutional separation of powers, sentencing is a judicial function. Although the power to fix the limits of punishment for criminal acts lies with the legislature, the imposition of a sentence in a particular case within those limits is a judicial function.

16A Am. Jur. 2d *Constitutional Law* § 262 (Westlaw version 2015)(citations omitted).

In addition to the serious constitutional concerns presented by this bill, this drastic reversal of prior law would potentially open the State to a flood of claims from numerous inmates who are currently detained legally, but whose continued incarceration would suddenly become illegal under this bill. The number of cases this law will affect is unclear, but it would, without more, require the Department of Public Safety to immediately review numerous cases in an attempt to comply with the new law.

It is the recommendation of the Department of the Attorney General that this bill be held.



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 Senate Committee on Judiciary and Labor

February 12, 2015, 9:00 a.m.

RE: S.B. 209: Relating to the Hawaii Penal Code

Chair Keith-Agaran and Members of the Committee:

This measure would amend §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 S.B. 213.

§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.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY IN OPPOSITION TO
SB213 – RELATING TO THE PENAL CODE**

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

Senate Committee on Public Safety, Intergovernmental and Military Affairs
February 12, 2015, 9:00 a.m., Conference Room 016

Chair Espero, Vice Chair Baker, and Members of the Committee:

The County of Kaua'i, Office of the Prosecuting Attorney, submits this testimony in OPPOSITION to SB213 – Relating to the Penal Code. This Bill requires multiple terms of imprisonment imposed on a defendant who is already subject to an unexpired term of imprisonment imposed prior to 6/18/08 to run concurrently unless the terms are mandated by the court or statute to run consecutively.

In 2008, the Department of Public Safety fixed a problem that was allowing inmates to improperly receive credit on consecutive sentences. In 2008, the law was changed so that the default was concurrent sentences if sentenced at multiple times, unless the court specified otherwise - prior to that, the default was consecutive. Essentially, this Bill supposes that the attorneys and judges involved in these cases did not know the law at the time. We respectfully suggest that due deference be given to the sound discretion of the attorneys and judges who handled these cases at the time.

Accordingly, we OPPOSE SB213. We ask that your Committee HOLD the Bill.

Thank you very much for the opportunity to provide testimony on this Bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawai`i

February 12, 2015

RE: S.B. 213; RELATING TO THE HAWAII PENAL CODE.

Chair Keith-Agaran, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to Senate Bill 213.

The purpose of Senate Bill 213 is to automatically convert all consecutive prison sentences imposed prior to June 18, 2008, to run concurrently instead of consecutively. Because this bill appears to alter prison sentences previously handed down by the courts--and impose the opposite of the courts' original judgment and intent--the Department believes that it would be highly inappropriate to pass this bill.

For over 20 years, Section 706-668.5, Hawaii Revised Statutes, mandated that multiple terms of imprisonment imposed at the same time run concurrently, and multiple terms of imprisonment imposed at different times run consecutively, unless specified by court order. In other words, if a defendant was already subject to a previously-imposed prison sentence, and a court wanted to impose a concurrent prison sentence, that had to be specified in the court order. However, if the court wanted to impose a consecutive prison sentence on top of the previously-imposed sentence, no special language was needed.

Based on these statutory requirements—which were long in effect and known to the courts and all parties prior to enactment of Act 193 (2008)—it should be presumed that any prison sentence imposed on a defendant with previously-imposed prison sentences was intended to be served consecutively, if the court order remained silent on the matter of concurrent or consecutive terms.

After Act 193 took effect on June 18, 2008, courts were essentially required to craft their orders in the completely opposite fashion, for these types of situations. Now, if a court wants to

impose a subsequent prison sentence to run concurrent, no special language is needed; but if a court wants to impose a subsequent prison sentence to run consecutive, this must be specified in the court order.

