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LATE TESTIMONY

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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai'i

February 23, 2016

RE: S.B. 2964; RELATING TO THE ADMINISTRATION OF JUSTICE.

Chair Keith-Agaran, Vice Chair Shimabukuro, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support, with amendments, of S.B. 2964.

Thank you for the opportunity to participate as members of the Penal Code Review Committee. Each member committed an extraordinary amount of time and effort in construction of this bill and our Department would like to commend all the members for their dedication to this important area of law.

Areas for Amendments:

Section 37-41 (pg. 72-77), would increase the dollar amount thresholds for multiple types of theft. Such drastic increases will negatively impact local retailers—including many small business owners—as they will be increasingly victimized by repeat or 'professional' offenders, who are clearly aware of these threshold values. While proponents of these changes have opined that "Habitual property crime" (HRS §708-803) could be used to address such repeat offenders, Habitual property crime does not pertain to petty misdemeanor offenses. As such, the proposed changes on page 74, lines 9 and 17, would more than double the amount that can be stolen from a particular victim—from \$100 to \$250—without ever meeting the criteria for Habitual property crime, no matter how many people or establishments they victimize in this way, or how often.

Also, the significance of the felony theft threshold must not be underestimated, as the average citizen who works for minimum wage in Hawaii must work nearly 40 hours to earn \$300, and would have to work nearly 100 hours to earn \$750. Ultimately, these increases would lead to greater harms to our legitimate, law abiding citizens, and hinder law enforcement in their efforts to protect not just business owners, but also tourists and members of our communities.

Section 52-56 (pg. 93-100) would remove the current sentencing requirements for methamphetamine offenses. Since the introduction of methamphetamine to Hawaii, this drug has torn apart countless families and left entire neighborhoods in disrepair. Today, methamphetamine continues to have the same destructive force that it did when these laws were initially passed, unlike any other drug in Hawaii, and there is no compelling reason to remove the specialized sentencing requirements that were designed to address this epidemic.

Section 20 (pg. 35-45) would remove § 712-1243 H.R.S., Promoting a dangerous drug in the third degree (“PDD3”), from the repeat offender mandatory minimum imprisonment statute. For those with substance abuse issues, our Penal Code already provides numerous opportunities for diversion, treatment, deferral and/or expungement, which are typically utilized long before offenders reach the level of qualifying for these particular sentencing provisions. If substance abuse and other criminal activity continue to be a problem, retaining PDD3 in this statute precludes offenders from committing further serious crimes, ensures greater public safety, and makes it much more likely that such offenders will receive necessary treatment.

Section 44 (pg. 79-84) attempts to clarify when the offense of Abuse of family or household member (HRS §709-906) occurs “in the presence of a minor.” Although our Department supports this intent, we believe a more effective method would be to amend HRS §709-906 to add the definition of “in the presence” that is currently found in HRS §706-606.4, or perhaps add a reference thereto. Currently, our courts are forced to reach across chapters to utilize this section, which is a sentencing statute. Thus, we believe that creating a new definition for the term, “in the presence”—by adding the phrase “audio and visual”—would likely increase confusion with the definition in HRS §706-606.4, which would only complicate things further.

Sections 31-34 (pg. 61-66) would add a marriage exception to the offense of Sexual assault in the fourth degree. Unwanted sexual contact by any individual should not be acceptable under any circumstances, even if the individuals are still legally married. The proposed exception would essentially allow non-consenting spouses to be victimized by unwanted sexual contact, where no such exception exists for unwanted sexual contact between romantic partners who are unmarried, or other acquaintances or strangers.

Section 42 (pg. 77-78) would repeal HRS §708-893(a), which addresses the “cybercrime” version of theft. This statute was originally enacted in 2001, and subsection (a) added in 2006, with the unanimous approval of the Legislature, in recognition of the devastation that these types of crimes have on victims. Since 2006, the Legislature has taken additional steps to strengthen Hawaii’s computer crime laws, to reflect the seriousness of cybercrime occurring throughout Hawaii. By repealing this section, it would severely weaken Hawaii’s computer crime laws and eliminate one of the most important statutes needed to address the problem of computer crimes.

Section 10 (pg. 25-26) seeks to make an amendment that would allow the court the option of temporarily hospitalizing a defendant rather than revoking the defendant’s conditional release. Although this mechanism would generally provide more judicial efficiency, our Department urges this committee not to cap the maximum length of hospitalization at one (1) year, and instead allow courts to determine what is needed on a case-by-case basis.

Section 61 (pg. 104-105) attempts to clarify and ensure that restitution is deducted from an inmate’s account at a rate of 25%, pursuant to HRS §353-22.6. Although the proposed language on page 104, line 19 (“Notwithstanding any law to the contrary”), does provide some

clarification, we would urge this committee to consider amending this to read, “Notwithstanding any law or order to the contrary,” to ensure completeness.

Section 65 (pg. 112-123) attempts to simplify HRS §806-83 by making non-substantive formatting changes to list which offenses that can be charged by written information. However, as indicated on page 71 of the Penal Code Review Committee’s report to the Legislature (submitted December 30, 2015), the Committee initially approved simplifying HRS §806-83 further, by establishing a list of offenses that could not be charged by information. We strongly believe that those initial changes approved by the Committee are needed, as the current list of charges in HRS §806-83 is exorbitantly long and unruly, and also incomplete, as most offenses that existed before HRS §806-83 (established in 2004) were never added to the list, and even many offenses created or amended since 2004 appear to have been left out by mere oversight. As such, our preferred revisions to HRS §806-83 would complete the changes initially approved by the Committee, using language from S.B. 2423 or S.B. 2109. As the Legislative Reference Bureau noted that such an amendment may be time consuming or complex, we have taken the liberty of extrapolating every class B and class C felony not currently listed in HRS §806-83, which is available for line-by-line review and comparison. The proposed amendments in S.B. 2423 and S.B. 2109 would not only complete the Committee’s goal of simplifying HRS §806-83, but would also minimize oversights and allow for flexibility to add future offenses as needed.

Areas of Support:

Section 32 (pg. 62) amends the definition of “sexual contact” for purposes of sexual assault charges, to remove the existing exception for perpetrators who are legally married to the victim. As noted, unwanted sexual contact by any individual should not be acceptable under any circumstances, whether married or not, and no such exception exists for unwanted sexual contact between romantic partners who are unmarried, or other acquaintances or strangers.

Section 59 (pg. 103) would clarify the definition of the term “alcohol”. The current definition includes a list of five (5) different forms or molecular compounds which relate to alcohol. However, the list currently contains items that are poisonous when ingested or are easily covered under the more familiar term proposed, ethanol. This proposal does not change the current definition of “Alcohol” but merely clarifies and simplifies the current definition.

Section 51 (pg. 93) would remove any ambiguity between HRS §712-1200(1)(a) and (1)(b), and ensure conformance with the legislative intent articulated by the Legislature, in its 1990 and 2012 amendments. The proposed changes would ensure that “prostitutes” charged under HRS § 712-1200(1)(a) and “johns” charged under HRS §712-1200(1)(b) would be legally distinguishable, and further ensure that the Legislature’s intent—to exclude anyone convicted of HRS §712-1200(1)(b) from deferral of plea and sentencing, under HRS §853-4—is upheld.

Section 68 (pg. 128-132) would add the phrase, “or no contest plea,” to subsection (11) and (12) of the deferral provisions. Although our Department does not believe that there exists a loophole in which a defendant may receive a deferral on two separate occasions, this change may help to clarify the intent that a defendant can only receive a deferral on one occasion, whether that be a deferral of a plea of guilty or deferral of a plea of no contest.

For these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports S.B. 2964 with amendments. Thank you for the opportunity to testify on this.

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LATE TESTIMONY

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**TESTIMONY IN SUPPORT (WITH AMENDMENTS) OF
SB 2964 – RELATING TO THE ADMINISTRATION OF JUSTICE**

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Judiciary & Labor
February 23, 2016, 9:00 a.m., Conference Room 016

Chair Keith-Agaran, Vice-Chair Shimabukuro, and Members of the Committee:

The County of Kaua'i, Office of the Prosecuting Attorney, offers the following testimony in support, with amendments, of SB 2964 – Relating to the Administration of Justice.

We were proud to participate as a member of the Penal Code Review Committee and its efforts resulting in the current proposed Bill. We applaud the efforts of all the participants and of Judge Steven Alm in working hard to achieve consensus in many critical areas. In most areas of discussion, consensus was achieved and necessary and desirable recommendations were arrived at. However, there were two areas of concern to our Office and to the other law enforcement agencies participating in the process that we wish to highlight in our testimony.

First, our Office opposes the provisions of Sections 37 and 38 that increase the dollar amount thresholds for Theft in the Second and Third Degrees. Theft from residents, visitors, and businesses remains a major law enforcement concern in our community and easing the offense thresholds would only exacerbate the situation and hinder law enforcement's ability to address the problem.

Second, our Office opposes the provisions of Sections 52-56 removing the current sentencing requirements for methamphetamine offenses. Methamphetamine remains a significant problem in our community and no

compelling reason exists to delete the currently applicable sentencing requirements.

Accordingly, we SUPPORT SB 2964 but recommend that it be amended to delete Sections 37, 38 and 52-56. We request that Your Committee PASS the Bill with the amendments as described herein.

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