



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

S.B. NO. 2687, RELATING TO CRIMINAL PROCEDURE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Thursday, February 17, 2022 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Kory W. Young, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) appreciates the intent of the bill and provides the following comments.

The purpose of the bill is to add a new rule to part VI of the Hawaii Rules of Evidence (HRE) that would allow courts in criminal proceedings to take witness testimony through a live two-way video connection, either upon a finding of necessity by the court, or with the consent of the defendant.

The bill makes the admission of two-way video testimony contingent on either the consent of the defendant, or a finding of necessity by the court. The Department recommends that the bill be amended to require the prosecution's consent in addition to the defendant's consent in order to admit two-way video testimony. The bill is designed to allow for the admission of necessary video testimony, while at the same time safeguarding the defendant's constitutional right to confront his or her accuser. Although the prosecution does not have a constitutional right to confrontation, the prosecution does have a strong interest in maintaining the safety of the community and serving the cause of justice. As drafted, the defendant's unilateral consent alone will satisfy the exception, opening the floodgates to defense witnesses whose identities cannot be verified, whose locations cannot be identified, and who can be coached or coerced without detection. By requiring the consent of the prosecution as well as the defendant in order to admit two-way video testimony, the bill would allow for the

prosecution to raise its concerns and for the court to consider those concerns, greatly increasing the reliability of the two-way video testimony presented to the trier of fact.

On page 2, lines 15 – 16, the bill states that the two-way video will be viewed by "the court, the defendant, and the trier of fact." It is unclear if "the court" is intended to include only the judge and court staff, or the general public attending the court proceedings. As the presentation of witness' testimony would usually occur in open court, if the intent of the bill is to keep the public or other parties from viewing the video testimony, this should be explicitly stated.

On page 2, lines 19 – 20, the bill states that "full direct cross-examination shall be available as a matter of right." This should be amended to separate the "direct" and "cross-examination" with the word "and" to make it clear that two different types of questioning are being provided for. With this change, the bill would read as follows:

"full direct and cross-examination shall be available as a matter of right."

Opponents of the bill will point out that the use of two-way video testimony could be violative of a defendant's constitutional right to confront his or her accusers. This will not be an issue in cases where the defendant consents to the use of two-way video testimony, as the defendant would presumably waive his or her right to confrontation in those situations. In cases where the court authorizes the use of two-way video testimony without the consent of the defendant, or over the defendant's objection, it would be up to the court to determine whether a legal "necessity" exists, and to issue findings that support the court's determination. The bill correctly declines to provide specific criteria for determining what constitutes a legal "necessity", as this term continues to be refined and reevaluated by various State and Federal appellate courts. By allowing judges the flexibility to use the prevailing precedents when determining if necessity exists, the bill empowers the courts to obtain necessary testimony, protect the rights of the accused and ensure that the most current legal standards are met.

Additionally, there is a drafting error in section 2 of the bill, page 2, lines 11-20. The bill proposes to add a new HRE "rule" as a new section of chapter 626, Hawaii Revised Statutes, which is contrary to the existing structure of the HRE in chapter 626,

HRS. See Hawaii Legislative Drafting Manual, Tenth Edition, page 73. The recommended prefatory wording for such an addition would be:

SECTION 2. Section 626-1, Hawaii Revised Statutes, is amended by adding to article VI of the Hawaii Rules of Evidence a new rule to be appropriately designated and to read as follows:

"Rule _____ Witness; live two-way video testimony; criminal proceedings. Upon a finding of necessity . . . "

Thank you for the opportunity to provide comments on the bill.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

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

February 17, 2022

S.B. No. 2687: RELATING TO CRIMINAL PROCEDURE

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

The Office of the Public Defender respectfully opposes S.B. No. 2687, which would allow the testimony of witnesses to be taken through a live two-way video connection in certain circumstances.

Confrontation Clause

The measure would violate an accused’s right to confrontation of witnesses against him or her under article I, § 14 of the Hawai‘i Constitution. The Confrontation Clauses guarantee the accused “the right physically to face those who testify against him [or her.]” State v. Apilando, 79 Hawai‘i 128, 131, 900 P.2d 135, 138 (1995) (quoting Coy v. Iowa, 487 U.S. 1012 (1988)).

The accused’s presence with the witness when testimony is taken is critical because physical face-to-face confrontation is the “core” value of the Confrontation Clause. *See Coy v. Iowa*, 487 U.S. 1012 (1988). The proponent of this measure is under the impression that two-way video conferencing, where the witness can see the defendant and vice-versa, is the same as face-to-face confrontation. On the contrary,

The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, *the two are not constitutionally equivalent*. . . . The Sixth Amendment’s guarantee of the right to confront one’s accuser is most certainly compromised when the confrontation occurs through an electronic medium.

United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006) (*en banc*).

We do acknowledge that the U.S. Supreme Court, in Maryland v. Craig, 497 U.S. 836 (1990), by a 5-4 decision, held that the federal right to confront accusatory witnesses may be satisfied absent a face-to-face where denial of such confrontation is necessary. However, the Hawai‘i Supreme Court has repeatedly held that it may afford the people of the State of Hawai‘i more protection than by the federal constitution “when the United States Supreme Court’s interpretation of a provision present in both the United States and Hawai‘i Constitutions does not adequately preserve the rights and interests sought to be

prohibited.” State v. Bowe, 77 Hawai‘i 51, 57, 881 P.2d 538, 544 (1994) (quoting State v. Lessary, 75 Haw. 446, 453, 865 P.2d 150, 154 (1994) (citations omitted)). We submit that this Legislature should reject the Craig majority, as its reasoning does not adequately preserve the right to confrontation guaranteed under article I, § 14 of the Hawai‘i Constitution. See Bowe, 77 Hawai‘i at 57, 881 P.2d at 544.

Moreover, the Craig dissent written by Justice Scalia succinctly pointed out, “For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it.” 497 U.S. at 870. Justice Scalia’s reasoning is persuasive:

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The purpose of enshrining this protection in the Constitution was *to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court.* . . .

497 U.S. at 861 (emphasis added). We caution that a dilution of the right to confrontation would be detrimental to the fundamental principles of due process and the right to a fair trial.

Witnesses must be physically present before the jury

The government witness not only must be physically present before the accused but also *must be physically present before the jury when testifying*. Cross-examination is “the principal means by which the believability of a witness and the truth of his testimony are tested.” Davis v. Alaska, 415 U.S. 308, 316 (1974). There is little point in cross-examining a witness without a jury to observe it:

The primary object of the constitutional provision . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, *but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*

Mattox v. United States, 156 U.S. 237, 242-243 (1895) (emphasis added). Confrontation encompasses the right “to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.” Davis v. Alaska, 415 U.S. at 318.

Indeed, federal courts indicate that “exposing the facts” to the jury cannot be done by video conferencing:

The *virtual “confrontations” offered by closed-circuit television systems fall short of the face-to-face standard* because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. . . . Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person -- something is lost in translation. Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as the unmediated gaze across the courtroom. We are not alone in noting that something may be lost when a two-way closed-circuit television is employed.

United States v. Bordeaux, 400 F.3d 548, 554-555 (8th Cir. 2005) (emphasis added).

The fact-finder in a criminal proceeding is the exclusive judge of the credibility of the witnesses. To accomplish this, juries are routinely instructed that they must observe the witness’s manner of testifying, the witness’s appearance and demeanor, the witness’s manner of testifying, the witness’s candor or frankness, or lack thereof, and the witness’s temper, feeling, or bias. See [Hawai‘i Jury Instruction - Criminal Instruction No. 3.06](#). This duty would be severely impeded by testimony delivered outside the physical presence of the fact-finder.

Suggested Safeguard: Attorney Present with Witness

Finally, even though H.B. No. 1580 provides for the right of the defendant to have his attorney present with the witness delivering the video testimony, this is not sufficient to protect the right to confrontation. This protection is not only impractical, but it also does not safeguard the defendant’s right to confrontation. Moreover, it infringes upon the defendant’s right to effective assistance of counsel.

Constitutionally speaking, the defendant has the right to physically confront a witness against him/her, not simply to have his/her attorney confront the witness. Moreover, a criminal defendant’s constitutional right to counsel includes the defendant’s right to confer with counsel. State v. Mundon, 121 Hawai‘i 339, 367, 219 P.3d 1126, 1154 (2009); De la Garza v. State, 129 Hawai‘i 429, 302 P.3d 697 (2013). If the attorney is physically present at the location of the witness, the defendant’s ability to confer with counsel will severely be compromised. Unlike the usual defendant whose attorney is seated next to him/her, the defendant whose attorney is at another location cannot turn to his/her attorney for private legal advice, to assist in his/her own defense (e.g., to immediately to inform the attorney of a witness’s inconsistency or mistake), to clear up misunderstandings, or to seek reassurance. Thus, the defendant’s constitutional right to counsel requires the attorney must be physically present with the defendant; the attorney cannot be with the witness.

Practically speaking, most defendants would not have the financial means to pay for the attorney to travel to the location of the witness to conduct the examination. It is questionable whether any trial court in the state would approve alternative testimony under this measure even if it is enacted into law because (1) the trial will be delayed accommodating travel during trial; and (2) any conviction where such a procedure is employed will immediately come under constitutional attack.

Conclusion

While it is undeniable that virtual testimony is convenient, efficient, and cost effective for the prosecution, and even though it advances the compelling public policies of preventing the spread of a dangerous virus like COVID-19, the Hawai‘i Constitution demands live testimony. Confrontation “may not be disregarded at our convenience and the predictions of dire consequences . . . are dubious.” Bullcoming v. New Mexico, 564 U.S. 647, 655 (2011).

The need for the accused, the government witness, and jurors to be in the courtroom is concomitant to the accused’s right guaranteed by both the Confrontation Clause and the right to effective assistance of counsel. The witness and the jurors must be physically present in the courtroom for all to see and be seen by the accused and for the jurors to observe the confrontation of government witnesses. Anything less would render the accused’s Confrontation and Due Process rights meaningless.

Thank you for the opportunity to comment on this measure.



The Judiciary, State of Hawai`i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

February 17, 2022 at 9:30 a.m.

Via Videoconference

WRITTEN TESTIMONY ONLY

By

Catherine H. Remigio, Chair

Hawai`i Supreme Court Standing Committee

on the Hawai`i Rules of Evidence

Bill No. and Title: Senate Bill No. 2687 - Relating to Criminal Procedure

Purpose: Provides circumstances under which testimony of a witness in a criminal proceeding may be taken under oath through a live two-way video connection to be viewed by the court, the defendant, and the trier of fact pursuant to the Hawai`i Rules of Evidence. Allows the attorneys for the defendant and the State to be physically present with the witness via live two-way video, and to conduct direct and cross examination of the witness.

Judiciary's Position:

The Hawai`i Supreme Court's Standing Committee on Rules of Evidence respectfully opposes Senate Bill No. 2687 ("SB2687") to the extent that it violates the right to confrontation guaranteed by article 1, section 14 of the Hawai`i Constitution and the Sixth Amendment to the United States Constitution.

The confrontation clause of the Hawai`i Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against the accused[.]" Haw. Const. art I, section 14. The confrontation clause of the Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, is virtually identical. Under the Clause, criminal defendants have the "right to physically face those who testify against him [or her] and the right to conduct cross-examination." Coy v. Iowa, 487 U.S. 1012, 1017, 108 S. Ct. 2798, 2801, 101 L. Ed.



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2d 87 (1988) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct 989, 998, 94 L. Ed. 2d 40 (1987)).

The Clause's requirement of face to face testimony has been deemed essential to fairness because it requires the witness to look at the person who will be harmed greatly if the witness distorts or mistakes the facts. Coy, 487 U.S. at 1020, 108 S. Ct. at 2802. The Clause also confers "a right to meet face to face all those who appear and give evidence at trial." Coy, 487 U.S. at 1016, 108 S. Ct. at 2800; State v. Apilando, 79 Hawai'i 128, 131, 900 P.2d 135, 138 (1995). The Clause "affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses." State v. Ortiz, 74 Haw. 343, 360, 845 P.2d 547, 555 (1993).

As such, the occasions under which face to face confrontation may be dispensed with are the exception rather than the rule. The U.S. Supreme Court in Maryland v. Craig, adopted a two-prong test to determine when "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial: 1) where it is necessary to further an important public policy and 2) where the reliability of the testimony is otherwise assured. Maryland v. Craig, 110 S. Ct. 3157, 3166, 497 U.S. 836, 850 (1990). Under the "important public policy" prong, the court must make a case specific, individualized determination of necessity. The second "reliability" prong is measured by the combined effect of the following elements: physical presence, oath, cross examination, and observation of demeanor by the trier of fact. Maryland, 497 U.S. at 851, 3166.

SB2687 falls far short of the Maryland two-pronged test. It does not define "necessity" and two (2) essential elements of the reliability prong are missing: physical presence and observation of demeanor by the trier of fact. SB2687 therefore provides less protection under a defendant's constitutional right to confrontation than federal courts provide. This is contrary to the Hawai'i Supreme Court's consistent holding that in interpreting our own constitution, Hawai'i courts "may not convey less protection than the federal standard." State v. Fields, 115 Hawai'i. 503, 517, 168 P.3d 955, 969 (2007).

SB2687 also does not define the type of "criminal proceeding" (trials, substantive motions, preliminary hearings, bail hearings) that is affected.

For the above reasons, the Committee respectfully opposes Senate Bill No. 2687. Thank you for the opportunity to comment on this measure.