Given this drastic change in the law, and the possibility that the law could change again in the future, it is our understanding that some judges now make it a practice to specify "concurrent" or "consecutive" for all defendants with previously-imposed prison sentences, to avoid any possible confusion. Nevertheless, those sentences handed down prior to Act 193 had no reason to contemplate such changes, and likely made no specification when a consecutive prison sentence was intended.

In light of the foregoing, the Department believes that imposing Act 193 to all prison sentences handed down prior to June 18, 2008 would essentially usurp the courts' authority, by legislatively reversing that which was most likely intended by court orders issued prior to June 18, 2008. If prison inmates now serving consecutive sentences wish to have their sentences reviewed, for potential conversion to concurrent sentences, there are already means for them to do so.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of S.B. 213. Thank you for the opportunity to testify on this matter.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: lanibreinerlaw.net
Subject: Submitted testimony for SB213 on Feb 12, 2015 09:00AM
Date: Tuesday, February 10, 2015 9:03:50 AM

SB213

Submitted on: 2/10/2015

Testimony for JDL/PSM on Feb 12, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Myles S. Breiner	Hawaii Association of Criminal Defense Lawyers	Support	Yes

Comments: Aloha, I am writing as President of the Hawaii Association of Criminal Defense Lawyers (HACDL) and in support of SB 213. Consecutive sentencing without prior notice is cruel and unusual punishment and tantamount to taxation without representation. Concurrent sentencing has been the long term policy and practice of all courts nationwide and that consecutive sentencing is only in extraordinary circumstances. Thank you for the opportunity to submit testimony in support of SB 213. Mahalo, Myles S. Breiner President Hawaii Association of Criminal Defense Lawyers (HACDL)

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

Law Offices of
BROOK HART
A LAW CORPORATION
333 Queen Street, Suite 610
Honolulu, Hawaii 96813

TEL: (808) 526-0811

brookhartlaw@gmail.com

FAX: (808) 531-2677

HAND DELIVERED TO ROOMS 206 AND 221 OF THE STATE CAPITOL

February 10, 2015

Senator Gilbert S.C. Keith-Agaran
Chairman, Committee on Judiciary & Labor
Senator Will Espero
Chairman, Committee on Public Safety,
Intergovernmental & Military Affairs
Hawaii Senate
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Senate Bill No. 213, "Penal Code;
Multiple Sentences of Imprisonment"

Dear Chairman Keith-Agaran,
Chairman Espero, 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 Senate Bill No. 213. That bill was introduced by Chairman Keith-Agaran, Chairman Espero, and Senators Maile Shimabukuro (Vice Chair of the Senate Judiciary Committee), J. Kalani English (Senate Majority Leader), Les Ihara, Jr. (Senate Majority Policy Leader), and Russell Ruderman. The bill is scheduled to receive a joint hearing by both the Senate Public Safety Committee and the Senate Judiciary Committee in conference room 016 at 9:00 a.m. on Thursday, February 12, 2015.

Senator Gilbert S.C. Keith-Agaran
Chairman, Judiciary Committee
Senator Will Espero
Chairman, Public Safety Committee
February 10, 2015
Page 2

Senate Bill No. 213 concerns a sentencing statute, H.R.S. § 706-668.5(1), that addresses the matter of "Multiple sentences of imprisonment." As the legislative description of Senate Bill No. 213 explains, the bill "[r]equires 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," and "[a]uthorizes multiple terms of imprisonment imposed on or after the effective date of this Act to run concurrently unless the terms are mandated by the court or statute to run consecutively."

Prior to its amendment by the Hawaii Legislature in 2008, H.R.S. § 706-668.5(1) stated:

If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.

After its amendment by Act 193 of 2008, H.R.S. § 706-668.5(1) now states:

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, the terms may run concurrently or consecutively. Multiple terms of imprisonment run concurrently unless the court orders or the statute mandates that the terms run consecutively.

Senator Gilbert S.C. Keith-Agaran
Chairman, Judiciary Committee
Senator Will Espero
Chairman, Public Safety Committee
February 10, 2015
Page 3

The amendment of H.R.S. § 706-668.5(1) by Act 193 in 2008 was supported by cogent and compelling testimony from the State Office of the Public Defender and the Community Alliance on Prisons. The Commentary on H.R.S. § 706-668.5 explains:

Act 193, Session Laws 2008, amended this section to promote consistency in sentencing law by requiring that multiple terms of imprisonment, whether imposed at the same time or at different times, run concurrently unless the court orders or the statute mandates that the terms run consecutively. Testimony indicated that there had been some misunderstanding and misinterpretation of the sentencing law involving multiple terms of imprisonment. Act 193 clarified the law. Conference Committee Report No. 81-08, House Standing Committee Report No. 688-08, Senate Standing Committee Report No. 3337.

[Underlining added.]

Senate Bill No. 213 would now further improve H.R.S. § 706-668.5(1) to read:

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. Multiple terms of imprisonment imposed on or after the effective date of this Act may run concurrently unless the court orders or the statute mandates that the terms run consecutively.

Senate Bill No. 213 would effectively address the problem caused by the language of Sections 3 and 4 of Act 193 in 2008:

Senator Gilbert S.C. Keith-Agaran
Chairman, Judiciary Committee
Senator Will Espero
Chairman, Public Safety Committee
February 10, 2015
Page 4

SECTION 3. This Act shall apply to all terms of imprisonment imposed on or after the effective date of this Act.

SECTION 4. This Act shall take effect upon its approval.

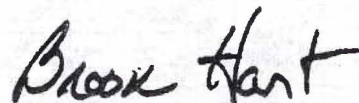
Act 193 was approved and signed into law by Governor Linda Lingle on June 18, 2008, so pursuant to Sections 3 and 4, it applies only to terms of imprisonment imposed on or after June 18, 2008. That is why Senate Bill No. 213 includes the explicit language: "if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment that was imposed prior to June 18, 2008" [Underlining added.]

Consecutive terms of imprisonment are unusually harsh and should not be inflicted upon defendants unless, as Senate Bill No. 213 makes clear, "the court has ordered or the statute mandates that the terms run consecutively." [Underlining added.] Plus, Senate Bill No. 213 further "promote[s] consistency in sentencing law" (see Commentary on H.R.S. § 706-668.5, supra).

In view of the foregoing, I and the Hawaii Innocence Project urge the Hawaii Senate's Public Safety Committee and Judiciary Committee to approve Senate Bill No. 213.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation



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

COMMUNITY ALLIANCE ON PRISONS

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

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



COMMITTEE ON JUDICIARY AND LABOR

Sen. Gilbert Keith-Agaran, Chair

Sen. Maile Shimabukuro, Vice Chair

COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL & MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Roz Baker, Vice Chair

Tuesday, February 12, 2015

9:00 a.m.

Room 016

SUPPORT for SB 213 - SENTENCING

Aloha Chairs Keith-Agaran and Espero and Members of the Committees!

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. Authorizes multiple terms of imprisonment imposed on or after the effective date of this Act to run concurrently unless the terms are mandated by the court or statute to run consecutively.

Community Alliance on Prisons is in support of this measure.

This bill codifies what has been the practice in Hawai'i. In 2008, a similar bill was passed, however it was amended to make it only prospective. In other words, those sentenced for multiple offenses *after* June 18, 2008 serve those multiple sentences concurrently **unless the court specifies that the terms are to be served consecutively.**

This bill applies to those sentenced *before* June 18, 2008. Please pass this measure. Mahalo for this opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: *Submitted testimony for SB213 on Feb 12, 2015 09:00AM*
Date: Tuesday, February 10, 2015 9:15:27 AM

SB213

Submitted on: 2/10/2015

Testimony for JDL/PSM on Feb 12, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kenny Wusstig	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov