STATE OF HAWAIʻI
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawaiʻi to the House Committee on Judiciary

January 29, 2020

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

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 2610, 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 Hawaiʻi 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, ***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 Hawaiʻi Supreme Court in State v. Fields, 115 Hawaiʻi 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 will be deemed inadmissible as a violation of the Hawaiʻi Constitution. Likewise, if the alleged victim is available to testify, his/her out-of-court statement will be inadmissible.

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 Hawaiʻi 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 Hawaiʻi 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. For these reasons, we strongly opposed H.B. No. 2610.

Thank you for the opportunity to comment on this measure.

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THE HONORABLE CHRIS LEE, CHAIR
THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

January 30, 2020

RE: H.B. 2610; RELATING TO DOMESTIC VIOLENCE.

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua‘i submits the following testimony in support of S.B. 1160.

The purpose of S.B. 1160 is to allow a narrow hearsay exception for statements made by a domestic violence victim to a government official within 24 hours of a domestic violence attack, even if the statement is testimonial in nature, as long as the statement bears sufficient indicia of reliability.

Domestic violence is among the most intractable problems faced by our community. Successful prosecution of domestic violence crimes is extraordinarily difficult due to the power and control abusers wield over their victims. Oregon has recently implemented a hearsay exception for statements made by domestic violence victims to government officials within 24 hours of their being assaulted. This has resulted in improved trial results for victims and, consequently, a safer community. This hearsay exception is consistent with the many other exceptions to the hearsay rule and will protect the rights of the accused by requiring that any statement sought to be introduced must bear sufficient indicia of reliability.

For these reasons, the Office of the Prosecuting Attorney supports the passage of H.B. 2610. Thank you for this opportunity to testify.

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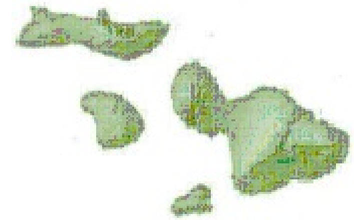

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January 29, 2020

TESTIMONY ON
HB 2610 - RELATING TO DOMESTIC VIOLENCE

Before the House Judiciary Committee
Hearing Date: January 30, 2020, 2:45 p.m.

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
and Members of the House Judiciary Committee

Chair Lee, Vice Chair Buenaventura, and Members of the Committee:

Thank you for the opportunity to submit this written testimony regarding HB 2610. The Department of the Prosecuting Attorney, County of Maui, **SUPPORTS** this bill.

The exception to the hearsay rule that HB 2610 would implement would lead to more just outcomes in domestic violence cases, while carefully balancing the rights of the accused and victims. Statements made within 24 hours of an incident of domestic violence are likely to be highly probative and reliable evidence, as they will have been made while the incident is still fresh in the victim's memory.

In addition, HB 2610 will address one of the most common issues that arises in such cases: victim recantation. It is well established that domestic violence victims often recant allegations of abuse. The Supreme Court of Hawaii has permitted introduction of expert testimony in domestic violence cases to the effect that "... it is not uncommon for victims of domestic violence to recant allegations of abuse after they have been victimized in order to protect the abuser." State v. Clark, 83 Hawai'i 289, 298 926 P.2d 194, 203 (1996). See, also, See, State v. Cababag, 9 Haw.App. 496, 850 P.2d 716 (1993). False recantations by domestic abuse victims are, obviously, a serious obstacle to just outcomes in the prosecution of such cases. HB 2610 would help address this issue via its narrowly tailored exception to the hearsay rule.

Some types of prior statements made by domestic violence victims are already admitted when the victim attempts to recant on the witness stand. For example, in a case decided just today, the Intermediate Court of Appeals approved of using the victim's grand jury testimony at trial after the victim's testimony changed to support the defendant's self defense theory. See,

State v. Feliciano, CAAP-16-0000610 (January 29, 2020). HB 2610 would allow similarly reliable statements to be used for this purpose.

By ensuring that only recorded or otherwise reliable statements made within 24 hours of the incident are admitted, HB 2610 strikes an appropriate balance between general concerns about the reliability of hearsay and the probative nature of the statements at issue.

The main potential concern with HB 2610 arises if the domestic violence victim does not testify at trial at all. The proposed rule allows the admission of the out of court statement regardless of whether the declarant testifies. As the discussion in Section 1 of HB 2610 makes clear, this raises a potential confrontation clause issue under Crawford v. Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and Davis v. Washington, 547 U.S. 813, 827, 126 S.Ct. 2266, 2276, 165 L.Ed.2d 224 (2006). In Davis, Supreme Court drew a fine distinction between a statement made by a person facing "an ongoing emergency" and a statement made by a person that "took place hours after the events she described had occurred." Id. at 827. Admission fo the statement made during the ongoing emergency did not violate the confrontation clause, but the statement made "hours later" (in Crawford) did. Id.

The question, then, would be whether a statement made within 24 hours of an incident of domestic violence is closer to the admissible "ongoing emergency" statement in Davis, or the inadmissible statement made "hours later" in Crawford. That question is not easily resolved as a general proposition, and will likely need to be answered by the courts on a case-by-case basis. As noted, however, this will only arise when the victim does not testify at trial, which is unlikely to be an extremely common occurrence.

In conclusion, the Department of the Prosecuting Attorney, County of Maui, supports HB 2610, because it will allow reliable and probative statements of domestic violence victims to be admitted in evidence.

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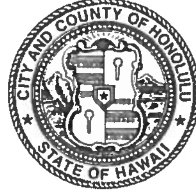

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OUR REFERENCE WO-KK

January 30, 2020

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: House Bill No. 2610, Relating to Domestic Violence

I am Walter Ozeki, Major of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 2610, Relating to Domestic Violence, with the following concerns.

The HPD agrees wholeheartedly with the legislature that allowing a limited hearsay exception for a statement made by a victim of domestic violence would be a valuable tool for the prosecution of domestic violence cases, as the instances where victims become uncooperative over time and are reluctant or refuse to testify at trial is a continuing and all too common occurrence in domestic violence cases.

Our concern with this piece of legislation is that the admissibility of such evidence brings into question broader constitutional issues, which should be specifically addressed by county prosecutor's offices and the judiciary, as law enforcement's use of such evidence rests for the most part on both prosecutorial digression and judicial interpretation of the state constitution. As law enforcement, we support the creation of new legislation that would provide law enforcement additional tools to assist in protecting the public, but we are concerned that these tools will ultimately not be made available to us as we have experienced previously with the introduction of prior legislation that tested the lines of constitutional protections.

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THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

January 30, 2020

RE: H.B. 2610; RELATING TO DOMESTIC VIOLENCE.

Chair Lee, Vice Chair San Buenaventura, and members of the House 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 <u>support</u> of H.B. 2610.

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 the Bureau Chief of the Domestic Violence Bureau of the Queens County District Attorney's office, where I supervised the prosecution of over the 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 more recently at Columbia Law School, where I am currently employed as an adjunct professor. I have been teaching at Columbia law school for 10 years. I also have been speaking at national conferences on domestic violence for over 15 years and have trained numerous jurisdictions, police and prosecutors offices throughout the country on best practices, policies and procedures as well as evidence-based prosecution.

Last August, I was hired by the current Acting Prosecuting Attorney to assist the Honolulu Prosecuting Attorney's Office 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 victims' advocates, had meetings with and discussed new policies and procedures with the Honolulu Police Department, and lastly spent

days talking to domestic violence prosecutors in Hawaii—as well as public defenders—on the current criminal justice and court system in place.

It is very clear that the current system—which involves personal subpoenas for all domestic violence victims, requiring all of the victims to come to court and sit in a room for hours waiting to see if their case is the one or two cases that goes to trial that week—does not work. The victims, often hours later, find out almost every time that they must come back again in 4 weeks. The current system is totally unfair to the domestic violence victims who take off of work, and often have child care issues, just to have the case adjourned. The reason every single victim has to come in to court is due to the current underlying system, where no case goes to trial without a victim and almost all the defendants won't plead guilty to anything—despite offers given to them before the trial date—without seeing the victim in court. The reason most defendants in misdemeanor domestic violence cases decline pre-trial offers is because, they know that if they just wait it out, the vast majority of the time the case will be dismissed. In addition, the new policy involving the misdemeanor court not issuing bench warrants on victims makes it less likely that victims will return to court, even if they showed up voluntarily in the beginning of the case.

H.B. 2610 addresses a concern occurring every day in the courts in Hawaii, that domestic violence offenders almost always, after their arrest, will put pressure on victims not to appear in court, to recant and not cooperate with prosecutors. The strategy of convincing the victims not to appear in court, or to recant, is working within the current system, as each year hundreds of cases are dismissed due to the victims failing to appear in court or recanting their statements to the police. The pressure by domestic violence defendants to have victims recant and or not appear in court can often be heard in recordings from prison, where—every day—DV defendants threaten, sweet-talk, and coerce victims not to appear or testify truthfully.

The proposed bill with the minor change of adding the phrase "and made prior to the defendant being in custody" after the bills phrase "made by victim of that domestic violence within twenty-four hours after the incident occurred" is not unconstitutional. It balances the defendant's requirement of a fair trial and the right to confrontation, with the public policy of attempting to keep victims safe and hold batterers accountable for their actions, despite defendants often interfering with the criminal justice system by convincing victims not to appear. We also believe that the bill should strike the language "even if the statement is testimonial in nature" that appears in the second paragraph of the bill as it is not needed and could be confusing and misleading if reviewed by higher courts. Lastly we would request that in the third paragraph the bill add the United States Supreme court case of Michigan vs Bryant 562 U.S. 364 (2011) as that case is the leading case on confrontation

The Prosecuting Attorney's office believes that when the police respond to a 911 call for domestic violence and the perpetrator is not on the scene, the statements make to the officer are non-testimonial as they are asked to gather facts as to what happened, what medical attention may be needed and to gather information about who did this so as to possibly arrest that person to keep the victim and their family safe. In addition when the police respond to a domestic violence call all initial statements made by the victim until the arrest of the individual are also made with the intent of finding out what happened by whom and what medical attention may or may not be needed. This questioning passes the ongoing emergency test standard that that the United States Supreme Court discussed in its most recent case related to that issue, Michigan vs Bryant U.S. 562 364 (2011). As the court clearly stated in Michigan vs Bryant The existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's primary purpose.

In deciding if the proposed statute will be constitutional, we should look closely at the current statute, HRS §626-0001-803(b)(4).

> **Rule 803 Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> **(b) Other exceptions**
> **(4)**Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This statute allows patients statements as exactly what happened to them and

1) Does not require that the event the domestic violence patient describes to the nurse or doctor occur within 24 hours of the reporting;
2) Does not require that the statement of the victim have any corroboration of any kind to be admissible;
3) Does not require that the court consider whether the nurse or the doctor asked leading questions; and
4) Lastly, the court does not even consider the victims statement to the doctor or nurse to have any indicia of reliability only that it was said.

Clearly, if HRS §626-0001-803(b)(4) is constitutional, then the new proposed statute—which adds 4 more layers of protection—is also constitutional.

The statement to medical personnel comes in to evidence at trial because it is generally understood that you would normally not lie to your doctor or nurse about how or who injured you. The same rationale applies to the current proposed statute. The domestic violence victims—when reporting crimes within hours of the incident—would normally not lie to the police about how or who injured them. It is remotely possible that patients would lie to their doctors to gain an advantage in a lawsuit for numerous other reasons. However, the remote possibility of the lie does not prevent the admissibility. Here, the same is true, while remotely possible for a domestic violence victim to lie to the police, but that remote possibility should not prevent the statute from being used in the same manner as the current statements for the purpose of diagnosis and treatment and adds a judicial review with 4 more layers for the court to consider.

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 homicides occur right after the breakup and or report due to anger and outrage the batterer feels. The killings of 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 the intimate partner, often right after the breakup and/or report to the police. The New York City's police department, having recognized

the "ongoing emergency" and danger that occurs right after a victim of domestic violence reports her intimate partner to the authorities, years ago instituted protocols to deal with this important emergency. New York City police follow up with home visits right after reports of domestic violence, in order to keep the victim and her family safe during this too often hectic time. Officers will do home visits on domestic violence cases within 24 to 48 hours of the arrest, to check on victim's safety, notify them about services, and check on any other acts of violence or threats that may have occurred after the assault.

The Washington Post recently did a study on domestic violence in major cities and found:

> In a close analysis of homicides in five of the cities, The Post found that more than one-third of all men who killed a current or former intimate partner were publicly known to be a potential threat to their loved one ahead of the attack.

The Post's data aligns with recent research into the murders of women, including a report from Northeastern University criminology professor James Alan Fox, who used FBI data from police departments to find that 44.8 percent of women killed from 2007 to 2016 were killed by an intimate partner. Fox also found that 5 percent of all men killed from 2007 to 2016 were killed by an intimate partner.

Other news articles and studies are also alarming and discuss the ongoing emergency right after a victim reports a case of intimate partner violence. "The statistics are that women in abusive relationships are about 500 many times more at risk when they leave," said Wendy Mahoney, executive director for the Mississippi Coalition Against Domestic Violence. "Domestic violence is all about power and control, and when a woman leaves, a man has lost his power and control."

In summary, the proposed statute is needed to address an ongoing emergency of how the criminal justice system in Hawaii handles the prosecution of domestic violence cases, and the proposed statute has constitutional safeguards in place that would entitle the defendant to a fair trial and also only allow in statements that have a sufficient indicia of reliability.

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. Thank you for the opportunity to testify on this matter.

LATE

HB-2610
Submitted on: 1/29/2020 3:44:47 PM
Testimony for JUD on 1/30/2020 2:45:00 PM

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

Comments:

Thank you.

This would be of enormous benefit to successful prosecution. of course there are many other elements necessary - available - to hold defendants accountable. The approach has always relied exclusively on the witness testimony.

This shift in practice is worth review, consideration and continued discussion.

Thank you.

LATE

HB-2610
Submitted on: 1/29/2020 5:47:11 PM
Testimony for JUD on 1/30/2020 2:45:00 PM

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

Comments: