LATE

The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Tuesday, March 10, 2020 at 10:00 am
State Capitol, Conference Room 016

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: House Bill No. 2610, H.D.2 - Relating to Domestic Violence

Purpose: Allows a hearsay exception for statements made by a victim of domestic violence within twenty-four hours of a domestic violence incident and prior to the arrest of the defendant regardless of the availability of the declarant, provided the statement was recorded or made to a law enforcement officer and is found to have sufficient indicia of reliability.

Judiciary's Position:

The Hawai'i Supreme Court's Standing Committee on Rules of Evidence respectfully opposes House Bill No. 2610, H.D.2 to the extent that it violates the right to confrontation guaranteed under the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution.

The Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution provide that "the accused shall enjoy the right … to be confronted with the witnesses against the accused[.]" Prior to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), federal courts declined to embrace an absolute bar on the admission of hearsay statements uttered by unavailable declarants – as long as the declarant was shown to be unavailable, and the statement bore "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Crawford limited Roberts "sufficient indicia of reliability" test to hearsay statements that are "non-testimonial." A statement is non-testimonial if its primary purpose is to "enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224 (2006). Non-testimonial statements are not subject to the Confrontation Clause, but still subject to the Roberts "sufficient indicia of reliability" test.

A statement is testimonial when "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." State v. Fields, 115 Haw. 503, 514, 168 P.3d 955, 966 (2007), *citing* Davis, 126 S.Ct. at 2273-74 (footnote omitted). Testimonial statements are subject to the Confrontation Clause.

HB 2610, H.D. 2 also attempts to classify all statements within its purview as "non-testimonial" because it purports to define as "non-testimonial," any statement made to law enforcement within 24 hours of a domestic violence incident and before defendant's arrest.

In determining whether the primary purpose of an interrogation is to meet an ongoing emergency (that is, whether a statement is non-testimonial), the U.S. Supreme Court has stated that courts must "objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions." Michigan v. Bryant, 562 U.S. 344, 359, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93, 108 (2011). *See also* People v. Blacksher, 52 Cal.4th 769 (2011) (identifying the six factors courts should consider, under *Bryant*, in determining whether a statement is non-testimonial), and Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (victim's statement to police responding to a domestic violence call, prior to defendant's arrest, found to be testimonial).

Given the above, House Bill No. 2610, H.D.2 runs afoul of a Defendant's right to confrontation as guaranteed by the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai`i Constitution.

Furthermore, the implication that all statements made within "24 hours" of a domestic violence incident and before a defendant's arrest are more reliable, without further information, appears arbitrary. The proposed exception also implies that similarly-situated victims of other crimes are somehow less reliable than domestic violence victims.

For these reasons, the Committee respectfully opposes House Bill No. 2610, H.D.2. Thank you for the opportunity to comment on this measure.

LATE

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

March 10, 2020

H.B. No. 2610 HD2: RELATING TO DOMESTIC VIOLENCE

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

The Office of the Public Defender respectfully opposes H.B. No. 2610 HD2, which would create an exception to the hearsay rule that will be unconstitutional as a violation of an accused's right to confrontation of witnesses against him/her under article I, section 14 of the Hawai'i Constitution.

H.B. No. 2610 states,

> [T]he purpose of this Act is to allow a narrow hearsay exception for statements made by a domestic violence victim to a government official within twenty-four hours of a domestic violence attack and prior to the arrest of the defendant regardless of the availability of the declarant, ***even if the statement is testimonial in nature***, as long as the statement bears sufficient indicia of reliability.

(Page 3, line 18 to page 4, line 2) (emphasis added).

Because any out-of-court statement to the government official (presumably, a police officer) relating to the alleged domestic attack will be deemed ***testimonial***, the statement will only be admissible ***if the witness is unavailable and the accused had the opportunity for cross-examination***, as the Hawai'i Supreme Court in State v. Fields, 115 Hawai'i 503, 565, 168 P.3d 955, 1017 (2007), clearly held,

> Under Hawai'i's confrontation clause, if an out-of-court statement is testimonial, it is subject to the [Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] analysis, which mandates that (1) the witness be "unavailable," and (2) the accused had a prior opportunity for cross-examination.

Therefore, if the alleged domestic violence victim is not available to testify, any attempt to introduce his/her statement made within twenty-four hours of an alleged domestic violence incident and prior to the arrest of the defendant will be deemed ***inadmissible*** as a violation of the Hawai'i Constitution. Likewise, if the alleged victim is available to testify, his/her out-of-court statement will be inadmissible. The proposed domestic violence exception will not overcome State v. Fields and Crawford v. Washington; the testimonial statements will not be made admissible.

The proponents of this bill significantly rely on the Oregon domestic violence hearsay exception and an article written in the Boston College Journal of Law and Social Justice, "A Call for Change: The Detrimental Impacts of Crawford v. Washington." The proponents, however, fail to take into account that the article and the Oregon law based their analysis on ***only*** the sixth amendment to the United States Constitution. Although the sixth amendment to the federal constitution and article I, section 14 are textually similar, the Hawai‘i Constitution affords the people in our state more protection than required 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 protected.

We also question several assertions set forth in the article and the proponents' justification for passage of the bill. First, is there any data to establish or support the assertion that "victim statements made within twenty-four hours of an incident are the most reliable"? Second, the proponents assert that "statistics showing that incidents of domestic violence tend to escalate over time and sometimes culminate in the victim's death." Although we do not have hard data to contradict the "statistics" (referred to by the proponents), the majority of the defendants charged with domestic violence in the family court are first-time offenders.

The confrontation clause was intended to prevent the conviction of a defendant without the opportunity to face his or her accusers and to put their honesty and truthfulness to test before the trier of fact. In Mattox v. United States, 156 U.S. 237 (1895), the United States Supreme Court enunciated the three fundamental purposes that the Confrontation Clause was meant to serve:

- To ensure that witnesses would testify under oath and understand the serious nature of the trial process;
- To allow the accused to cross-examine witnesses who testify against him; and
- To allow jurors to assess the credibility of a witness by observing that witness's behavior.

The proposed exception to the hearsay rule simply undermines the purpose of the Confrontation Clause. The exception will allow unfettered narrative statements to be received in evidence without the accused having the opportunity to test the credibility and veracity of the accuser's statement. Alleged domestic violence victims will no longer need to testify under oath and be made to understand the seriousness of the trial process. Jurors will no longer be able to assess the credibility of the accuser by observing his/her behavior.

We are also concerned how the proponents of this measure (and the Oregon legislature) determined that the time limit of "24 hours." Without any data or statistics to support the assertion that out-of-court statements made by alleged victims of domestic violence are reliable within 24 hours are reliable, the "24 hour" period appears arbitrary. Are statements made 25 hours after an alleged incident not reliable while statements uttered 23 hours after an incident reliable?

Thank you for the opportunity to comment on this measure.

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LATE

THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON FINANCE
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

March 10, 2020

RE: H.B. 2610, H.D. 1; RELATING TO DOMESTIC VIOLENCE.

Chair Rhoads, Vice Chair Keohokalole, and members of the Senate Committee on Judiciary, my name is Scott Kessler, and I currently work as a legal consultant on domestic violence issues for the Department of the Prosecuting Attorney, City and County of Honolulu. The Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in support of H.B. 2610, H.D. 2.

In terms of my background, I worked as an Assistant District Attorney for 30 years in New York City. For the last 20 years of my career, I was Bureau Chief of the Domestic Violence Bureau of the Queens County District Attorney's office, where I supervised the prosecution of over 5,000 domestic violence arrests and prosecutions each year. In addition, I have been teaching law for over 24 years, first at St. Johns University Law School, and since 2010 at Columbia Law School, where I am currently employed as an adjunct professor. I also have been speaking at national conferences on domestic violence for over 15 years and trained numerous police and prosecutors offices throughout the country on best practices, policies, procedures, and evidence-based prosecution.

