TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

ON THE FOLLOWING MEASURE:
S.B. NO. 2793, RELATING TO DRUG OFFENSES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, February 7, 2020 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Michelle M.L. Puu, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Attorney General respectfully opposes this bill on policy grounds as the Chief Law Enforcement Officer of the State of Hawai'i.

This bill proposes reduction of the current conduct under Promoting a Dangerous Drug in the Third Degree ("PDD3") from a class C felony to a misdemeanor, Promoting a Dangerous Drug in the Fourth Degree ("PDD4"). Currently, possession of any amount of any Dangerous Drug, which is any Schedule I or II substance, constitutes a class C felony. This bill changes the requirement to establish a felony offense by making the threshold 1/16 of an ounce or more and by limiting applicability to only four of more than 200 Dangerous Drugs. Most significantly, this bill is intended to apply retroactively, effectively converting preexisting felony convictions into misdemeanor convictions.

Drugs are scheduled based on their degree of danger or probable danger to the public. See section 329-11 of the Hawaii Revised Statutes. For example, ingestion of even miniscule amounts of Carfentanil (equivalent in size to a grain of salt), is known to be lethal. Despite these dangers, under this bill, possession of dangerous drugs like Fentanyl, Carfentanil, Amphetamine, Pentobarbital, Opium, Mescaline, Peyote, and a whole host of other drugs would only constitute a misdemeanor.

Hawai'i law already affords defendants various opportunities to avoid prison sentences for a PDD3 offense. Deferrals, Conditional Discharges, and First Time Drug Offender sentencing provisions may allow defendants to avoid criminal convictions on

their record. Following that, Defendants are regularly given multiple opportunities to participate in probation before prison is even a consideration. Defendants serving a prison term solely for a PDD3 offense have likely either been sentenced as a repeat offender or have already failed on probation.

Moreover, it is unclear whether the wording on page 5, lines 12-17, regarding retroactivity intends to amend all prior convictions and pending cases of PDD3 from a class C felony into a misdemeanor. Individuals have been sentenced as repeat offenders and pursuant to extended term sentencing provisions, in part, based on prior PDD3 felony convictions. Also, it is unclear how one would establish that the amount involved in these prior cases fell below the 1/16 of an ounce threshold. Should this bill pass, at a minimum, this wording should not have retroactive applicability on prior convictions.

We respectfully ask the Committee to hold this bill. Thank you for the opportunity to testify.

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

LATE

SB2793
RELATING TO DRUG OFFENSES
Senate Committee on Judiciary

February 7, 2020 10:00 a.m. Room 016

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB2793, which would create a new, misdemeanor offense for the possession of certain drugs in the lowest quantities, and provide retroactive relief to those convicted of crimes that would qualify for this lower misdemeanor classification. **By reducing the criminal justice resources – including those relating to lengthy prison sentences – that would otherwise be needed to punish low-level, non-violent drug offenses, this measure could save the state substantial taxpayer dollars, and mitigate the disproportionate impacts of the criminal justice system on Native Hawaiians.** This measure represents the hard work of a broad coalition of criminal justice experts and practitioners, including a retired Associate Justice of the Hawai'i Supreme Court, Hawai'i criminal court judges, criminal law professors, criminal law attorneys, and community advocates committed to reforming our criminal justice system with smarter sentencing policies.

The War on Drugs and decades of a traditional, Western criminal justice approach have led to the highest prison population in Hawai'i's history. Alarmingly, between 1977 and 2016, the number of people incarcerated in Hawai'i has increased by 670%.[1] The Native Hawaiian community has been particularly impacted by this increase, making up nearly 37% of our prison population today.[2] Drug criminalization policies may have contributed significantly to this latter impact: in its 2010 report on the disparate treatment of Native Hawaiians in the criminal justice system, OHA identified drug-related offenses as a critical source of Native Hawaiians' uniquely and acutely disproportionate conviction rates and lengths of imprisonment.[3]

In light of the disproportionate impacts of the criminal justice system on the Native Hawaiian community, OHA has long advocated for reform approaches that examine and implement incarceration alternatives that can improve public safety, effectively rehabilitate pa'ahao, reduce recidivism, and save taxpayer dollars. OHA accordingly strongly believes that the proposed reduction of criminal liability for the mere possession of very small amounts of certain "dangerous drugs," from a felony punishable by a year or longer in prison, to a misdemeanor that could be dispensed with diversion, probation, or a jail sentence of less than one year, is a step in the right direction. **This measure will reduce prison overcrowding, save**

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[1] BUREAU OF JUSTICE STATISTICS, COUNT OF TOTAL JURISDICTION POPULATION (2018), *generated using the Corrections Statistical Analysis Tool (CSAT) – Prisoners* at www.bjs.gov.
[2] Department of Public Safety, System Wide End of Month Data, July 2018. In contrast, Native Hawaiians only represent 18% of adults in Hawai'i. U.S. CENSUS BUREAU. 2017. "COMMUNITY FACTS", AMERICAN FACT FINDER, *accessed* Dec. 21, 2018 at https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.
[3] THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 45 (2010), *available at* http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf.

state resources, and mitigate the life-long harms that otherwise result from these non-violent and relatively harmless acts, including the harms particularly felt by Native Hawaiians, their families, and communities.

Therefore, OHA urges the Committee to **PASS** SB2793. Mahalo nui for the opportunity to testify on this measure.

The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Joy A. San Buenaventura, Vice Chair

Friday, February 7, 2020, 10:00 a.m.
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by
Judge Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge
Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 2793, Relating to Drug Offenses.

Purpose: Establishes a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts. Limits the class C felony offense of promoting a dangerous drug in the third degree to include possession of certain dangerous drugs in an amount or weight equal to one-sixteenth of one ounce or more. Retroactive to 6/1/1972.

Judiciary's Position:

The Judiciary appreciates the intent of this proposed bill, however respectfully notes the widespread potential ramifications of its retroactivity to June 1, 1972. At the outset, it should be noted that in recent years, approximately one-fourth of felony cases involve the charge of Promoting a Dangerous Drug in the Third Degree ("PDD 3"). Indeed, if retroactive to 1972, this bill may impact and re-open well over 20,000 felony cases. Thus, the implementation of the retroactivity clause is problematic.

1. The proposed bill does not set forth a procedure for the factual determination of whether a defendant possessed less than one-sixteenth ounce of a dangerous drug.

Further, the bill only applies to methamphetamine, heroin, morphine and cocaine and not to other controlled substances currently defined as "dangerous drugs." Requiring such factual determinations and consideration of evidence in thousands of closed cases dating back to June 1, 1972 is not feasible. It is unknown whether evidence in affected closed cases still exists to be tested. If the evidence exists to be tested, it is unknown whether the HPD laboratory has the capacity to re-test the evidence. Significant positions and resources are necessary to accommodate the re-litigation of 40 years of closed cases.

2. The proposed bill does not set forth a court procedure for the initiation of a judgment to be amended from a felony PDD 3 to a misdemeanor Promoting a Dangerous Drug in the Fourth Degree ("PDD 4"). If a defense motion is anticipated, implementation will require appropriate and significant resources for counsel, courts, prosecution and criminal data centers.

3. Legal challenges to pending Promoting a Dangerous Drug in the Third Degree cases are anticipated.

    a. For pretrial cases, most of the instant charges are brought via felony information pursuant to Hawaii Revised Statutes ("HRS") §806-83. However, misdemeanor offenses may not be initiated under this provision. Defective case initiation challenges may be anticipated in the majority of these cases.

    b. For post no contest/guilty plea and pre-sentencing cases, a large number of motions to withdraw plea are anticipated pursuant to Hawaii Rules of Penal Procedure ("HRPP") 32(d).

    c. For defendants serving indeterminate terms on PDD3 charges, many who have credit for at least one year of imprisonment will require immediate release.

    d. For defendants participating in and benefiting from treatment courts (Drug Court, Mental Health Court, Veteran's Court) for over a year, jurisdiction may end, eligibility and treatment support terminated.

4. Court and parties will be inundated with legal challenges to Promoting Dangerous Drug in the Third Degree convictions based on HRPP Rule 40. PDD 3 charges may be the most common offense prosecuted. Any defendant convicted of a felony PDD 3 since June 1, 1972 may request to overturn the conviction.

5. Convictions for enhanced sentencing as a persistent offender under HRS §§706-661 and 662, repeat offenders under HRS §706-605.5, or convicted of a Felon in Possession charge under HRS §134-7, wherein the predicate charge was a PDD 3 offense, may initiate legal challenges requesting that their convictions be overturned.

Given the overwhelming number of court filings, contested hearings, re-sentencing hearings and post-conviction hearings retroactivity since 1972 would initiate, the bill will require significant additional positions and resources at the law enforcement agencies, prosecuting attorneys' offices, public defender's office, courts, criminal justice data centers.

Thank you for the opportunity to testify on this measure.

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy

Rebecca Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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THE HONORABLE KARL RHOADS, CHAIR
THE HONORABLE JARRET KEOHOKALOLE, VICE CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

February 7, 2020

RE: S.B. 2793; RELATING TO DRUG OFFENSES.

Chair Rhoads, Vice Chair Keohokalole, and members of the Senate Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua'i submits the following testimony in support of S.B. 2793.

The purpose of S.B. 2187 is to establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts; and to limit the class C felony offense of promoting a dangerous drug in the third degree to include possession of certain dangerous drugs in an amount or weight equal to one-sixteenth of one ounce or more.

Creating a misdemeanor level offense will give Prosecutors, Defense, and Judges another tool to use in resolving certain drug cases where the public safety is not adversely impacted. The criminal justice community is increasingly becoming aware that substance use disorder is a public and personal health problem that leads to negative consequences for the community and that emphasizing treatment rather than punishment is appropriate in many, if not most, cases. Further, felony convictions can provide obstacles to the recovery of a person fighting addiction in the form of barriers to housing and employment; those barriers are adverse and unjust in many cases and run counter to the rehabilitative goals of the criminal justice system.

For these reasons, the Office of the Prosecuting Attorney supports the passage of S.B. 2793. Thank you for this opportunity to testify.

Harry Kim
Mayor

Paul K. Ferreira
Police Chief

Kenneth Bugado Jr.
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT
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February 4, 2020

Senator Karl Rhoads
Chairperson and Committee Members
Committee On Judiciary
415 South Beretania Street, Room 016
Honolulu, Hawai`i 96813

RE: SENATE BILL 2793 RELATING TO DRUG OFFENSES

Dear Senator Rhoads:

The Hawai`i Police Department strongly opposes Senate Bill 2793, with its stated purpose to establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts.

I am of the belief that the Bill as proposed fails to take into account the overwhelming negative effect that the drugs classified as "Dangerous" have had on our society here in Hawai`i. First of all, many of the homeless persons that my officers encounter are either under the influence of dangerous drugs, have dangerous drugs in their possession or are homeless due to their addiction to dangerous drugs.

The four drugs cited (Methamphetamine, Cocaine, Morphine and Heroin) aside from being highly addictive, affect a person's mental stability and cognitive thinking skills. Additionally, the use of these drugs is often directly responsible for thefts, robberies, and assaults on members of our community.

Lastly, it is often the Police and Emergency Medical responders that have to deal with persons while under the influence of these drugs. Many of those encounters are often highly volatile, and the very thought of lessening the penalties for use of these drugs are not in accordance with the basic tenets of an orderly society.

It is for these reasons, we urge this committee to oppose this legislation.

Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 2793.

Sincerely,

Kenneth Bugado, Jr.
KENNETH BUGADO JR.
DEPUTY POLICE CHIEF

MICHAEL P. VICTORINO
Mayor

DON S. GUZMAN
Prosecuting Attorney

ROBERT D. RIVERA
First Deputy Prosecuting Attorney

ANDREW H. MARTIN
Second Deputy Prosecuting Attorney

LATE

DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
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TESTIMONY
ON
S.B. 2793 - RELATING TO
DRUG OFFENSES

February 7, 2020

The Honorable Karl Rhoads
Chair
The Honorable Jarrett Keohokalole
Vice Chair
and Members of the Committee on Judiciary

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 2793, Relating to Drug Offenses. Specifically, we would like to express our strong opposition to S.B. 2793 in its current form, which appears to: 1) create a misdemeanor-level offense for possession of less than 1/16th of an ounce of a dangerous drug ("PDD4"), 2) amend the existing H.R.S. 712-1243 Promoting a Dangerous Drug in the Third Degree ("PDD3") offense to limit its applicability solely to possession of methamphetamine, heroin, morphine, or cocaine in an aggregate weight of more than 1/16th of an ounce, and 3) apply all changes retroactively to June 1, 1972.

In our Department's view, the proposed amendments do not properly reflect the degree of danger these substances pose to the community. Per HRS 329-11, drugs are placed on the drug schedules according to the degree of danger or probable danger, including their ability to create severe psychological or physical dependence. There are more than 200 drugs currently matching the definition of a dangerous drug. Carfentanil, for example, is a Schedule II synthetic opioid that is mixed with heroin, a Schedule I substance, to increase the heroin's potency. Carfentanil is also lethal if an amount equivalent to a grain of salt is ingested, let alone more than 1/16th of an ounce.

The proposed amendments to PDD3 would result in both heroin and carfentanil possession constituting a misdemeanor offense for amounts that are well over standard street amounts (the average street amount for heroin is approximately .01 grams vs. the proposed threshold amount of approximately 4 grams), despite the increased danger of carfentanil. They

would also completely remove possession of relatively large amounts of these substances (2 grams, equivalent to .07 ounces, of carfentanil would be a very dangerous amount for everyone encountering it) from being considered a felony offense.

The proposed amendments also do not take into account drug compounds, such as the aforementioned heroin/carfentanil preparation. A heroin/carfentanil compound may weigh substantially less than 1/16 of an ounce (again, approximately 4 grams) while being more dangerous than either drug standing alone, yet would only qualify for a misdemeanor offense at best. Moreover, standard street amounts of these drugs are well under the 1/16 ounce threshold (e.g., 0.2 grams for methamphetamine, the aforementioned 0.1 grams for heroin, 0.3 grams for LSD, etc.) while maintaining the same level of danger. Finally, the proposed amendments don't appear to take into account that the form of the preparation may affect its weight-to-potency ratio, e.g. pill, paste, liquid, patch or powder formulations may have a greater or lesser effect than their actual weight would suggest.

Current Hawaii law allows nonviolent drug offenders a variety of opportunities to avoid prison sentences, prevent convictions from appearing on their record, and obtain treatment. Conditional discharge, deferred plea acceptance, First Time Drug Offender, and standard probation sentencing provisions allow a defendant the opportunity to avoid incarceration and or even having a conviction remain on their record. Moreover, the Legislature has made it clear over time that the focus of nonviolent drug sentences should be on treatment and rehabilitation, not prison, so the vast majority of our first-time nonviolent drug offenders do not receive a significant term of incarceration aside from credit for time served, if they receive a prison term at all. An offender receiving a prison term for a PDD3 offense will often have been sentenced as a repeat offender, have been unable to successfully complete probation, or have a record of prior offenses that very clearly warrants a prison term.

The creation of the misdemeanor PDD4 offense does not take into account the addiction qualities of Schedule I and II drugs. The current sentencing scheme for PDD3 offenses contemplates a probation term that allows monitoring a defendant for four years, which is an effective monitoring period to ensure that a defendant can receive adequate treatment and monitoring for what are often highly addictive substances. A one-year monitoring period for the misdemeanor PDD4 offense is not nearly long enough to ensure that a defendant has the proper supervision, support and treatment to avoid future drug offenses.

Even if there were no issues with the proposed amendments themselves, retroactive application poses two problems. First, it would potentially require the State to devote resources to reviewing <u>every</u> PDD3 case since 1972 to determine whether 1) the conviction falls within the amendment, and 2) whether any action needs to be taken. Second, it would result in unknown amounts of convicted PDD3 offenders being released from custody, without regard to whether their criminal history or the circumstances of their particular case warranted a felony prison term for the PDD3 charge.

Finally, our Department would like to note that, as a policy matter, a reduction in the severity of the penalty for an offense sends the message that the offense is "not that bad", even if the offense is still considered a criminal violation, and reduces its deterrent effect. Reducing the penalty for murder to the misdemeanor penalty of a maximum of one year in jail, for example, sends the message that killing someone is a crime on the same level as stealing a low-end iPad.

These proposed amendments would send the message that possession of relatively large amounts of dangerous drugs is a crime on par with stealing a low-end iPad.

For these reasons, the Department of the Prosecuting Attorney, County of Maui opposes the passage of S.B. 2793. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

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

POLICE DEPARTMENT
COUNTY OF MAUI

MICHAEL P. VICTORINO
MAYOR

OUR REFERENCE

YOUR REFERENCE

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TIVOLI S. FAAUMU
CHIEF OF POLICE

DEAN M. RICKARD
DEPUTY CHIEF OF POLICE

February 5, 2020

The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
and Members of the Committee on Judiciary

The Senate
Hawaii State Capitol
Honolulu, Hawaii 96813

RE: Senate Bill No. 2793 – Relating To Drug Offenses

Dear Chair Rhoads and Members of the Committee:

The Maui Police Department strongly OPPOSES Senate Bill No. 2793, which will establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree and which will limit the current class C felony offense of Promoting a Dangerous Drug in the Third Degree to include possession of one sixteenth (1/16) of one ounce or more.

One of the Maui Police Department's main goals is to disrupt or dismantle drug trafficking organizations in Maui County. The importation and sale of dangerous drugs (Hawaii Revised Statutes) have been an ongoing problem. These drugs, namely Cocaine, Heroin and Methamphetamine (but not limited to) have no medical use, are Schedule I substances and highly addictive. The people who support these drug trafficking organizations are the users of these drugs. Often times they are caught with small amounts of the drug in their possession. They are feeding the illicit drug trade.

By introducing the offense of Promoting a Dangerous Drug in the Fourth Degree, we are sending the message that it is all right to have these Schedule I drugs in their possession if it is a small amount. This will encourage more drug sales and an increased consumption of dangerous drugs.

You claim that convictions of the offense of Promoting a Dangerous Drug in the Third Degree burdens the penal system. While it may initially do so, most if not all people convicted of Promoting a Dangerous Drug in the Third Degree serve less than one year of incarceration! We have encountered numerous drug users who have

multiple felony drug convictions who have related they did not serve anywhere near the sentencing guidelines for the drug crime committed.

We cannot allow possession of a dangerous drug to be a misdemeanor. We are sending the wrong message to the people of Hawaii. We want the public to understand that possession of these highly addictive and dangerous substances will have consequences, including a felony record, if they are convicted. We oppose changing the offense of Promoting a Dangerous Drug in the Third Degree to include possession of one sixteenth (1/16) or more of a dangerous drug.

The Maui Police Department asks that you strongly OPPOSE the passage of S.B. No. 2793.

Thank you for the opportunity to testify.

Sincerely,

Victor K. Raymes

For TIVOLI S. FAAUMU
Chief of Police

LATE

SB-2793
Submitted on: 2/7/2020 3:24:34 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Testifying for Maui Police Department	Oppose	No

Comments:

STATE OF HAWAI'I

OFFICE OF THE PUBLIC DEFENDER

LATE

Testimony of the Office of the Public Defender,
State of Hawai'i to the Senate Committee on Judiciary

February 7, 2020

S.B. No. 2793: RELATING TO DRUG OFFENSES

Chair Rhoads, Vice Chair Keohaokalole, and Members of the Committee:

The Office of the Public Defender supports S.B. No. 2793, which would amend HRS Sect. 712-1243 to add the following language to what constitutes the class C felony offense of Promoting[1] a Dangerous Drug in the Third Degree:

> (1) A person commits the offense … if the person knowingly possesses one of more preparations, compounds, mixtures, or substances of an aggregate weight of **one-sixteenth or an ounce or more, containing methamphetamine, heroin, morphine, or cocaine** or any of their respective salts, isomers, and salts of isomers.

(Page 5, lines 3 to 9). (Emphasis added).

S.B. 2793 would also create the new misdemeanor offense of Promoting a Dangerous Drug in the Fourth Degree, as follows:

> (1) A person commits the offense … if the person knowingly possesses any dangerous drug **in any amount under one-sixteenth of an ounce.**

(Page 4, lines 15 to 20). (Emphasis added).

We believe the approach of this legislation is farsighted and reflects the most up to date research in this area of law.

Recognizing the harm caused by felony convictions and the importance of targeting limited correctional resources more efficiently, several states have made key adjustments to their drugs laws by reclassifying all drug possession offenses from a felony to a misdemeanor in recent years: California (voter referendum, Proposition 47, in 2014); Utah (legislation, House Bill 348 in 2015); Connecticut (legislation, House Bill 7104 in 2015); Alaska (legislation, Senate Bill 91 in 2016); and Oklahoma (voter referendum, State Question 780, in 2016).

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[1] It is important to note that despite the use of the word "promoting", these offenses refer to the **possession** of a dangerous drug. In other words, these offenses do not require selling the drug, only possessing it.

For people convicted of felony offenses, there are numerous negative impacts. First, felony convictions can lead to lengthy prison sentences. In Hawai`i, a class C felony is punishable by up to 5 years imprisonment, or up to five years probation with one year jail as a condition of probation. Although first time drug offenders are eligible for probation rather than prison, a court may decide to include a jail term as a condition of probation until a space opens up in our limited drug treatment programs. This is especially true for defendants who are homeless and have no stable residence to return to while waiting for a treatment slot.

Periods of incarceration, even for a short time, can cost a defendant a job and a place to stay because they can't show up to work and can't pay rent. A felony conviction on their record can have long term effects on the ability to secure and maintain employment and housing well into the future. It is essentially a scarlet letter, easily confirmed by accessing the internet, which a person wears for the rest of their life.

In California, both state prison and local jail populations have declined as a result of Proposition 47. In the first two months after Proposition 47 passed, California's average daily jail population dropped by about 10,000 people. *See* Californians for Safety and Justice, Second Chances and Systems Change, (https://safeandjust.org/wp-content/uploads/P47_Report_Final.pdf, last visited February 4, 2020) (citing California Board of State and Community Corrections, Jail Population Survey (http://bscc.ca.gov/m_dataresearch/, last visited February 5, 2020). In addition to reducing jail population, California's practice of early release (releasing people before completion of their jail sentences as a way to manage jail populations) declined.

It is estimated that in just one year after Proposition 47 passed, felony arrests decreased by 118,940, more than 9,000 of which accounted for decreased felony arrests for drug possession. *See* Californians for Safety and Justice, Second Chances and Systems Change, (https://safeandjust.org/wp-content/uploads/P47_Report_Final.pdf, last visited February 4, 2020). California state officials estimated that Proposition 47 reduced prison spending by $68 million in the first year alone. *See* id. In addition to lowering jail population and felony arrests and convictions, Proposition 47 has impacted court operations. Felony court caseloads decreased by nearly 33% compared to the prior year.

The passage of S.B. 2793 would bring significant reductions to prison spending, Not only would Hawai'i save $13,000 a year for each low-level non-violent offender not incarcerated, but Hawai'i might no longer need to lease prison space in Arizona and could return the Arizona-housed inmates home.

We believe it is time for this approach to low-level drug possession cases as provided for in this bill.

Thank you for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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LATE

THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

February 7, 2020

RE: S.B. 2793; RELATING TO DRUG OFFENSES.

Chair Rhoads, Vice Chair Keohokalole, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to S.B. 2793.

The purpose of S.B. 2793 is to reduce the prison population, re-divert state funds to community-based programs and reducing the collateral effects of a felony offense by creating a reduced charge (Promoting a Dangerous Drug in the Fourth Degree) and penalty (class C felony to a misdemeanor) for the current charge of §712-1243, H.R.S., Promoting a Dangerous Drug in the Third Degree.

The Department believes that as currently written, S.B. 2793 not only reduces the penalty of the current offense Promoting a Dangerous Drug in the Third Degree (PDD 3), but it sends the wrong message to those addicted and users of cocaine, heroine, crystal methamphetamine, morphine and a myriad of other dangerous schedule 1 and 2 substances, that our community and our leaders do not view these types of dangerous drugs as a problem. Specifically, this bill allows **all** dangerous drugs in an amount less than one-sixteenth of an ounce to be classified as a misdemeanor, but limits §712-1243, H.R.S., Promoting a Dangerous Drug in the Third Degree to only four dangerous drugs. The Department believes this is not the intended message by our lawmakers, and as proposed, S.B. 2793 would have the opposite effect it intends by providing drug offenders with less treatment options and a higher rate of incarceration.

By creating a misdemeanor offense, this bill is limiting the maximum deferral or probation sentence to a one year period. As most drug treatment programs often span longer than one year, the lack of court mandated oversight past the one year period is sometimes crucial when addressing an offender's addiction issues. Thus, drug offenders will be often times left without support or motivation half way through their recovery leaving a high probability of

relapse. In addition, although statutorily not restricted from such specialty courts such as drug court or HOPE probation, most drug offenders will not be aware of these types of treatment programs in district court. Even if they are aware of these programs, offenders being charged with a misdemeanor drug offense may simply choose the path of least resistance and accept the relatively low penalties offered for misdemeanor drug offenses, rather than making a true commitment to sobriety.

Although this bill seeks to minimize the negative effects for incarceration on a defendant facing a violation of §712-1243, H.R.S., Promoting a Dangerous Drug in the Third Degree, under current law, most if not all first time drug offenders are not sentenced to incarceration as a first resort. Many drug offenders will generally take advantage of first time drug offender provisions and plea deferrals. As part of probation, special sentencing provisions are also available for first- and second-time felony drug offenders under §706-622.5, H.R.S., if they complete the requisite substance abuse treatment (that generally takes more than one year to complete). If that fails, a revocation of a defendant's deferral and a term of probation may be imposed. If a defendant consistently has difficulties complying with probation, courts will often turn to HOPE probation as a last ditch attempt to provide more oversight of the defendant's actions while on probation. It is only when all of these tools have been thoroughly exhausted – and this is typically years after the person was initially charged with their first felony drug offense – that a court has no choice but to impose incarceration. Therefore, incarceration is not and has never been the go-to solution for low-level drug offenders but rather it is the last resort for repeat offenders who have not been accountable for their actions.

Lastly, the Department is very concerned with the effects the retroactive language in this bill will have on defendants with prior convictions for PDD3 offenses. This will have a great impact on defendants who are currently receiving treatment and rely on the added assistance by the courts through a deferral, probation, drug court and HOPE probation for stability.

For all the reasons above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of S.B. 2793. Thank you for the opportunity to testify on this matter.

LATE

Committees:	Senate Committee on Judiciary
Hearing Date/Time:	Friday, February 7, 2020, 10:00 a.m.
Place:	Conference Room 016
Re:	*Testimony of the ACLU of Hawai'i in Support of S.B. 2793, Relating to Drug Offenses*

Dear Chair Rhoads, Vice Chair Keohokalole, and Committee members:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes **in support of S.B. 2793,** which creates a new misdemeanor for possession of a dangerous drug in a small amount. This measure is a meaningful reform that will free up state funds, which can be reinvested in community-based treatment.

Between 1980 and 2017, Hawaii's incarcerated population rose by 472 percent.[1] In 2018, roughly half of the people incarcerated were serving time for a felony offense. Felony records create significant barriers in an individual's life. During a period of incarceration for a felony offense, an individual loses one of their most basic and important rights—the right to vote. Upon release, people with felony records may face obstacles in securing employment and housing, and may be denied access to food stamps or other important public assistance that would help them their families get back on their feet. Many navigate these barriers while simultaneously seeking out addiction counseling and treatment, needs which are often not met in prison. Indeed, research suggests that community-based treatments produce better public safety results for substance use compared with incarceration.

S.B. 2793 would create a misdemeanor offense to account for low-level drug possession. In fiscal year 2018, 131 people were sentenced for "promoting a dangerous drug in the third degree," defined as possession of any amount of specific controlled substances. Because this is a Class C felony, people convicted of this offense that year received an average minimum sentence of 2.45 years.[2] A misdemeanor offense for low-level possession, as provided by S.B. 2793, however, would be eligible for a maximum of one year in jail. Given the high cost of

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[1] In 2019, the American Civil Liberties Union, in partnership with the ACLU of Hawai'i and Urban Institute, released the Blueprint for Smart Justice Hawai'i. This report resulted from a two-year research project dedicated to identifying key reforms in Hawai'i that would cut the state's incarcerated population in half and reduce racial disparities in Hawaii's corrections system. The report is available at https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-HI.pdf.

[2] Hawai'i Paroling Authority, 2018 Annual Statistical Report (2018), https://dps.hawaii.gov/wp-content/uploads/2018/11/2018-AnnualReport.pdf.

incarceration, reducing the maximum penalty for low-level possession could save the state upwards of $13 million.[3] This measure is a smart reform that will save the state money, which it may then reinvest in better, evidence-based substance use treatment and diversion programs. For these reasons, we urge the Committee to support this measure. Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i 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 Hawai‘i has been serving Hawai‘i for over 50 years.

[3] The Department of Public Safety has reported the cost of incarceration per inmate per day at $198. If all those incarcerated in FY 2018 for promoting a dangerous drug in the third degree would qualify for the fourth degree misdemeanor offense created by S.B. 2793, the difference between the cost of incarcerating all 131 inmates for 2.45 years and incarcerating them instead for one year is $13,727,686.50. (198 x 131 x 365 x 2.45) – (198 x 131 x 365) = 13,727,686.50.

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COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair
Friday, February 7, 2020
10:00 a.m.
Room 016

SUPPORT for SB 2793 – DRUG OFFENSES

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

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the families of **ASHLEY GREY, DAISY KASITATI, JOEY O`MALLEY, JESSICA FORTSON** and all the people who have died under the "care and custody" of the state including the ten people who died in the last 5 months of 2019 and for **JAMES BORLING-SALAS** who was beaten and died on January 16th. We also remember the approximately 5,200 Hawai`i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day and we are always mindful that more than 1,200 of Hawai`i's imprisoned people 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 2793 establishes a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts. Limits the class C felony offense of promoting a dangerous drug in the third degree to include possession of certain dangerous drugs in an amount or weight equal to one-sixteenth of one ounce or more. Retroactive to 6/1/1972.

This bill was created by a Sentencing Reform Group who have been meeting at the UH Richardson School of Law since last summer. Our initial discussion centered around one question: *"What is the sentencing reform that would have the most impact on imprisoned populations while protecting community safety?"* It was decided that tackling low-level drug offenses would be a good start since the majority of Hawai`i's incarcerated population have substance use disorders.

A report[1] from the Ohio Criminal Sentencing Commission shows low-level felony sentencing in all 50 states. Here is the Hawai`i section:

Felony Defined: A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced to imprisonment for a term which is in excess of one year. HRS § 701-107
Lowest Level Felony: Class C Felony HRS § 706-610
Sentence: 5 years (can be mandatory for some crimes and for repeat offenses) or less, but not less than one-year HRS § 706-660
Where Served: When a person is sentenced to imprisonment, the court shall commit the person to the custody of the department of public safety for the term of the person's sentence and until released in accordance with law. The director of public safety shall determine the proper program of redirection and any place of confinement of the committed person. HRS § 706-672

[1] A National PERSPECTIVE: 50 STATE LOW-LEVEL FELONY SENTENCING SUMMARY, By OHIO Chief Justice Maureen O'Connor, Chair, Sara Andrews, Director, Hawai`i, pages 8- 9.
https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/50StateLowLevelFelonySentencingSummary.pdf

The January 6, 2020 population report from the department of public safety shows 5,208 as the total population under the "care and custody" of the state; 45% of these folks are pretrial detainees innocent until proven guilty (1,117/21%) and parole or probation violators (1,237/24%).

The current rate that the department is using is $198 a day. The pretrial detainee and parole/probation populations total 2,354 persons - 45% of the total statewide population. Here is how much these policies cost taxpayers:

2,354 x $198/day = $466,092/day; $3,262,644/week;
$13,050,576/month; $156,606,912/year!

If the Pretrial Population (1,117 persons) was released with promissory notes to show up in court (Act 277 – Unsecured Bonds):

Hawai`i could save $221,166 a day; $1,548,162 a week;
$6,192,648 a month; and $74,311,776 a year!

The cost of incarcerating the Parole and Probation Violator Populations (mostly technical violations):

1,237 persons x $198/day = $244,926/day; $1,714,482/week;
$6,857,928/month; $82,295,136/year!

Reducing the population of low-level drug lawbreakers makes good fiscal sense. The fact that more that 76% of all the people incarcerated by Hawai`i are serving too-long sentences for the lowest felonies, misdemeanors, violations, petty misdemeanors, and parole and probation violations is wasteful.

Hawai`i has programs and services that could be expanded or new ones created to address low-level lawbreaking.

- Foster Desistence-Supporting Interventions
- Increase Jail Diversion Programs, such as LEAD
- Establish Pu`uhonua/Wellness Centers in the districts with the greatest needs
- Increase Community-based Mental Health & Substance Use Programs and Services
- Contract with community-based Restorative Justice Practitioners to heal communities
- Create Work Training and Educational Programs in the districts with the greatest needs
- Developing Reentry Drop-In Centers with computers, classes, case management to help individuals successfully transition back to the community

Diverting money from incarceration to building safer, healthier and stronger communities is a better investment in the long-run than continuing to fund the trauma machine that turns many low-level lawbreakers into real criminals.

We urge the committee to pass this legislation that has proven successful in many other jurisdictions who are enjoying reduced incarceration along with a reduction in crime. Hawai`i can do this!

Mahalo for this opportunity to testify on this important measure.

SB-2793
Submitted on: 2/5/2020 8:11:50 AM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Lorenn Walker	Testifying for Hawai'i Friends of Restorative Justice	Support	No

Comments:

Please vote in favor of this bill, which was recommended by the Sentencing Reform Group that included a retired supreme court justice, a retired judge, several defense attorneys, and community advocates. We need sentencing reform to help reduce the $230 million annual cost of maintainng our destructive state prison and jail system.

Mahalo, Lorenn Walker, director Hawaiʻi Friends of Restorative Justice, http://hawaiifriends.org

TESTIMONY ON BEHALF OF
THE LIBERTARIAN PARTY OF HAWAII
c/o 1658 Liholiho St #205
Honolulu, HI 96822

February 5, 2020

RE: SB2793 to be heard Friday 7, in Room 016, at 10:00 AM
To the members of the Senate Committee on Judiciary

SUPPORT

Dear Senators:

Reducing penalties for drug offenses is a worthy and useful action. However, I should point out the Libertarian Party's strong objections to our criminal drug laws in general. There is no evidence to suggest that making the possession, use, sale, or distribution of so called "hard" drugs, has had beneficial effects on society.

Up until early in the last century drugs were legal in the United States. In 1900 substances such as heroin, and cocaine were legally and readily available. The percentage of Americans who had become addicts was about the same then as now. There were obviously many problems as a result. However, more than a hundred years of criminalization has not impacted any of those problems. Instead it has added a rogue's gallery of new problems caused solely by criminalization. These include the dangers to addicts of using street drugs of unknown potency or consistency, the crimes committed by addicts to obtain funds to buy drugs, the development of violent criminal organizations that undermine public safety and the very stability of some of our Latin American neighbors, the enormous costs of policing, prosecuting, and incarcerating people, the reduction in police attention to all other crimes, the lives of free citizens ruined by incarceration, and more.

I have only listed the practical issues above. There are serious constitutional and human rights issues that are ignored by our laws as well.

Aloha

Tracy Ryan
For The Libertarian Party of Hawaii

tracyar@hawaiiantel.net (808) 534-1846

the Drug Policy Forum of hawai'i

LATE

Dedicated to safe, responsible, humane and effective drug policies since 1993

TESTIMONY IN SUPPORT OF SB 2793

TO: Chair Rhoads, Vice Chair Wakai & Senate Judiciary Committee Members

FROM: Nikos Leverenz
DPFH Board President

DATE: February 7, 2020 (10:00 AM)

Drug Policy Forum of Hawai'i (DPFH) **strongly supports** SB 2793, which would establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree, to include possession of dangerous drugs in the smallest amounts, and limit the class C felony offense of possession of certain dangerous drugs in an amount or weight equal to one-sixteenth of an ounce (1.77 g) or more.

This bill is certainly a step in the right direction in remedying the unfortunate structure of current Hawai'i law that, unlike many other jurisdictions, imposes draconian criminal penalties for possession of *any amount* of Schedule I and Schedule II substances under Hawai'i's Uniform Controlled Substances Act (HRS Section 329 et seq.), including unusable traces and residue, under HRS Section 712-1243.

When the Legislature decriminalized drug paraphernalia in 2017 (HB 1501, Act 72), then-Attorney General Doug Chin noted in his testimony opposing the bill that the measure would "likely not negate the perceived burdens on the Department of Public Safety and the Judiciary" because "the possession of drug paraphernalia is rarely, if ever charged without a companion count for Promoting a Dangerous Drug in the Third Degree, Section 712-1243, Hawai'i Revised Statutes (HRS), (also a Class-C Felony). The companion Dangerous Drug charge, defined as possession of any amount, continues to maintain its Class-C Felony status."

Mr. Chin had a measured response in contrast to the incumbent Honolulu County prosecutor, who made well-trod rhetorical assertions about the necessity of criminal penalties and incarceration to "help in their rehabilitation process," and the incumbent Hawai'i County prosecutor, who predicted that it "will cost the state millions of dollars."

Toward that end, SB 2739 would likely lift much of the fiscal burden on the Department of Public Safety and the Judiciary by placing a clear quantity threshold that could trigger felony prosecutorial proceedings. The fiscal burden could also be lifted by corrective legislative action that responds to what Mr. Chin and others noted, namely that the decriminalization of drug paraphernalia is wholly undercut by the continued felony prosecution of "unusable traces and residue," including that found in paraphernalia.

The case law surrounding the putative ability of a court to dismiss de minimis infractions pursuant to HRS Section 702-236 also counsels that the Legislature expressly provide that, at minimum, a "usable quantity" standard be applied in all simple possession offenses, felony and misdemeanor. Current prosecutorial practices are such that many persons who only have mere residue or otherwise unusable remnants of prior use are arrested and subsequently charged with felony possession under HRS Section 712-1243.

Clear statutory language expressly providing that persons will not be subject to criminal liability for "unusable traces or residue" will have an immediate and far reaching impact on police practices, prosecutorial practices, court dockets, and the probation system that will be even greater than the threshold limit imposed by this bill. More importantly, it will remedy the current injustice of subjecting a person to arrest, prosecution, incarceration, and protracted periods of supervision for, essentially, the possession of nothing.

DPFH therefore respectfully offers the following amendment: insert "beyond unusable traces or residue" after "any amount" in HRS Sections 712-1243, 712-1246.5, and 712-1249.

DPFH strongly believes that the criminalization of behavioral health concerns is unwise, unjust, and multiplies the suffering experienced by persons who may (or may not) be engaged in the misuse of drugs, often with a co-occurring mental health condition.

The American Public Health Association (APHA) observes that far-reaching criminalization statutes like HRS Section 712-1243 serve as structural impediments to community-based treatment access:

> Public health approaches offer effective, evidence-based responses, but some of the most effective interventions are not currently allowed in the United States owing to outdated drug laws, attitudes, and stigma. *Substance misuse treatment is too often unavailable or unaffordable for the people who want it. A criminal justice response, including requiring arrest to access health services, is ineffective and leads to other public health problems.* ("Defining and Implementing a Public Health Response to Drug Use and Misuse," emphasis added.)

The APHA is clear regarding the tangible deleterious human toll of the continued criminalization of substance use among underserved populations:

> Criminalization of substance use further stigmatizes people who use drugs, making it more difficult to engage people in health care and other services, a tendency that is often compounded by sociocultural factors associated with problematic drug-using populations, such as fear, lack of information and education, general physical and mental health problems, homelessness, and incarceration. Criminalization also exacerbates social marginalization and encourages high-risk behaviors such as poly-drug use, binging, and injecting in unhygienic, unsupervised environments. (*Id.*)

One would hope that Hawaiʻi could endeavor to do more to provide needed therapeutic assistance to those who require such and not make their short- or long-term prospects even more grim. Repeated encounters with the legal system, including cycles of incarceration and long periods of parole or probation are not in furtherance of individual or public health.

A 2019 report by the Robert Wood Johnson Foundation underscored the negative health impacts of incarceration:

> Incarceration is associated with adverse health effects that last far beyond the period of confinement. According to the U.S. Department of Justice, one-third of illness-related deaths in state prisons from 2001 to 2004 (the latest years for which this statistic was reported) resulted from conditions not present at the time of admission. Longitudinal studies have documented strong, pervasive links between incarceration and multiple adverse health indicators across the lifespan, even after considering health before incarceration. On average, adult inmates are released from correctional facilities with more chronic medical problems than they had before admission….
>
> In the two weeks following release from prison, the mortality rate of former inmates is approximately times higher than that of the general population, primarily due to drug overdose. The most serious health consequences of incarceration may not manifest until after release. Individuals treated for chronic health conditions while incarcerated often face obstacles to accessing care after leaving the justice system. Among individuals who are incarcerated, future prospects for employment, economic stability, affordable housing, and education are curtailed and in many cases eliminated. ("Mass Incarceration Threatens Health Equity in America," at p. 3.)

The most recent recipient of the Presidential Medal of Freedom demonstrates that even those persons who struggle for long periods with a severe substance use disorder need not be jailed, imprisoned, subjected to protracted periods of parole or probation, stripped of their vote, or otherwise face a host of far-reaching collateral consequences in the pursuit of public safety.

Thank you for the opportunity to testify on this measure.

SB-2793
Submitted on: 2/6/2020 11:23:14 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Nikos Leverenz	Testifying for Hawaii Health & Harm Reduction Center	Support	Yes

Comments:

Hawaii Health & Harm Reduction Center (HHHRC) supports SB 2793. This bill is the first step in moving away from a needlessly punitive approach to substance use and misuse, as current law subjects a person to felony punishment, including jail and imprisonment, for possession of Schedule I and Schedule II substances "in any amount." Even a misdemeanor conviction under the language of this proposed bill has far-reaching damaging consequences, direct and collateral, for a person.

HHHRC strongly believes that those who use substances not be subject to criminal sanctions absent actual harm to others, including those who use substances because of underlying mental health conditions. Criminalizing drug users significantly perpetuates and compounds social, medical, and legal stigma. Dehumanizing drug users and those who have substance misuse problems with the coercive force of law increases the negative impacts of their use upon themselves and those around them.

HHHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and misuse and underlying mental health conditions.

Behavioral health issues are best dealt with by employing a therapeutic model and not a criminal justice framework. Subjecting those who are struggling with substance use, with or without a co-occurring mental health condition, to criminal sanctions – including probation and parole -- exacerbates harms to those persons, their families, and our larger community.

Hawaii should increase its capacity to provide low-threshold, evidence-based care and medical treatment. The continued criminalization of behavioral health concerns under existing law and prevailing prosecutorial practices is simply not conducive to individual or public health.

HHHRC serves Hawaii communities by reducing the harm and fighting the stigma of HIV, hepatitis, homelessness, substance use, mental illness, and poverty in our community. We focus our efforts on those disproportionately affected by social

determinants of health, including but not limited to: people living with and/or affected by HIV, hepatitis, substance use, and the transgender, LGBQ and the Native Hawaiian communities. We foster health, wellness, and systemic change in Hawaii and the Pacific through care services, advocacy, training, prevention, education, and capacity building.

Thank you for the opportunity to testify on behalf of this important reform measure.

SB-2793
Submitted on: 2/5/2020 6:06:55 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Carla Allison	Individual	Support	No

Comments:

I strongly support SB2793 because reducing the population of low-level drug lawbreakers makes good fiscal sense. More than 76% of all the people incarcerated by Hawai`i are serving too-long sentences for the lowest felonies, misdemeanors, violations, petty misdemeanors, and parole and probation violations…this is wasteful. Hawai`i has programs and services that can be expanded plus new ones created to address low level lawbreaking. Diverting money from incarceration to building safer, healthier and stronger communities is a better investment in the long-run than continuing to fund the prison machine that turns many low-level lawbreakers into real criminals. This type of legislation has proven successful in many other jurisdictions where they are enjoying reduced incarceration along with a reduction in crime. Please support this bill.

SB-2793
Submitted on: 2/5/2020 1:53:49 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Jennifer Brown	Individual	Support	No

Comments:

I am a Hawai'i licensed attorney practicing in the area of post-conviction appeals and civil rights. I submit this testimony in strong support of SB2793, which creates a misdemeanor level classification of drug possession in small amounts (typically considered for personal use). Drug use in Hawai'i has only increased under our current system, where those suffering from drug addiction are arrested for felonies and incarcerated for long sentences. Incarceration has not helped to address drug use problem in Hawai'i, nor has it made our streets safer. Incarceration does not address the underlying causes of addiction nor does it provide the necessary treatment that would give individuals the tools to get and stay clean. Instead, incarceration has been used to address drug addiction, which most experts consider to be a public health/mental health issue that needs affective treatment-based solutions, as incarceration does little to curb drug use and in many cases may make it worse. Creating a misdemeanor level offense for possession of drugs in personal use amounts will allow individuals to be diverted from our prisons to programs that will address drug use and give individuals the help required to help them to get sober. For these reasons, I strongly support SB2793.

SB-2793
Submitted on: 2/3/2020 5:55:19 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Oppose	No

Comments:

This is not the solution to the problem at hand; substance abuse requires treatment (to address the issues causing it) not incarceration - and this can be easily misapplied to a user (who would need treatment) vs. a dealer (who would need incarceration).

SB-2793
Submitted on: 2/5/2020 2:16:50 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Steven Costa	Individual	Support	No

Comments:

SB-2793
Submitted on: 2/6/2020 9:08:49 AM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Kristine Crawford	Individual	Support	No

Comments:

SB-2793
Submitted on: 2/5/2020 7:38:43 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Jacquelyn Esser	Individual	Support	No

Comments:

I support SB2793 because it is a step in the right direction. We cannot incarcerate our way out of drug use. Substance use is a behavior. Just as prohibition did not stop drinking, the war on drugs does not stop drugs. Substance use disorder is a mental illness and responding to it with incarceration only makes it worse. Creating strict requirements for people, stigmatizing them as a felon, and incarcerating them when they relapse only makes it worse. We know that relapse is a part of recovery yet we punish it. We incarcerate people at $72,000 a year only to have them come out of custody with no additional skills and no additional mechanisms to prevent relapse. This only makes things worse and at a much greater public expense. We must work with public health officials to create public health solutions to public health problems like substance use. This will not be easy. The easy answer is fear. Fear is always the response of choice of people who do not have solutions. Decisions based on fear are never real solutions. Real solutions are only possible through a thoughtful and measured response focused on evidence and long-term prevention.

We are talking about people who are using drugs and the vast majority of them suffering from addiction. Instead of treating these people as felons and criminals we need to be getting them into treatment. Although I would like to see a measure to divert people arrested for possession into treatment, downgrading it to a misdemeanor is a step in the right direction.

SB-2793
Submitted on: 2/6/2020 8:39:52 AM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
E. Ileina Funakoshi	Individual	Support	No

Comments:

SB-2793
Submitted on: 2/4/2020 10:20:28 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Jen Jenkins	Individual	Support	No

Comments:

TESTIMONY OF STEVEN H. LEVINSON BEFORE THE HAWAII SENATE COMMITTEE ON JUDICIARY IN SUPPORT OF SB 2793 – A BILL RELATING TO DRUG OFFENSES

February 4, 2020

Honorable Chair Rhoads, Vice Chair Keohokalole, and members of the Judiciary Committee, my name is Steven H. Levinson, and I testify in **strong support** of SB 2793, which would establish a new misdemeanor offense of promoting a dangerous drug in the fourth degree with respect to the knowing possession of any dangerous drug in any amount under one-sixteenth of an ounce. SB 2793 would also limit the class C felony offense of promoting a dangerous in the third degree, in violation of HRS § 712-1243, to the knowing possession of certain dangerous drugs in amounts of one-sixteenth ounce or more. SB 2793 is expressly made retroactive to June 1, 1972 (the effective date of the Hawaii Penal Code as originally enacted), deeming all persons convicted under HRS § 712-1243 prior to the effective date of SB 2793 to have been convicted of a misdemeanor (but not "wrongfully convicted" within the meaning of HRS Ch. 661B).

In my written testimony, I would like to focus on the retroactive component of SB 2793. HRS § 1-3 codifies the rule of statutory construction that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended." Pursuant to section 5 of SB 2793, the legislature declares its express intent that, upon enactment, the bill be applied retroactive to the 1972 inception of the Hawaii Penal Code. Thus, the statutory precondition of expressly declared legislative intent is satisfied.

As I am sure you are aware, the Hawaii state courts are constantly called upon to engage in the business of construing the meaning of the myriad statutes that govern most of the disputes that come before them. Over the years, the Hawaii Supreme Court has, on innumerable occasions, formulated and honed the principles of statutory construction that illuminate the Court's interpretation of the laws that the legislature enacts. These principles have become clear, consistent, and dependable. All of them are designed to ascertain *the intent of the legislature* and to apply the law, as the legislature constitutionally intended it, to the case at hand.

It should come as no surprise, therefore, that the first rule of statutory construction, dating back to pre-statehood days, is that, "[w]here the language of the stature is plain and unambiguous there is no occasion for construction and the statute must be given effect according to its plain and obvious meaning." *See*, *e.g.*, Territory v. Fasi, 40 Hawai`i 478, 484 (1954). But even when statutory construction is warranted, a statute will be deemed to apply retroactively when: (1) its provisions are "ameliorative and remedial," especially when the application of the statute "would neither be detrimental nor materially disadvantageous to the defendant"; and (2) the statute "reduces, not increases, possible punishment." *See* State v. Koch, 107 Hawai`i 215, 221-222, 112 P.3d 69, 75-76 (2005) (citations omitted).

I mention these judicially created maxims of statutory construction because SB 2793 does not undertake, within its four corners, to anticipate and enumerate the specific mechanisms of its implementation under all of the circumstances in which they may arise. In my view, it would be virtually impossible for the legislature to do so; to attempt such an exhaustive and encyclopedic exercise would almost certainly be incomplete.

But the plain and unambiguous language of SB 2793 definitively expresses the legislature's express intent that the misdemeanor status of convictions under HRS § 712-1243 prior to the effective date of the bill be given retroactive application. That being the case, it is the duty of the state's courts to give effect to that clear, unambiguous, and express legislative intent, particularly given the act's ameliorative and remedial provisions and the fact that its retroactive application would neither be detrimental nor materially disadvantageous to defendants and would not increase any possible punishment. Under the circumstances, when there is a need for judicial interpretation, the legislature can rest easy in allowing the state's courts to do their job.

ROBERT K. MERCE
2467 Aha Aina Place
Honolulu, Hawai‘i 96821

phone: (808) 398-9594 (cell)
email: mercer001@hawaii.rr.com

February 5, 2020

TO: Senate Committee on Judiciary
RE: SB 2793
HEARING: February 7, 2020
TIME: 10:00 a.m.
ROOM: 016
POSITON: **STRONGLY SUPPORT**

Chair Rhoads Vice Chair Keohokalole, and members of the committee:

My name is Bob Merce. I am a retired lawyer and recently served as vice chair of the House Concurrent Resolution 85 Task Force on prison reform.

I strongly support HB 2793 which would make possession of a very small amount of a dangerous drug - up to one-sixteenth of an ounce - a misdemeanor instead of a class C felony, and make possession of more than one sixteenth of an ounce a class C felony. If passed, the new law would be retroactive to June 1, 2072.

Shortly after the 2019 legislature ended, a group of people concerned with sentencing reform met at the William S. Richardson law school. The group included the staff of the Innocence Project, representatives of the ACLU-Hawaii, the Office of Hawaiian Affairs, the Community Alliance on Prisons, and some of the most experienced and highly respected criminal defense attorneys in the state. The group also included a former Hawaii Supreme Court Justice, a former first circuit court judge, a former president of the Hawaii State Bar Association, and the former vice-chair of the HCR 85 Task Force on Prison Reform.

The group quickly identified possession of a dangerous drug in the third degree as one of the most unjust laws in the penal code, and one that was driving up Hawaii’s prison population and incarceration rate. The current law states that possession of **any amount** of a dangerous drug is a class C felony, punishable by up to five years and a $10,000 dollar fine.

> HRS 712-1243. Promoting a dangerous drug in the third degree
>
> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the third degree is a class C felony.

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The term "any amount" in HRS 712-1243 includes amounts as small as residue found in a pipe in the defendant's possession. *See State v. Fukagawa,* 100 P.2d 498, 60 P3d 899 (December 30, 2002)

The current sentence for possession of "any amount" of a dangerous drug – up to five years in prison and a $10,000 fine - is unduly harsh particularly since the small amount is indicative of personal use, not sale or distribution.

Additionally, a conviction for drug possession can have a devastating effects on the defendant's family, and can make it harder for the defendant to receive federal aid for college, or access public housing.[1]

Making possession of any amount of a dangerous drug up to one-sixteenth of an ounce a misdemeanor rather than a class C felony is a small, conservative, and sensible step in the direction of decarcerating our state.

I urge you to pass SB 2793.

Thank you for allowing me to testify on this matter.

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[1] See Beau Kilmer and Robert J. MacCoun, "Should California Drop Criminal Penalties for Drug Possession" The Rand Corporation, July 20, 2017. Accessed February 5, 2020 https://www.rand.org/blog/2017/07/should-california-drop-criminal-penalties-for-drug.html

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LATE

SB-2793
Submitted on: 2/6/2020 12:09:38 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
David Shaku	Individual	Support	No

Comments:

SB-2793
Submitted on: 2/5/2020 10:00:11 AM
Testimony for JDC on 2/7/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
R Siciliano	Individual	Support	No

Comments:

SB-2793
Submitted on: 2/6/2020 4:47:21 PM
Testimony for JDC on 2/7/2020 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Dante K. Carpenter	Individual	Support	Yes

Comments:

Chair Sen. Karl Rhoads & Committee Members:

My Name is Dante Carpenter, former County, State & OHA elected official & Democratic Party Chair. I support SB2793 which defines a penalty for possesion of any dangerous drug in any amount less than one-sixteenth of an ounce (1/16th ounce) as a Misdemeaner (Fourth Degree), retroactively to June 1972.

The intent of this measure is to reduce incarceration and its costs to the State of Hawai'i. Further, it recognizes that decades of policies focused on criminalization and incrimination of drug users, Nationwide, as well, has had no effect on rates of drug use!

Finally, this sentencing reform will have a large impact on imprisoned populations, and concurrently reduce recidivism through training and education via creating Pu'uhonua Sites, statewide.

Respectfully submitted,

Dante Carpenter