



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

H.B. NO. 1046, H.D. 2, S.D. 1 RELATING TO WRONGFUL IMPRISONMENT.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Wednesday, March 30, 2016

TIME: 09:15 a.m.

LOCATION: Conference Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Mark Nomura, Deputy Attorney General,
at (808) 586-1300)

Chair Tokuda and Members of the Committee:

The Department of the Attorney General supports H.B. No. 1046, H.D. 2, S.D. 1, which provides a procedure for persons who are actually innocent of crimes for which they were convicted and imprisoned, to seek compensation from the State. The Department opposed H.B. No. 1046, as originally introduced, for reasons raised previously.

H.B. No. 1046, H.D. 2, S.D. 1, is substantially the product of the American Judicature Society-Hawaii Chapter's special committee on redress for unlawful imprisonment. The American Judicature Society is an independent, nonpartisan, national organization of judges, lawyers, and interested members of the public, whose mission is to improve the American justice system. The special committee on redress for unlawful imprisonment was co-chaired by the Honorable Jeannette H. Castagnetti, state circuit court judge, and Mark J. Bennett, Esq., former Hawaii Attorney General.

H.B. No. 1046, H.D. 2, S.D.1, represents the collaborative work of the special committee, which was comprised of a wide range of state and federal judicial representatives, as well as legal, educational, and community representatives from all interested stakeholders in the community. The committee considered wording from existing statutes in other states on issues such as the eligibility for compensation, evidence of innocence, evidence of a claim, burdens of proof, decision-making entities, exclusions, amount of compensation, types of eligible benefits, attorney's fees, and tax implications.

Ultimately, the committee drafted proposed legislation that is substantially the same as S.D. 1. The Department believes that S.D. 1 presents a reasonable compensation statute, based on the collaborative effort of significant stakeholders in the community, which balances the interests of an allegedly wrongfully imprisoned petitioner against the State's limited resources.

Thank you for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: gladys.baisa@mauicounty.us
Subject: *Submitted testimony for HB1046 on Mar 30, 2016 09:15AM*
Date: Monday, March 28, 2016 3:18:59 PM

HB1046

Submitted on: 3/28/2016

Testimony for WAM on Mar 30, 2016 09:15AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Gladys Coelho Baisa	Maui County Council	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.

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Committee: Committee on Ways and Means
Hearing Date/Time: Wednesday, March 30, 2016, 9:15 a.m.
Place: Room 211
Re: Testimony of the ACLU of Hawaii in Support of H.B. 1046, H.D.2, S.D.1, Relating to Wrongful Imprisonment

Dear Chair Tokuda and Members of the Committee on Ways and Means:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of H.B. 1046, H.D.2, S.D.1, which seeks to provide compensation and expungement of conviction to innocent persons who were wrongfully convicted and imprisoned.

The federal government, thirty states, and the District of Columbia currently provide some form of compensation to those who have been wrongfully imprisoned for crimes they did not commit. These individuals often leave prison with no housing, no savings, and no career, having been robbed of the opportunity to lead a normal life. Additionally, wrongfully imprisoned individuals are erroneously denied constitutionally protected rights during their period of incarceration, including the right to move around freely and, in Hawaii, the right to vote. While no amount of money can fully remedy the loss experienced by someone who has been wrongfully imprisoned, the government has a duty to reasonably compensate these individuals and assist in their successful reintegration into society.

Thank you for this opportunity to testify.

Sincerely,

Mandy Finlay
Advocacy Coordinator
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years

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COMMITTEE ON WAYS AND MEANS

Chair: Sen. Jill Tokuda

Vice Chair: Sen. Donovan Dela Cruz

Wednesday, March 30, 2016

9:15 a.m.

Room 016

STRONG SUPPORT for HB 1046 SD1 - WRONGFUL IMPRISONMENT

Aloha Chair Tokuda, Vice Chair Dela Cruz 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 for almost two decades. This testimony is respectfully offered on behalf of the 6,000 Hawai'i individuals under the "care and custody" of the Department of Public Safety. We are always mindful that approximately 1,400 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 Native Hawaiians, far from their ancestral lands.

HB 1046 SD1 provides compensation and expungement of conviction to persons who can demonstrate they were wrongfully convicted and imprisoned when actually innocent.

Community Alliance on Prisons is in strong support of this measure. The state imprisons people who cause harm to others. Conversely, when it is the state that causes the harm, it is the moral responsibility of the state to compensate the person who endured that harm.

This bill creates a process for redress when a person is actually innocent and was wrongfully imprisoned...finally.

By fairly compensating those who have suffered under the criminal justice system, the state reassures its citizens that the government will attempt to rectify a wrong – whether the state is at fault or not. In short, it's the right thing to do.

Mahalo for this opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: lorenn@hawaiifriends.org
Subject: Submitted testimony for HB1046 on Mar 30, 2016 09:15AM
Date: Monday, March 28, 2016 1:56:37 PM

HB1046

Submitted on: 3/28/2016

Testimony for WAM on Mar 30, 2016 09:15AM in Conference Room 211

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

Comments: We are a 30+ year old non-profit dedicated to improving the justice system. We strongly support this measure to provide compensation to people wrongfully imprisoned. Mahalo for your public service. Lorenn Walker, JD, MPH Director, Hawai'i Friends of Restorative Justice

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Benjamin N. Cardozo School of Law, Yeshiva University

**Testimony of Amol Sinha, Esq., State Policy Advocate, Innocence Project
Before the Hawaii State Senate Committee on Judiciary and Labor**

March 15, 2015

RE: H.B. 1046

On behalf of the Innocence Project, thank you for the opportunity to submit testimony before the Senate Committee on Judiciary and Labor. The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to reduce the likelihood of wrongful convictions.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 337 people who had been wrongly convicted of serious crimes. The Innocence Project regards each DNA exoneration as an opportunity to review where the system fell short and identify factually supported policies and procedures to minimize the possibility that such errors will impair justice again in the future. We also regard it as a time to consider the reentry needs and appropriate compensation due to the victims of those errors who, innocent of the crime accused, were nonetheless stripped of their lives and liberty and forced to endure the misery of prison. Not only have DNA exonerations led to a growing public awareness of the possibility of wrongful conviction, but media accounts accompanying these exonerations have brought into stark relief those issues facing individuals who are attempting to reenter society following protracted incarceration.

This testimony will describe some of the impacts of incarceration on the wrongfully convicted, explain some of their extraordinary needs upon release, and voice our support for H.B. 1046, which would provide a mechanism for compensation for Hawaii's wrongfully convicted.

Impact of Incarceration on the Wrongfully Convicted

Individuals who reenter society after lengthy prison sentences suffer from significant emotional, physical, and economic needs, and thus require as much support as they can get. According to a report by the Re-entry Policy Council, a bipartisan group comprised of leading elected officials, policymakers and practitioners working in state and local governments, barriers to successful reentry are profound. "Research shows that when people who are released from prison or jail return to the community, their job prospects are generally dim, their chances of finding their own place to live are bleak, and their health is typically poor."¹ Indeed, the National Institute of Justice – the research arm of the Department of Justice – has found that individuals reentering the free world frequently face a lack of adequate education and job skills, limited housing options, substance abuse issues, and mental health issues.²

¹ *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*. Council of State Governments. Reentry Policy Council. New York: Council of State Governments. January 2005.

² "Offender Reentry," National Institute of Justice, available at <http://www.nij.gov/topics/corrections/reentry/pages/welcome.aspx> (last visited Dec. 10, 2015).



Scholarship recognizes the well-established emotional and psychological harm wrought by incarceration. Institutionalization reaps profound psychological consequences for the incarcerated, from diminished decision-making capabilities to overwhelming distrust of others to psychological distancing. Prison culture demands the rejection of any behavior that might reveal any sort of emotional weakness or intimacy. As a result, the “emotional flatness” that an individual might have adopted in prison in the service of self-protection can be devastating to his social relationships upon release.³ A 2007 New York Times expose tracked the experiences of those wrongfully convicted individuals proven innocent through DNA testing and found that most “have struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of years of questionable or wrongful imprisonment.”⁴

Of course, all of these experiences are only compounded by one’s knowledge that he has been wrongfully convicted and incarcerated.⁵ A 2004 study that examined the psychological effects of wrongful conviction presented a series of clinical findings based on assessments of a sample of wrongfully convicted men. More than 75% of the sample group experienced enduring personality changes, defined as “personality change with characteristics that were not previously seen such as hostile or mistrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of threat, and estrangement.”⁶ Two-thirds of those assessed experienced post-traumatic stress disorder, and 90% evidenced some form of a psychiatric disorder.

As one might expect, nearly all of individuals interviewed experience incredible feelings of bitterness and “strong and unresolved feelings of loss.”⁷ These feelings of loss may exist because of grief and mourning over loved ones – often parents – who passed during the course of their incarceration. But, additionally, relationships with family members, including children, are often permanently fractured or destroyed.

The average prison stay of individuals exonerated through DNA testing is 14 years. During the course of those years, many of the exonerated missed out on educational and workforce development opportunities. They return to their communities feeling out of step, often unable to meet even basic professional expectations. They are often coping with seriously debilitating insecurities and a persistent feeling of “what might have been” in their professional lives.

In addition to the psychological, emotional, and economic harms, the exonerated typically face serious medical issues upon release. Research shows that the strain and trauma of prison life yields a higher incidence of medical problems for the incarcerated as compared to the general population. For instance, the health of fifty-year-old prisoner has been found, on average, to be similar to that of the average sixty-year-old in the free world.⁸ Of course, prison life also increases exposure to communicable and serious diseases, including HIV and Hepatitis B and C, many of which require long-term and comprehensive healthcare upon release. Medical care provided to prisoners is notoriously poor, exacerbating existing conditions and leaving others untreated. Prison rape is also prevalent, with some experts estimating that more than 40% of the

³ Ibid.

⁴ Roberts, Janet and Elizabeth Stanton. “A Long Road Back After Exoneration, and Justice is Slow to Make Amends.” New York Times, November 25, 2007.

⁵ See Scott, Leslie. “It Never, Ever Ends”: The Psychological Impact of Wrongful Conviction " American University Criminal Law Brief 5, no. 2 (2010):10-22.

⁶ Grounds, A. 2004, Psychological Consequences of Wrongful Conviction and Imprisonment. *Canadian Journal of Criminology and Criminal Justice*. 46(2): 165-183.

⁷ Ibid.

⁸ Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 *Fed. Probation* 3, 5 (2001).



prison population has been victimized.⁹ As such, the medical and mental health problems facing individuals upon release are enormous. Correspondingly, the expenses associated with treatment for such mental and physical health issues, finding suitable housing, and providing for basic sustenance quickly add up.

The costs associated with reentering society are extremely onerous. This is particularly true for the wrongly convicted, who, as described above, are often indigent and are experiencing a unique trauma. Tragically, they have paid another's significant debt to society. While it is impossible to give back an innocent person the years he or she lost, it is crucial that we provide a path to try to make them as whole as possible, so that they can develop into the full, productive members of society they were intending to become. H.B. 1046 is that pathway.

Litigation is Neither a Suitable Alternative Nor Supplement to Statutory Compensation

Some speculate that the wrongly convicted who live in states that have not passed universal compensation legislation will be able to recover monetary compensation for their wrongful imprisonment through federal civil rights litigation. The most common vehicle for this would be filing a claim under section 1983 of the Civil Rights Act of 1871.¹⁰ However, the burden and costs associated with litigating such a case are extremely high, successes are few and far between, and monetary relief - if any - lacks uniformity.

In order to prevail on a §1983 claim, the wrongly convicted individual must demonstrate that his conviction was the result of official misconduct that directly led to a constitutional violation. First, the wrongly convicted individual has the heavy burden of showing that he or she was the victim of "intentional misconduct." Next, the wrongly convicted must also prove that the misconduct fit into a narrow category of clearly established constitutional standards, and that the standards existed and were widely known by the relevant officials when the person was convicted. However, there are many instances in which actions do not constitute "intentional misconduct" for §1983 purposes, including when:

- Individuals are pressured into providing a false confession;
- Individuals agree to plea agreements (10% of the nation's 337 people who were proven innocent through DNA testing agreed to a plea);
- Individuals are wrongfully convicted based on incentivized testimony, including that of jailhouse informants;
- Mistaken eyewitness identifications result from procedures that are not declared problematic at the time of the criminal investigation.

Additionally, even if a wrongly convicted individual is able to overcome these difficult burdens and present a viable claim, most official actors, including police and prosecutors, are often immune from liability for their misconduct.

Simply put, §1983 claims do not guarantee compensation for three basic reasons:

1. The wrongly convicted plaintiff must not only prove that mistakes were made, but that there was deliberate and/or reckless conduct on the part of officials.
2. In most cases, the doctrines of qualified and absolute immunity shield official actors, such as police, crime lab personnel, and prosecutors from liability for misconduct.

⁹ Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 *PRISON i.* 413, 414 (1995).

¹⁰ 42 U.S.C. § 1983.



3. Even if there is a successful suit, litigation takes years and there is still no guarantee that the wrongly convicted plaintiff will recover damages. Often, smaller towns are not insured or do not have sufficient funds in their coffers to cover significant claims. Outside insurers that cover municipalities often refuse to cover the most egregious conduct carried out by official actors.

Therefore, the Innocence Project recommends that each state pass a statute that includes a fixed sum of recovery for each year a wrongfully convicted person spends in prison. Ten years ago, President George W. Bush endorsed Congress's recommended amount of up to \$50,000 per year, with up to an additional \$50,000 for each year spent on death row. All fixed sums included in state compensation laws should, at minimum, meet the federal standard and include a provision that contemplates inflation and makes annual adjustments on that basis. H.B. 1046 is an opportunity to bring Hawaii in line with the federal standard and national trends.

Conclusion

Stakeholders from all corners of the criminal justice system – from advocates to police to prosecutors – agree that the wrongly convicted deserve to be compensated for their lost years. The victims of criminal justice system error deserve strong support from the government that harmed them – however inadvertently – to return them to where they could have been in life but for their wrongful conviction, and to compensate them for the horror they endured. The Innocence Project urges the Senate Committee on Judiciary and Labor to pass H.B. 1046 to help the wrongly convicted better transition from prison life to mainstream society. Thank you for your time and consideration.

Amol Sinha, Esq.
asinha@innocenceproject.org
(212) 364-5389

Heather McVay
Hawai'i Innocence Project Student
JD Candidate 2016
William S. Richardson School of Law

TESTIMONY IN SUPPORT OF HB1046 H.D. 2 S.D.1
WAM Committee Room 0211 March 30, 2016, 9:15 a.m.

I am a law student who has been involved with the Hawai'i Innocence Project for almost a year now and I strongly support this measure. This measure is the product of great collaboration in an effort to improve the American justice system by a distinguished group of stakeholders and concerned citizens who agreed unanimously that individuals that are wrongfully imprisoned should be compensated by the state for their time spent behind bars. 30 other states have already enacted laws compensating wrongfully incarcerated individuals.

Although you will hear testimony in support of this measure from the Attorney General, the Community Alliance on Prisons, the CHOW project, Harrison & Matsuoka, Virginia Hench – the founding director of the Hawai'i Innocence Project, and others, about how this bill is legally sound, is comparable to the policy of the majority of states and is good policy, I offer the following additional testimony in support.

Working on cases involving wrongfully incarcerated people has been a heart breaking and inspiring experience. As law students we learn that criminal law has the highest burden of proof – beyond a reasonable doubt - because criminal charges can incur the highest form of punishment possible: loss of freedom. In fact, in some situations the criminal law system prefers to let guilty people free rather than put an innocent person in prison. Nevertheless, there are cases such as that of exoneree Ricky Jackson of Ohio who spent 39 years in prison for a crime he didn't commit. It could happen to anyone.

The attitudes of the defendants and exonerees I have met and have become acquainted with through the Innocence Project are amazingly positive and focused on “change for the better”. Rather than being angry and bitter, they simply want an opportunity to live the life they have been deprived of. Some of them have dire medical situations that are exacerbated by the low level of medical care provided in prisons. Their family members and supporting communities have also experienced extreme sacrifice and strife but are focused on making up for lost time. In service to the Hawai'i Innocence Project I often ask myself, what is my freedom really worth? In reality, no amount of money can give back what wrongful imprisonment takes from people, but it is a step in allowing individuals to pick up what pieces of their lives are left so that they and their families can try to make up for lost time.

Aside from policy reasons such as restoring faith in the system, allowing released individuals a chance to become contributing members of society, and creating incentives for better and accountable police and prosecution policy, I would ask that the effects that wrongful convictions have on the health of individuals, as well as the burden on families and communities be a part of the consideration in the passage of this measure.

I therefore respectfully request that the reasonable compensations amounts that were unanimously agreed upon by the American Judicature Society-Hawai'i Chapter Special Committee on Redress for Unlawful Imprisonment be adopted by this committee and that the measure be moved forward. Thank you for hearing this bill and for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: ssalmers@hawaii.rr.com
Subject: Submitted testimony for HB1046 on Mar 30, 2016 09:15AM
Date: Tuesday, March 29, 2016 12:59:35 PM

HB1046

Submitted on: 3/29/2016

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Submitted By	Organization	Testifier Position	Present at Hearing
Sandy Salmers	Individual	Support	No

Comments: Please support this bill. Mahalo.

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