Last August, I was hired by the Acting Prosecuting Attorney to assist the Department in its handling of domestic violence cases, with the goal of trying to keep victims safe and holding batterers accountable for their actions. I first began my new position by gaining access to the body worn camera footage available to prosecutors, and I reviewed hundreds of hours of footage. In addition, I have met with victim advocates, met with and discussed new policies and procedures with the Honolulu Police Department, and spent days talking to domestic violence prosecutors in Hawaii—as well as public defenders—on the criminal justice and court systems currently in place.

H.B. 2610, H.D. 2, addresses a concern occurring every day in the courts in Hawaii. Domestic violence offenders almost always—after their arrest—put pressure on victims to not appear in court, to recant and not cooperate with prosecutors. The defendants' strategy of convincing their victims to recant, or not appear in court, is working; each year the vast majority of

domestic violence cases are dismissed for these very reasons. The pressure by domestic violence defendants to have victims recant, and/or not appear in court, can often be heard in recordings from jail, where domestic violence defendants—every day—threaten, sweet-talk and often coerce victims not to appear, or to testify untruthfully. For instance, the following is an example of a recent call in Honolulu from an abuse defendant to his victim:

> THE DEFENDANT: DV is a no-drop case but the case going finish when they cannot prove me guilty because you no show up to court, you know what I mean? They just trying to scare you into coming to court and saying things. You can even come to court and say, "I plead the fifth, I no like say nothing." You no need tell -- like, nobody can tell you what for do, like, for real. It's the United States, freedom of speech and everything, like. Everything you say, like, yeah, can and will be used against you in a court of law, but you don't need to ****ing say ****, for real.
>
> THE VICTIM: And how do I know you not going ever do that again?
>
> THE DEFENDANT: I not, babe. I love you.
>
> THE VICTIM: You always said that one.
>
> THE DEFENDANT: Babe, I not going do nothing to harm you. I know I'm not.

Recently, a process server went to the home of a victim here in Honolulu, to serve her with a subpoena to appear in court for the upcoming trial. She had been a victim of domestic violence, kicked in the face, and reported the incident to the police. The victim told the process server that she was confused, as she was told she didn't need to go to court, and if she did not show up, then the case would be dropped. Regardless of who told her this, the concept—that victims' not appearing in court will result in the case being dismissed—is being disseminated throughout the state, and based upon the statistics, it is probably not factually inaccurate, as there is currently no mechanism in place to hold batterers accountable without the victims' participation.

In response to the non-appearance of victims, some prosecutors in Hawaii resorted to having victims arrested on subpoenas, when they refuse to testify. In 2011, news stories appeared about the arrest of a victim at her graduation, after she refused to testify. Essentially, the current court system is controlled by the batterers, who control the outcomes of these case by controlling their victims' appearance.

The current version of the bill—with a minor change already added by the House—includes the phrase, "and prior to the defendants being arrested regardless of the availability of the declarant," after the phrase "made by a victim of that domestic violence within twenty-four hours after the incident occurred" (page 12, lines 3-5). That change made this important bill constitutional, balancing the defendant's requirement of a fair trial with the public policy of attempting to keep victims safe, and hold batterers accountable for their actions.

The Department believes that when the police respond to a call for domestic violence, and the perpetrator is not on the scene, the primary purpose for both the questions to the victim and the responses to those questions (to law enforcement) are made in response to an ongoing emergency, and are therefore non-testimonial. Police officers ask questions of victim in order to gather facts as to what happened, what medical attention may be needed, who did this, is the victim safe and where

the perpetrator may be hiding, in order to arrest the individual quickly, thereby keeping the victim and their family safe. In domestic violence cases, a perpetrator who is not in custody is still a danger to the victim and their family. For example, a defendant may have keys to the home, knows what time the victim leaves their house, the route taken when she leaves, knows the victim's family and friends, where the victim might flee to when they don't feel safe in their home, and a lot of other information that puts the victim in danger until the perpetrator is apprehended.

