



The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

House Committee on Public Safety, Veterans, and Military Affairs

Rep. Gregg Takayama, Chair

Rep. Cedric Asuega Gates, Vice Chair

Wednesday, February 12, 2020, 10:00 a.m.

State Capitol, Conference Room 430

WRITTEN TESTIMONY ONLY

By

Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Melanie M. May

Deputy Chief Judge, District Court of the First Circuit

Bill No. and Title: House Bill No. 1900, Relating to Public Safety.

Purpose:

Requires a defendant's incarceration history certificate be provided to a court prior to sentencing or resentencing and requires a court to determine a defendant's credit time, compute the expiration date for a defendant's specified sentence, and include the expiration date in the court's judgment order.

Judiciary's Position:

The Judiciary *strongly opposes* the instant bill in its current form, as implementation is not feasible. The Department of Public Safety (DPS) has always calculated a defendant's incarceration credit and release date for one reason – DPS is in the best position, with the required information, to perform that duty. To transfer the DPS's responsibility to the Judiciary is impractical, unfeasible, and will lead to unintended consequences, such as operational delays and the increased risk of illegal detention.



A. When Defendants are Detained, they are held in the Custody and Care of the DPS, DPS Maintains Detention Records, and thus DPS is the Appropriate Authority to Calculate Release Dates.

When a defendant is detained, he or she remains in the custody and care of DPS. DPS creates a defendant's incarceration record, is the custodian of that record, and is therefore in the best position to calculate the number of days the defendant has been incarcerated. This is why, historically, DPS calculates a defendant's incarceration credit and determines his or her release date.

In contrast, the court's primary duty is to focus on the merits of the case, and, if a defendant is convicted, to sentence the defendant in accordance with the sentencing criteria in Hawai'i Revised Statutes (HRS) §706-606, as well as all of the other requirements set forth in chapter 706. Requiring the court to calculate incarceration credit detracts from this fundamental responsibility.

Under the existing system, the authority and responsibility of calculating incarceration credit and sentence expiration dates is placed where it belongs, with DPS. Indeed, in the federal system, the Federal Bureau of Prisons is responsible for the calculation of incarceration credit. It is our understanding that the United States District Court for the District of Hawai'i, our federal counterpart, does not include a defendant's incarceration credit and sentence expiration date in its orders and judgments.

B. In Virtually All District and Family Courts, Certificates of Detention are Not Available and thus Implementation of this Bill is Not Feasible.

In the district and family criminal courts, judges adjudicate petty misdemeanor and misdemeanor cases. Petty misdemeanors are offenses for which jail of up to 30 days may be imposed, while misdemeanors are offenses for which jail of up to one year may be imposed. In the vast majority of these cases, pre-sentence reports are not ordered and certificates of detention are therefore not available at the time of sentencing.¹ Without certificates of detention, calculating incarceration credits and release dates is impossible. The court simply does not have the necessary information to do so.

In the rare instance in which a pre-sentence report is ordered, a probation officer conducts interviews, gathers information, and assesses the sentencing options available for the offense in question. Because of the comprehensive nature of the report, it takes a minimum of 60 days to prepare the report. That 60-day period is double the maximum jail time that could be imposed in petty misdemeanor cases. Even in misdemeanor cases, the time it takes to prepare a pre-sentence report often exceeds the recommended jail term covered by plea agreements and ultimately

¹ Pre-sentence reports are not required in misdemeanor and petty misdemeanor cases, unless the defendant is less than 22 years of age, *see* HRS § 706-601, and many of those defendants waive their right to a pre-sentence investigation.



ordered by the court. To delay sentencing for the sole purpose of ordering a pre-sentence report and requesting a certificate of incarceration is unfeasible and counterproductive, particularly in those cases where a plea agreement has been reached, and both the complaining witness and defendant seek closure.

Even if certificates of incarceration were to be made available to the court, the high volume of cases heard in the district court and family court each and every day simply do not give judges and court staff the time needed to review the certificates, track down missing or incomplete certificates, verify the information in the certificates, and calculate incarceration credit and release dates. Each day, hundreds of criminal cases are heard in the district courts on O‘ahu alone; of those cases, dozens of defendants are sentenced to some amount of jail. The positions, resources, and funding that would be needed to review the certificate of incarceration (or locate a missing or incomplete certificate), verify the information in the certificate, calculate the number of days of credit available, and calculate the specific date and times of release in each and every case would be significant, and could bring the court’s calendar to a grinding halt, to the detriment of all other individuals waiting for their cases to be heard.

To further complicate matters, defendants in the district court frequently have multiple cases on the court’s calendar. For example, it is not uncommon for a single defendant to have multiple cases with multiple counts of driving without a license and driving without insurance arising out of different incidents on different days. In all likelihood, the number of days of incarceration credit and the applicable release dates for each of these cases will differ because the defendant may have been in custody at some point in one case but not officially in custody on the others. The process of gathering credit information and calculating credit for just this one defendant could conceivably take hours. This scenario is compounded when there are particularly heavy district court dockets. For example, in January of 2020 alone, there were 1,740 cases in the Honolulu Division of the District Court (not including the “country courts”) which involved defendants in custody. Calculating incarceration credit and determining release dates is simply not feasible under these circumstances.

Furthermore, requiring the district and family criminal courts to calculate incarceration credit and release dates would have unintended effects beyond the courtroom. Before sheriffs can release defendants from the courthouse or to the custody of the appropriate correctional facility, they must have a copy of the court’s judgment and/or mittimus. Requiring the district courts to calculate credit would delay preparation of the judgment and/or mittimus, and in turn delay release and transport of defendants to appropriate institutions.

Finally, the inevitable delays in preparing judgments under this bill’s requirements would heighten the risk of illegally detaining defendants beyond the sentences imposed by the court. The protracted delay that would be caused by requiring judges and court staff gather incarceration certificates and calculate credit and release dates may very well end up exceeding a defendant’s sentence. The current practice of having DPS -- the agency that creates and maintains incarceration records -- calculate incarceration credit and release dates is functional, efficient and appropriate.



C. In Circuit Courts, Certificates of Detention are Not Always Available, Accurate, Nor Easily Verified and Courts Are Not in a Position to Calculate Release Dates.

The bill states that a defendant’s “pre-sentence report shall contain a certificate showing the length of such detention of the defendant prior to sentence . . .” and that the “court shall review the certificate to determine the defendant’s presentence credit time and compute the sentence expiration date for each case and count . . .”. Thus, the bill presupposes the existence and accuracy of certificates of detention in each case. This is not necessarily the case.

1. Certificates of Detention Unavailable

The bill presupposes that a pre-sentence report is produced in each case. Even in Circuit Court, this is not necessarily the case.

a. a. Pre-sentence Reports Waived

Especially on the neighbor islands, a pre-sentence investigation report, and its accompanying certificate of detention, is not always ordered. For example, in the Second, Third, and Fifth Circuits, when the parties have agreed to a plea agreement which includes an agreed-upon period of incarceration, parties often waive the pre-sentence reports. Even when a pre-sentence report is ordered, certificates of detention are requested but often not received. If pre-sentence reports are not ordered and certificates of detention are not produced, there is no way for a court to determine the amount of pre-sentence credit as required by the bill.

b. Motions to Revoke or Modify Probation

For motions to revoke probation and re-sentencing, there is no pre-sentence report nor certificate of detention available. Upon such a motion, the court may re-sentence the defendant to probation with jail, or an indeterminate term of incarceration. Certificates of detention are not provided and it is not possible for a court to determine a defendant’s pre-sentence credit nor sentence expiration date. DPS is the only agency able to make that determination.

If the courts are required to obtain credit information from DPS for each and every probation revocation, enlargement, or modification, the problems noted above will be compounded exponentially in HOPE Probation courts. The HOPE program is designed to closely monitor more than 2,000 at-risk probationers and provide swift, certain, consistent, and proportionate jail sanctions for non-compliance with the terms and conditions of probation/deferral. The sanctions are immediate and frequent: just one HOPE Probation court in the First Circuit may issue approximately 300 judgments and over 2,000 modification orders per year.

It would be impractical for the court to constantly recalculate the pre-sentence credit and expiration date on each probation revocation/modification, especially in HOPE where probationers are constantly going in and out of custody as often as week-to-week, and where



fast-paced custody sanctions result in constant changes to the probationer's pre-sentence credit status. The practical challenges are exacerbated where probationers have multiple cases, each at a different juncture. The "certification" of the sentence expiration dates on the legal document would necessitate a significant increase in staffing to track the tolling and calculation of prison time for each defendant (HOPE currently has over 1,800 probationers). Judicial discretion would be hindered because any enlargement of detention would affect and delay the preparation of the judgments and modification orders until proper calculations could occur.

Finally, because defendants in custody cannot be transported to the facility without the proper paperwork, staff would be faced with undue time constraints in preparing legal judgments.

2. Incomplete and/or Inaccurate Certificates of Detention

a. Courts are Unable to Verify Whether Certificates of Detention are Complete.

Even when some certificates of detention are available, courts are not in a position to verify their completeness or accuracy. It is significant to note that certificates of detention may come from various custody institutions, *e.g.*, in-state and out-of-state correctional facilities, police departments holding cells, and the sheriff's division. There is no way for a court to verify all the detention facilities in which a defendant may have been held. The sentencing court does not know if an incarceration certificate is outstanding and has no way of verifying that all applicable certificates have been included in the pre-sentence report. Often, courts are not in receipt of all certificates of detention prior to the time of sentencing. Any sentence expiration date given in such circumstances would not be reliable. Only DPS, the entity to whom the defendant is committed, has the authority, information and ability to make that call.

b. Courts are Unable to Verify Whether Certificates of Detention are Accurate.

The certificates of detention received by the court are often incorrect at the time of sentencing hearings. DPS often updates, revises, and routinely verifies credit after the court judgment is filed and transmitted to them. By the time the defendant comes before the paroling authority, DPS will have several opportunities to double check the proper documentation to accurately determine defendant's sentence expiration date. This date is then provided to the defendant, who is then able to rely on an accurate calculation of his or her credit. Because courts are not in a position to verify these calculations, judgments should not include this unreliable information.



3. Implementation of this Bill Will Require Significant Resources and Will Result in Significant Delays.

Currently, DPS has a highly functional Records Division which is able to confirm all facilities at which any defendant was held, gathers all certificates of detention from each facility, calculates detention periods (wherein bail was set and defendant receiving credit) for each count and case a defendant may have. Under the proposed bill, DPS would still be required to perform all of these functions and provide certificates of detention to the courts. On the other hand, the Judiciary currently does not have a similar division set up to confirm and verify a criminal defendant's detention records. Placing these responsibilities on the Judiciary will require significant positions, resources and expenditures on new software, programming and training.

Finally, implementation of this bill will result in continued sentencing hearings, extended incarceration and delayed filing of judgments. Terms of imprisonment can only be determined following argument and disposition at a sentencing hearing. Defendants often have multiple counts and cases for which their detention credits vary. Defendants may be held on bail in some cases and counts while on release status (because bail is not set) in other cases and counts. Calculating bail under these common but complicated scenarios will result in the sentencing delays and extended incarceration while expiration dates are verified and calculated. These unintended consequences will impede the efficiency of the current system to the detriment of all parties.

Respectfully, the Judiciary encourages the Legislature to maintain the current practice, whereby (1) the court orders and states in its judgment the precise amount of jail/prison time a defendant is sentenced to serve and (2) DPS calculates the jail credit and expiration/release date.

Thank you for the opportunity to testify on this measure.



**Office of the Public Defender
State of Hawaii
William Bagasol, Deputy Public Defender**



**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Public Safety, Veterans and Military
Affairs**

February 9, 2020

Hearing: February 12, 2020 at 10:00 a.m.

Chair Greg Takayama, Vice Chair Cedric Gates and Committee Members

The Office of the Public Defender provides the following comments regarding HB1900.

The amount of credit for time served and sentence expiration date for a defendant is often unclear, uncertain, and sometimes disputed. The Office of the Public Defender spends much time fielding communications and answering questions regarding credit for time served, sometimes years after a person is sentenced. The lack of clarity results in frustration, delayed release and sometimes illegal detentions.

Under the proposed legislation, while the courts may determine credit for time served and sentence expiration, this system would work only if the courts and parties receive complete and accurate information prior to sentencing. Currently, by the time of sentencing, the courts may not have all the information to properly render an accurate decision regarding credit for time served or the specific sentence expiration date.

The courts and the relevant parties rely upon the Department of Public Safety (“DPS”) to collect and maintain incarceration (police cellblock, pretrial incarceration, juvenile detentions, etc.) records. Hence, it would be necessary to provide DPS with the necessary resources, staffing, training and record keeping system for accurate and timely determinations of incarceration credit and sentence expirations.

Furthermore, given the large numbers of cases and short-term offenders in the District Courts, it may not be feasible to mandate this requirement upon the District Courts. Certificate of detentions cannot be expected to be completed for the courts if there is only a short window, often days, between incarceration and sentencing.

Thank you for allowing us an opportunity to provide comment on HB 1900.

HB-1900

Submitted on: 2/6/2020 8:53:04 PM

Testimony for PVM on 2/12/2020 10:00:00 AM

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

Comments: