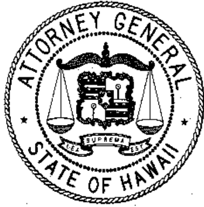

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023

ON THE FOLLOWING MEASURE:
H.B. NO. 863, RELATING TO INITIATION OF PROSECUTION.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 7, 2023 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Amy Murakami, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General (Department) offers the following comments and proposed amendments.

This bill provides that a subsequent attempt to prosecute a felony using an alternative charging method, after the first attempt has failed, shall not be permitted unless certain conditions are met. This bill amends section 801-1, Hawaii Revised Statutes (HRS), to codify Justice Nakayama's dissent in *State v. Obrero*, 151 Hawaii 472, 517 P.3d 755 (2022), by prohibiting the prosecution from attempting to re-initiate criminal felony charges using a different charging method or seeking a different judge or grand jury panel, unless there is new evidence or the prosecution is pursuing lesser charges. The bill's amendments to section 801-1(a) would not permit cases to be initiated by complaint or felony criminal charges to be initiated by complaint filed after preliminary hearing.

The Department respectfully requests that Senate Bill No. 36, which permit cases to be initiated by complaint or felony criminal charges to be initiated by complaint filed after preliminary hearing, be the bill to address the issues in the *Obrero* case. And while the Department has concerns regarding limiting prosecutors' discretion to seek felony charges after a failed attempt as proposed in S.B. 36 (page 4, lines 3-17) and this bill (page 2, line 8, through page 3, line 4), the Department recognizes that such limitation has greater impact on the County Prosecutors and defers to the County

Prosecutors' position on this issue. The County Prosecutors have expressed their support of S.B. 36. S.B. 36 crossed to the House and passed first reading in the House.

If the Committee wishes to pass this bill, the Department recommends amending the bill to permit cases to be initiated by complaint and for felony cases to be initiated by complaint following a preliminary hearing by amending subsection (a) on page 2, line 3 as follows:

> (a) No person shall be subject to be tried and sentenced to be punished in any court, for an alleged offense, unless upon indictment, complaint, or information, except for offenses within the jurisdiction of a district court or in summary proceedings for contempt. For any felony offense to be tried and sentenced upon complaint, a finding of probable cause after a preliminary hearing, or a waiver of the probable cause determination at the preliminary hearing, shall be required.

The process of initiating felony charges via complaint filed after preliminary hearing benefits the administration of justice, the prosecution, the defendant, the witnesses, and the victims. By having three methods to initiate criminal cases (i.e., grand jury indictments, felony information, and complaint), the burden on grand jury panels would be lessened because certain offenses cannot be initiated by felony information. And preliminary hearings are a reasonable and appropriate way of initiating charges for defendants who need to be arrested and held in custody pending charging.

Currently, without the ability to charge defendants via preliminary hearing, the prosecution must present the case for charging twice and require the witnesses and victims to testify in two separate proceedings. If a defendant is held in custody pending a grand jury indictment, the defendant must be taken before a judge who will hold a preliminary hearing with witnesses just to continue holding the defendant in custody pending grand jury indictment. If the judge finds probable cause to support the felony charges, the judge will normally order that the defendant continue to be held in custody pending the outcome of the grand jury proceedings, which will require the witnesses to testify again. If preliminary hearings can be used to initiate felony criminal cases, the

witnesses will only have to testify once, and the defendants' cases will start sooner, giving the defendants the opportunity to go to trial faster or seek other dispositions of their cases.

Additionally, the Department believes that the amendment to permit cases to be initiated by complaint in the circuit court would be equally beneficial for our justice system. In addition to the felony complaints filed following a probable cause finding after a preliminary hearing, misdemeanor offenses such as Unauthorized Practice of Law, section 605-14, HRS, are required by statute to be initiated in circuit court. These misdemeanor charges are not charges that are constitutionally required to be brought before a grand jury or meet the criteria for initiation by felony information.

The Department appreciates the opportunity to provide comments.

STATE OF HAWAIʻI
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender, State of Hawaiʻi to the Senate Committee on Judiciary and Hawaiian Affairs

February 7, 2023

H.B. No. 863: RELATING TO THE INITIATION OF FELONY PROSECUTIONS

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender ("OPD") supports H.B. No. 863, which specifies that a subsequent attempt to prosecute a felony using an alternative charging method, after the first attempt has failed, shall not be permitted unless certain conditions are met.

Repeated attempts at initiating prosecution of the same felony offense by presenting the same evidence to both a grand jury and judge, or returning to the same forum, is not contemplated by the Hawaiʻi Constitution. Whether by presenting the allegations to a different grand jury panel after a previous grand jury panel did not find sufficient evidence for an indictment, or by using both the grand jury and preliminary hearing processes after the first forum rejected the evidence, the prosecution is precluded from having multiple opportunities to present the same evidence in hopes of achieving a different outcome.

The proposed provision set forth in SECTION 2 (b)(1) [page 2, lines 8-20] is consistent with the concurring and dissenting opinion by the Associate Justice Paula Nakayama in State v. Obrero, 151 Hawaiʻi 472, 517 P.3d 755 (2022).

The requirement for "new evidence" or for "additional material evidence" does two very important things. First, this requires the prosecution to ensure that they have all necessary evidence and witnesses before charging someone with a crime and proceeding to a grand jury or preliminary hearing. In other words, the prosecutions should not move forward unless and until they are certain that they can establish probable cause. And if there is no finding of probable cause, then the prosecution should be precluded from moving forward unless they can establish to the court that additional material evidence will be presented which was not known at the time of the first presentation of evidence.

Second, the "new evidence" requirement precludes the prosecution from holding back on evidence and requires them to present everything they know. In other words, this will preclude them from sand bagging if they think a certain judge or grand jury panel, from past experience, might not be open to their arguments.

Proposed notice requirement

The OPD suggests the bill include language, which mandates that the prosecutor inform the defendant of prior attempts to seek a true bill or a finding of probable cause on the same matter:

> (c) If initiation of a felony prosecution was sought via an indictment by a grand jury or a finding of probable cause after a preliminary hearing, and is denied, and a subsequent initiation of a felony prosecution via an indictment by a grand jury of a finding of probable cause after a preliminary hearing was successful, the prosecutor is required to inform the defendant of any prior attempt to seek a true bill or a finding of probable cause on the same matter.

Due process requires that the accused be informed of any prior attempt to initiate prosecution of the same felony offense so that the accused may be able to challenge any assertion that a subsequent initiation of a felony prosecution meets the requirements set forth in this bill.

Counterarguments to possible requests to amend the bill

The OPD anticipates that this Committee will receive testimony requesting to amend the bill to include a "good cause" exception and a "grand jury/grand jury counsel misconduct" exception. Justice Nakayama in her concurring and dissenting opinion in State v. Obrero did not suggest or intimate a "good cause" or a "grand jury/grand jury counsel misconduct" exception.

a. Good Cause Exception

The OPD opposes any "good cause" exception. First, concurrence in State v. Obrero clearly provides, "[T]he State may return to the grand jury to seek an indictment of Obrero, but prosecutors ***must present new evidence*** that was not presented to the prior panel that had not returned a true bill to obtain a constitutionally valid indictment." (Emphasis added). Codifying an alternative method to present the same evidence to a different grand jury (presuming that the alleged "good cause" is other than new evidence) will certainly invite additional constitutional challenges; criminal defense attorneys will appeal any case in which

the prosecutor was able to present a case a second time to a grand jury (or a district/family court judge) based on a finding of good cause.

Second, a procedural problem is created when a prosecutor, after a true bill is refused by a grand jury, files an application to the court to seek another attempt to present evidence to another grand jury based on good cause. It should be noted that neither the accused nor defense counsel are allowed to be present at grand jury proceedings. ***Indeed, the accused is not even aware that an indictment is being sought***; the accused becomes aware only when an arrest warrant is issued. Furthermore, in the vast majority of cases, the accused does not have counsel. Therefore, if a true bill is refused and the prosecution files an *ex parte* motion to seek a second opportunity to appear before a grand jury or hold a preliminary hearing, ***there will be no party in opposition to argue*** whether good cause exists. Only the prosecution will be allowed to present its argument to the judge.

When only one party (here, the prosecution) is allowed to present argument on an issue (here, whether good cause exists), our adversarial system is severely undermined. The adversarial system is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question.'" State v. Fields, 115 Hawai'i 503, 529, 168 P.3d 955, 981 (2007) (quoting Penson v. Ohio, 488 U.S. 75, 84, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988)). Therefore, in order to prevent the deterioration of our justice system, the prosecution should not be allowed to appear before a judge without opposition and argue on the issue of whether good cause has been established to submit a subsequent presentation to a grand jury or to a district court judge.

Third, the standard of "good cause" is simply too broad. What is good cause? The "good cause" standard will raise more questions and more litigation and provide no guidance for a court examining an *ex parte* application to present the same evidence (again, presuming that the alleged "good cause" is something other than new evidence). What is a "substantial reason" affording a "legal excuse" in this context? Is it the same thing as "unanticipated circumstances?" What would be an unanticipated circumstance in this situation? What is a "substantial reason affording a legal excuse" in this context? Will a judge be able to find good cause simply based on the seriousness of the charges? Will good cause include the prosecutor's failure to present material evidence, which the prosecutor was in possession of (or was aware of), to the grand jury or to a judge at a preliminary hearing?

A grand jury is free to return a no bill for any reason just as a petit jury is free to acquit. Should this provision be included in this bill over our objections, this standard will certainly be litigated in the appellate courts.

If State v. Obrero stands for anything, it stands for the integrity of the charging process, and for there to be more than a rubber stamp in the finding of probable cause. It has been speculated that the Obrero grand jury heard evidence that they believed that the defendant acted in self-defense, and so chose not to return a true bill. This is exactly how a grand jury of community members, standing between the government and a fellow citizen, should have acted. Thus, the grand jury system worked in this case. However, it is clear to see the breakdown in that system, when the "same" evidence was presented to a single member of the judiciary and probable cause was found. Therefore, if the legislature's intent is to maintain the integrity of the system, then making it easier for the prosecution to forum shop or to hide behind a vague term like "good cause" is not the answer.

b. Grand Jury and/or Grand Jury Counsel Misconduct

The OPD would further oppose any attempt to amend the bill to include an exception for a subsequent finding of grand jury misconduct or grand jury counsel misconduct.

Allowing representation of the same evidence after a "finding" of grand jury misconduct turns the entire premise of juror misconduct on its head. If the jury returns a no bill, then no prosecution has been initiated based on the evidence presented. The analogous situation is the finding of not guilty by a petit jury. If the prosecutor found juror misconduct, Double Jeopardy prevents the State from bringing a new trial.

We realize that Double Jeopardy does not apply at the grand jury phase, but Due Process does, and that is the basis for the defendant to raise grand juror misconduct. The State is not entitled to this kind of recourse. In fact, the Grand Jury is free to decline charges for any reason and for reasons that are confidential and secret. This exception would allow ***the prosecutors, in the name of investigating misconduct, to pry into the deliberation phase and have courts second-guess the finding of no bill***; all without constitutional authority.

Juror misconduct is an issue that can only be brought by the defense after a finding of a true bill or a guilty verdict because when the defendant raises misconduct, it is a violation of the defendant's constitutional rights. The State is not entitled to this recourse. While the court must concern itself with the defendant's constitutionally

protected rights, the State has no such recourse and the system is, and will remain, asymmetrical.

There is also a practical problem. A "finding" of juror misconduct implies that it is made by the court. (Certainly, the prosecutor cannot determine misconduct on its own). Thus, the prosecution will need to file an *ex parte* motion to determine juror misconduct, and a hearing will be held with only the prosecutor present. If witnesses are called to testify at the hearing, the accused will not be able to conduct cross-examination or present witnesses/evidence. The accused is not even a defendant at this point. When will the accused be informed about these proceedings? There are no rules for any of these proceedings to determine misconduct. It could incentivize prosecutors to investigate and even harass grand jurors who do not return a true bill.

Furthermore, we are faced with the same procedural problem as in the "good cause" exception. When a prosecutor files a motion for a second attempt to initiate a felony prosecution based on alleged juror misconduct or grand jury counsel misconduct, the accused is not only not present at the judicial hearing to determine whether misconduct occurred (since the accused is not even made aware that grand jury proceedings were ever initiated), but also, the accused is not entitled to be represented by counsel. Again, the prosecutor alone will be arguing before a judge. The adversarial system of justice will be undermined when only one party (here, the prosecution) is allowed to present argument on the issue of whether misconduct occurred. Therefore, the prosecution should not be allowed to appear before a judge and argue without opposition on the issue of whether misconduct had occurred to establish to submit a subsequent presentation to a grand jury or to a district court judge.

Thank you for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515

STEVEN S. ALM
PROSECUTING ATTORNEY

THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Second State Legislature
Regular Session of 2023
State of Hawai`i

February 7, 2023

RE: H.B. 863; RELATING TO INITIATION OF PROSECUTION.

Chair Tarnas, Vice-Chair Takayama and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney, City and County of Honolulu ("Department"), submits the following testimony in **opposition** to H.B. 863.

While the Department greatly appreciates the Committee's intent to address the Hawaii Supreme Court's decision in *State v. Obrero*[1]—and agrees that legislative amendments are needed at once, to return Hawai'i's felony charging procedures to a manageable process (which had already been established over the past 40 years)—H.B. 863 does not present a comprehensive solution to the problem. After extensive discussion with the other county Prosecuting Attorneys, and the introducer of H.B. 863, it is our understanding that all are in agreement that **S.B. 36** presents a complete solution that (although it is not the Prosecutors' most preferred solution, nor is it the Public Defender's most preferred solution) was carefully crafted to address all of the issues that the introducer of H.B. 863 intended to address, in a manner that leaves everyone in better circumstances than they would be otherwise.

As a result of the majority opinion in *Obrero*, hundreds of felony charges statewide—in which preliminary hearing judges had already found probable cause on which to proceed with the case—instantly became technically insufficient, as of September 8, 2022. That landslide of cases, combined with a grand jury schedule unprepared to hear all of these cases, and great uncertainty regarding the constitutionality of continuing to hold over a hundred of these individuals in jail without legally sufficient charges, created dire confusion and turmoil for prosecutors, defense

[1] *State v. Obrero*, 517 P.3d 755 (September 8, 2022). Majority opinion available online at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576.pdf; concurring opinion at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576condop.pdf; dissenting opinion at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576dis.pdf. Last accessed January 26, 2023.

attorneys, defendants, victims, judges, police, sheriffs, and indeed everyone in our criminal justice system who is involved with these felony cases.

Even today, the Department continues to deal with a significant backlog of "pre-Obrero" cases that have yet to go before a grand jury for charging, while we balance the simultaneous need to send new incoming felony cases to grand jury as well. Without preliminary hearings as a valid charging method, **many victims and other witnesses have been forced to testify twice within a matter of weeks, sometimes very soon after a traumatic event**; prosecutors and staff have had to duplicate efforts by presenting the same case twice, before different bodies; and courts have had to provide double the courtroom time and staffing to hear those cases twice. The extreme inefficiency of this system continues to affect each county negatively, in different ways, and indeed points back to the very reasons why our Hawaii State Constitution, and all-but-one (we believe, overlooked) statute was amended back in the 1980's, to allow for charging via preliminary hearings.

Given this urgent need to rectify the current situation in our courts and in our laws, the Department would **respectfully urge this Committee to hear S.B. 36**—which we believe has already crossed over from the Senate, un-amended—if the Committee wishes to completely address all of the issues raised by all of the opinions from *State v. Obrero*. In addition to amending subsection-(a) of HRS §801-1 (which addresses the main holding in *Obrero*), S.B. 36 goes on to create a new subsection-(b) (*see* S.B. 36, p. 4, lns. 3-17) that would limit prosecutors' discretion on when they could seek felony charges via grand jury or preliminary hearing, if a prior grand jury or preliminary hearing judge returns a finding of no probable cause. S.B. 36's approach to this second issue is somewhat similar to that found in H.B. 863, but is significantly different in its specific language and provisions.

The Department would like to emphasize that this second issue was never raised in the majority opinion nor dissenting opinion, and thus appears to be a "non-issue" for the majority of Hawaii's Supreme Court justices; they simply do not believe that the current procedures on this matter are unconstitutional. That said, there have been times—though very rare—when each county prosecutor has had to do this, but the procedure is used sparingly, judiciously, and only in the most serious cases that almost invariably involve gravely impacted victims (or surviving family members). Sometimes this effort by prosecutors does lead to felony charges—as has been seen in recent years—and that can and sometimes does result in conviction *beyond a reasonable doubt* (as determined by a 12-member jury, after considering *all* admissible evidence and arguments presented by *both* the state and defense). Due to some of the particular procedures that govern the way grand jury and preliminary hearings are conducted, as well as the *preliminary nature* of these proceedings, it is certainly possible for a single grand jury or judge—that has not heard any or all of the legal arguments, has not heard any or all of the expert testimony, and most likely has not heard from all potential witnesses—to "get it wrong." The Department acknowledges that sometimes this effort by prosecutors leads to a second finding of no probable cause, but that only strengthens our belief that the existing procedure works.

Be that as it may, the Department does understand that it is within the Legislature's purview to create new laws, and maintains that the specific language in S.B. 36 at least appears to be well-reasoned and narrow enough to prevent abuse, while also being broad enough to account for the infinite and unimaginable situations that could arise in the future.

For all of the foregoing reasons, **the Department respectfully requests that H.B. 863 be deferred, and that the Committee hear and consider S.B. 36 as soon as possible**. Thank you for the opportunity to testify on this matter.

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

KELDEN B.A. WALTJEN
PROSECUTING ATTORNEY

STEPHEN L. FRYE
FIRST DEPUTY
PROSECUTING ATTORNEY

655 KILAUEA AVENUE
HILO, HAWAIʻI 96720
PH: (808) 961-0466
FAX: (808) 961-8908

74-675 KEALAKEHE PARKWAY
KAILUA-KONA, HAWAIʻI 96740
PH: (808) 322-2552
FAX: (808) 322-6584

64-1067 MAMALAHOA HIGHWAY, C-3
KAMUELA, HAWAIʻI 96743
PH: (808) 887-3017
FAX: (808) 887-3016

OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION OF HOUSE BILL 863

A BILL FOR AN ACT RELATING
TO INITIATION OF PROSECUTION

COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Representative David Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 7, 2023 at 2:00 p.m.
Via Videoconference
State Capitol Conference Room 325
415 South Beretania Street

Honorable Chair Tarnas, Vice-Chair Takayama, and Members of the Committee on Judiciary and Hawaiian Affairs. The County of Hawaiʻi, Office of the Prosecuting Attorney submits the following testimony in opposition of House Bill No. 863.

On September 8, 2022, the Hawaiʻi Supreme Court released its opinion in *State v. Obrero*, which determined that Hawaii Revised Statutes § 801-1 precludes prosecutors from initiating felony prosecutions via complaint and preliminary hearing. This decision contradicts established criminal law procedures which have been in place in Hawaiʻi for the past forty years and impacts the most serious offenses including murder, kidnapping, robbery, domestic violence, drug trafficking, and sexual assault. The Court also raised concerns regarding the initiation of a subsequent felony prosecution by alternative means following the denial of a probable cause finding.

Since the *Obrero* decision, the four county prosecutors have worked together, proposed several different legislative solutions, and even requested a special legislative session in 2022 to repeal or amend § 801-1 given the urgency of this matter. We have also worked collaboratively with the Judiciary in order to secure more opportunities for grand jury sessions per month across the State.

The County of Hawaiʻi, Office of the Prosecuting Attorney appreciates the Committee's thoughtfulness to timely address the *Obrero* decision; however, we believe that the four county prosecutors and the introducer of House Bill No. 863 are all in agreement that Senate Bill No. 36 addresses concerns raised by the law enforcement community and also affords additional protections to the criminally accused.

Senate Bill No. 36 is consistent with the intent of the Hawaiʻi Constitution, restores criminal procedure practices that have been in place for the last 40 years, supports and protects

victims and witnesses of crime, affords the criminally accused an opportunity to participate in the initiation of felony criminal proceedings, and provides law enforcement with the resources necessary to ensure public safety.

The County of Hawaiʻi, Office of the Prosecuting Attorney remains committed to pursuing justice with integrity and commitment. For the foregoing reasons, the County of Hawaiʻi, Office of the Prosecuting Attorney respectfully requests that House Bill No. 863 be deferred, and that the Committee hear and consider Senate Bill No. 36 as soon as possible. Thank you for the opportunity to testify on this matter.