This questioning, and the answers to those questions, when the perpetrator is still at large prior to arrest, passes the ongoing emergency test standard discussed in the U.S. Supreme Court's most recent case related to this issue, Michigan v. Bryant, 562 U.S 364 (2011). Prior to the arrest of a defendant in a domestic violence case, it is clear that there is an ongoing emergency, such that the primary purpose of the police officers' questions, and the victim's answers about what exactly happened and by whom, is to gather important, potentially lifesaving facts. As the court clearly stated in Michigan v. Bryant, the existence of an "ongoing emergency," at the time of the encounter, is among the most important circumstances informing an interrogation's "primary purpose." The Court further stated that an emergency focuses the participants not on proving past events that may be relevant to later criminal prosecution, but on ending a threatening situation. In sum, the United States Supreme Court in Michigan v. Bryant held that, when the primary purpose of an interrogation is to respond to an ongoing emergency, and its purpose is not to create a record for trial but to handle the ongoing emergency, the questions and answers thereto are not within the scope of the Confrontation Clause and therefore do not violate the 6th amendments right to confrontation.

in cases where the defendant is still on-scene when police arrive, initial questions asked by law enforcement, and the answers given prior to the defendant's arrest, have the primary purpose of enabling police to deal with an ongoing emergency, and are therefore non-testimonial as well. Clearly, the task of law enforcement in response to a domestic violence call is to find out what happened, and who caused the injuries, if any, so that law enforcement can decide what if any action is necessary to prevent further harm. Statements made by victims on the often-hectic scene are non-testimonial up to the point of the defendant's arrest.

It is undisputed that victims of domestic violence and their children are in the most danger right after breaking up with the batterer and/or reporting the batterer to the police. Most victims of domestic violence homicide are killed right after the breakup and/or reporting, due to the anger and outrage the batterer feels. Killings in domestic violence cases are often especially brutal, involving close encounters such as stabbings, beatings and strangulation. Having been to the scene of these horrific crimes, I can attest to the extreme violence and anger used by these intimate partners, often right after the breakup and/or reporting to the police.

The Department of the Attorney General's most recent audit to the Mayor and City Council indicated that almost 40% of the murders committed in Hawaii were domestic violence-related homicides, and further, domestic violence made up a significant portion of violent crime. In addition, the report discussed a finding that nearly 30% of all domestic violence defendants arrested battered their victims again within 6 months. These alarming statistics are yet another reason why passing this bill is vital to the safety and welfare of the women and children of Hawaii.

The primary purpose of H.B. 2610, H.D. 2, is to address the ongoing emergency of how the criminal justice system in Hawaii handles the prosecution of domestic violence cases, and the proposed bill has constitutional safeguards in place that would entitle the defendant to a fair trial. The bill only allows statements that have a "sufficient indicia of reliability," and only after a judicial

review. For example, not every statement made by a victim of domestic violence within 24 hours and prior to the defendant's arrest automatically comes into evidence. The court must examine the statement to determine if it has "sufficient indicia of reliability" in order to be entered into evidence. When looking at what meets that standard, the court considers 4 factors:

1) The personal knowledge of the declarant
2) Whether the statement is corroborated by other evidence
3) The timing of the statement
4) Whether the statement was elicited by leading questions

Today, if a domestic violence batterer were arrested after beating his wife, and asked his attorney "what would happen if my wife doesn't show up to court to testify against me," the honest answer to that question is, "nothing would probably happen to either you or your wife, and the case would be dismissed". If, however, this bill is passed, the answer to that same question should and would be answered, "there is a way the state can prove your case without her testimony, so we should discuss various options if you are guilty of this, including probation and counseling".

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of H.B. 2610, H.D. 2. Thank you for the opportunity to testify on this matter.

HB-2610-HD-2
Submitted on: 3/6/2020 2:03:46 PM
Testimony for JDC on 3/10/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
	Testifying for Domestic Violence Action Center	Support	No

Comments:

aloha,

all vehicles for increasing accountability of abusers, that do not place the victim in jeopardy are important for consideration.

thank you.

LATE

HB-2610-HD-2
Submitted on: 3/9/2020 12:35:07 PM
Testimony for JDC on 3/10/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

LATE

HB-2610-HD-2
Submitted on: 3/9/2020 11:30:36 PM
Testimony for JDC on 3/10/2020 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
J Ashman	Individual	Support	No

Comments: