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

ON THE FOLLOWING MEASURE:
S.B. NO. 36, RELATING TO THE INITIATION OF FELONY PROSECUTIONS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 28, 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) supports the intent of this bill and offers the following comments.

This bill addresses the Hawaii Supreme Court's decision in State v. Obrero, 151 Hawaiʻi 472, 517 P.3d 755 (2022). The Court in Obrero held that section 801-1, Hawaii Revised Statutes (HRS), did not permit the initiation of felony criminal charges via preliminary hearing. By amending section 801-1, HRS, this bill would allow a felony criminal prosecution to be initiated by complaint following a preliminary hearing as permitted by section 10 of article I of the Hawaii Constitution.

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 indictment, felony information, and complaint), the burden on grand jury panels would be lessened, particularly in regard to the charging of offenses that cannot be initiated by felony information. Preliminary hearings are a reasonable, expeditious and appropriate way of initiating charges for defendants who need to be arrested and held in custody pending charging.

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 but also fail to meet the criteria for initiation by felony information. This bill would also allow these misdemeanor offenses to be charged via complaint.

The Department notes, however, that it has concerns regarding proposed subsection (b) to section 801-1, HRS, because it places a restriction on the prosecution's ability to seek charges following a "no bill" by a grand jury panel or a "no probable cause" finding by a judge after a preliminary hearing. Page 4, lines 3-17. Subsection (b) would essentially limit the prosecution to one attempt to charge a case unless (1) additional material evidence is presented, (2) there is evidence of misconduct by the grand jury or the grand jury counsel, or (3) a court finds good cause to allow a subsequent attempt. The Department does not believe this limitation on prosecutorial discretion is necessary. Nevertheless, the Department recognizes that this provision would have greater impact on the county prosecutors and defers to the county prosecutors' position on this provision.

We respectfully ask the Committee to pass this bill.

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 & Hawaiian Affairs**

February 28, 2023

S.B. No. 36: 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 in part and opposes in part S.B. No. 36.

The OPD support the provisions that would amend HRS § 801-1 to specify that a person may be tried and sentenced for certain alleged felony offenses through the complaint and preliminary hearing process, indictment by grand jury, or by written information.

The OPD also support the provision that would amend HRS § 801-1 to prevent multiple attempts to initiate a felony prosecution for the same offense, either through the same initial charging method or an alternative method, or in different forums except when additional material evidence is presented:

> (b) If initiation of a felony prosecution is sought via indictment by a grand jury or a finding of probable cause after a preliminary hearing, and is denied, initiation of a felony for the same prosecution for the same offense using the same or an available alternative charging method or by seeking a different judge or jury shall not be permitted unless:
>
> (1) Additional material evidence is presented[.]

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 after a prior grand jury 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 aforementioned provision is consistent with the concurring and dissenting opinion by the Honorable Paula Nakayama in State v. Obrero, 151 Hawai‘i 472, 517 P.3d 755 (2022). Justice Nakayama, however, did not suggest or intimate a "good cause" exception or a "grand jury/grand jury counsel misconduct" exception.

Good Cause Exception

The OPD opposes the "good cause" exception; specifically, the OPD opposes the added language found on page 4, lines 13 to 17 of the bill:

> (3) A court, upon application of the prosecutor, finds good cause to allow a subsequent presentation, provided that this paragraph shall not apply if prosecutors have previously sought a subsequent presentation for good cause.

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 invite another constitutional challenge; criminal defense attorneys will appeal any case in which the prosecutor was able to present a case a second time before a grand jury (or a district/family court judge) based on a finding of good cause.

Second, the requirement for "new evidence" or for "additional material evidence" does two very important things. The prosecution is required 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.

The requirement for "new evidence" also 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.

Third, 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 the accused (and defense counsel if privately retained) are not allowed to be present at grand jury proceedings. ***Indeed, in the vast majority of cases, the accused is not even aware that an indictment is being sought***; the accused becomes aware only when an arrest warrant is issued. And thus, in the majority of cases, the accused do 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 argue to the judge.

When only one party (here, the prosecution) is only allowed to present argument on an issue (here, whether good cause exists), our adversarial system is directly 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 and argue without opposition on the issue of whether good cause has been established to permit a subsequent presentation to a grand jury or to a district court judge.

Fourth, the standard of "good cause" is simply too broad. What is good cause? Based on this standard, a judge will be able to find good cause simply based on the seriousness of the charge.

The "good cause" standard will raise more questions 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? 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 go through 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 to 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.

Grand Jury and/or Grand Jury Counsel Misconduct

The OPD further opposes the "misconduct" exception; specifically, the OPD opposes the added language found on page 4, lines 10 to 12 of the bill:

> (2) The initial hearing was before a grand jury and there is 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 get into the deliberation phase and get courts to 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 it, it is a violation of the defendant's constitutional rights. The State is not entitled to this recourse. If prosecutors argue that that is unfair, our response is that when it comes to constitutional rights, it is always asymmetrical.

There is also a practical problem. A "finding" of juror misconduct implies that it is made by the court. So does that mean the prosecution has to file an *ex parte* motion

to determine juror misconduct? Is a hearing held? Are witnesses called? The accused is not even a defendant at this point. When would the accused be informed about these proceedings? After a true bill and a subsequent motion to dismiss? There are no rules for any of these proceedings fleshing this out. It could incentivize prosecutors to investigate and even harass grand jurors that did 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 counsel. Again, the prosecutor alone 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 established to submit a subsequent presentation to a grand jury or to a district court judge.

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.

Thank you for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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

February 28, 2023

RE: S.B. 36; RELATING TO THE INITIATION OF FELONY 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 regarding S.B. 36, in **support, with comments**.

The purpose of this bill is to address a Hawaii Supreme Court decision issued on September 8, 2022 (*State v. Obrero*[1]), in which the majority held that—despite 40 years of established law—charging felony cases via complaint and preliminary hearing is no longer allowed. This decision was based a single statute, section 801-1 of the Hawaii Revised Statutes ("HRS")—a statute that remained "unchanged in its current form at least since 1905"[2]—because that one statute was (we believe inadvertently) never amended when all other relevant statutes were amended in the 1980's. Indeed, in 1982, Article I, Section 10 of the Hawaii State Constitution was amended by the Legislature and voters, to expressly allow charging via complaint and preliminary hearings…and in subsequent years, multiple HRS statutes in other chapters were amended to comport with charging felonies via complaint/preliminary hearings. In 1983, the Hawaii Supreme Court itself established court rules setting out the requirements for charging felonies via complaint and preliminary hearings.

As a result of the majority opinion in *Obrero*, hundreds of felony charges statewide—in which judges had already found probable cause on which to proceed with the case—instantly

[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.
[2] *State v. Obrero* (September 9, 2022) (Recktenwald, dissenting). Available online at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576dis.pdf.

became technically insufficient. 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 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 the 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 the Hawaii State Constitution, and all-but-one (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, S.B. 36 would address this issue by amending HRS §801-1 (*see* p.1, ln.14, through p.2, ln.2), and we believe this would indeed allow preliminary hearings, once again, as a valid charging method. That said, the Department also believes that this could be done—perhaps more cleanly and concisely—by repealing HRS §801-1 altogether, as proposed by bills in our 2023 legislative package (S.B. 225 and H.B. 124). **Notably, all three opinions issued by the Hawaii Supreme Court justices in *Obrero* acknowledged that HRS §801-1 could be effectively repealed by the Legislature.**[3]

In addition to amending subsection-(a) of HRS §801-1, S.B. 36 goes on to create a new subsection-(b) (*see* SB 36, p. 4, lns. 3-17), which would limit prosecutors' discretion on when they could seek felony charges via grand jury or preliminary hearing, after a prior grand jury or preliminary hearing judge returned a finding of no probable cause. First, the Department would emphasize that this 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.

Admittedly, there have been times—though very rare—when each county prosecutor has had to do this, but it 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

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[3] *See State v. Obrero*, 517 P.3d 755 (September 8, 2022); **majority opinion** at p. 20: "The 1982 amendment of article I, section 10, then, made the repeal of HRS § 801-1 possible, but did not effectuate that repeal…", available online at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576.pdf; **concurring opinion** at p. 1: "For the reasons discussed in the Chief Justice's Dissent, I agree that the 1982 amendment to article I, section 10 of the Hawai'i Constitution invalidated Hawai'i Revised Statutes (HRS) § 801-1. I join wholeheartedly in his Dissent." available online at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576condop.pdf; and **dissenting opinion** at p. 11: "To give any force at all to the will of the voters and legislature that enacted the [1982 constitutional] amendment, we must hold that it repealed HRS § 801-1 by implication." available online at https://www.courts.state.hi.us/wp-content/uploads/2022/09/SCAP-21-0000576dis.pdf. Last accessed January 26, 2023.

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 does note 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 appreciates that the language of S.B. 36 does not entirely prohibit the safeguard system described above. If limitations to the existing system are codified, the provisions contained in S.B. 36 appear to be well-reasoned, narrow enough to prevent abuse, yet broad enough to account for the infinite and yet-unimaginable situations that could arise in the future.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **supports** the passage of S.B. 36, with comments. Thank you for the opportunity to testify on this matter.

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OUR REFERENCE AP-MS

February 28, 2023

The Honorable David A. Tarnas, Chair
and Members
Committee on Judiciary and
Hawaiian Affairs
House of Representatives
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Tarnas and Members:

SUBJECT: Senate Bill No. 36, Relating to the Initiation of Felony Prosecutions

I am Andre Peters, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 36, Relating to the Initiation of Felony Prosecutions.

As this bill clarifies the Hawaii Supreme Court's ruling in the *State v. Obrero* case, the HPD supports the direction of the bill where it will allow prosecutors to initiate prosecution upon a judge's finding of probable cause after a preliminary hearing by obtaining a grand jury indictment or by written information pursuant to Chapter 806, Hawaii Revised Statutes.

The HPD urges you to support Senate Bill No. 36, Relating to the Initiation of Felony Prosecutions.

Thank you for the opportunity to testify.

APPROVED:

Arthur J. Logan
Chief of Police

Sincerely,

Andre Peters, Captain
Criminal Investigation Division

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF S.B. 36, WITH COMMENTS

A BILL FOR AN ACT RELATING
TO THE INITIATION OF FELONY PROSECUTIONS

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 28, 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 & Hawaiian Affairs: The County of Hawaiʻi, Office of the Prosecuting Attorney submits the following testimony with comments in support of S.B. 36.

S.B. 36 was drafted with the intent to reinstate prosecutors' authority to initiate felony prosecutions by way of complaint and preliminary hearing. It also establishes limitations on the initiation of a subsequent felony prosecution, based on the same evidence, after a prior denial of a probable cause finding.

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 collectively proposed several different legislative solutions, and even requested a special legislative session in late 2022 to repeal (as noted by the Justices in all three *Obrero* opinions) or amend § 801-1 given the urgency of this matter. The four county prosecutors also worked collaboratively with Senate Judiciary Chair Senator Karl Rhoads, his staff, and the Department of the Attorney General. As discussed by Chair Rhoads in Standing Committee Report No. 1, dated February 1, 2023, "[Y]our Committee notes that this measure represents a months-long discussion and working draft during the interim following the issuance of the *Obrero* opinion. Feedback was solicited from many

parties, including the Department of the Attorney General, the Office of the Public Defender, and the four county prosecutors to bring about the measure's language. This measure is therefore a compromise that achieves the principal goal of clarifying that felony prosecutions can be initiated by use of the preliminary hearing process (emphasis added)."

The four county prosecutors also worked collaboratively with the Judiciary in order to secure more opportunities for grand jury sessions per month across the State. Despite the increased grand jury opportunities, inability to initiate felony prosecutions by way of complaint and preliminary hearing unnecessarily subjects victims of crimes to being inconvenienced and traumatized by requiring subsequent testimony at more than one evidentiary hearing in order to successfully commit a felony case to the circuit court. It also places undue stress upon the limited resources of police and prosecutors. In order to ensure that a serious offender was not prematurely released from custody, our Office has had to present witness testimony during a preliminary hearing before a district court judge, while another deputy prosecuting attorney was presenting the very same case, at the same time, before a grand jury panel on the other side of the island. The inability to initiate felony prosecution by way of complaint and preliminary hearing frustrates, inconveniences, and unjustly places additional burdens to not only police and prosecutors . . . but civilian witnesses as well, and more importantly victims and their families. As a result, restoring prosecutors' authority to initiate felony prosecutions by way of complaint and preliminary hearing is also necessary to restore the public's trust and confidence in our criminal justice system.

S.B. 36 is consistent with the intent of the Hawai‘i Constitution, restores criminal procedure practices that have been in place for the last forty years, supports and protects victims and witnesses of crime, affords the criminally accused an opportunity to participate in the initiation of felony proceedings, creates additional safeguards against unjustified multiple attempts to initiate a felony criminal case, and provides law enforcement with the resources necessary to ensure public safety.

The County of Hawai‘i, Office of the Prosecuting Attorney remains committed to pursuing justice with integrity and commitment. For the foregoing reasons, the County of Hawai‘i, Office of the Prosecuting Attorney supports the passage of S.B. 36 with comments. Thank you for the opportunity to testify on this matter.

Mitchell D. Roth
Mayor

Lee E. Lord
Managing Director

Robert H. Command
Deputy Managing Director

County of Hawai'i
Office of the Mayor

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February 27, 2023

Chair, Rep. David A. Tarnas
Vice Chair, Rep. Gregg Takayama
House Committee on Judiciary & Hawaiian Affairs

Hawai'i State Legislature
415 S. Beretania Street
Honolulu, Hawai'i 96813

Subject: S.B. 36 RELATING TO THE INITIATION OF FELONY PROSECUTIONS
Hearing Date: Tuesday, February 28, 2023, at 2:00 p.m.
Time/Place of Hearing: Via Video Conference, Conference Room 325

Aloha Chair Tarnas, Vice Chair Takayama, and members of the Committee on Judiciary & Hawaiian Affairs,

As Mayor and former Prosecuting Attorney for the County of Hawai'i, I strongly support S.B. 36 and stand with the testimony submitted by our Office of the Prosecuting Attorney asking for passage of this bill.

S.B. 36 represents a collective effort by the four county prosecutors, Office of the Attorney General, the Office of the Public Defender, the Judiciary and Senate Judiciary Committee, to address the impact of the Hawai'i State Supreme court opinion in *State v. Obrero*. This collaboration was necessary to bring clarity to ongoing law enforcement efforts by affirming that felony prosecutions can be initiated through the preliminary hearing process.

I highly encourage the Committee on Judiciary & Hawaiian Affairs to move this legislation forward with positive recommendations for passage.

Mahalo,

Mitchell D. Roth
Mayor
County of Hawai'i

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February 27, 2023

RE: S.B. 36, RELATING TO THE INITIATION OF FELONY PROSECUTIONS

Chair Tarnas, Vice-Chair Takayama, and Members of the House Committee on Judiciary and Hawaiian Affairs, the Office of the Prosecuting Attorney for the County of Kaua'i submits the following supplemental testimony in support of S.B. 36.

After months of work last fall, seeking input from the four county prosecutors and the Department of the Attorney General, Chair Rhoads drafted S.B. 36. This bill addresses the Hawai'i Supreme Court's decision in State v. Obrero (September 8, 2022), by re-authorizing the prosecution's ability to charge felonies via complaint and preliminary hearing. S.B. 36 is a compromise bill. The defense bar already had months in the fall in which to relay its concerns to Senator Rhoads.

It is crucial that this committee tries to understand the practical realities of proceeding (with live witnesses) to a preliminary hearing *and* a grand jury hearing - *within 12 days.* Police officers, physicians, victims and witnesses (who often have work and childcare responsibilities), have to testify in court twice within a two-week period. Physicians cancel appointments with patients, police officers are called in to cover for the testifying officers (triggering overtime payments), witnesses must take time off work, find child or elder care, and victims are subjected (unnecessarily) to having to testify twice for a probable cause determination. Also, our deputy prosecuting attorneys are stretched very thin as they work on the felony case in its early stages – assisting with search warrants, ensuring that charging documents are meticulously drafted, etc. – while preparing for two probable cause hearings.

Public Defender James Tabe recently appeared before this Committee, in a hearing on H.B. 863, the House companion bill that was ultimately deferred. He complained that if the State is initially unsuccessful at establishing probable cause to support the charges, and it later seeks to establish "good cause" to attempt to establish probable cause once again, the defendant's interests will not be represented in this ex parte application process (the prosecution will submit an application and declaration to the court). We would like to point out that when the State submits an ex parte application, the court keeps a record of this application; and it will be turned over to the defense with the rest of the "discovery" in the case, should charges be filed. This means the defense will be able to swiftly move to dismiss the charges, if it believes that the trial court found "good cause" in error. We also want to point out

that as drafted, S.B. 36 allows the State only one attempt to establish "good cause." The State will not have a third opportunity to establish good cause.

We would like to caution that S.B. 36 creates in effect double jeopardy in charging, a new legal concept. Historically, double jeopardy bars the prosecution, under certain circumstances, from subjecting a defendant to more than one trial for the same offense. S.B. 36 expands this concept in Hawai'i to prevent the prosecution, under certain circumstances, from even initiating a felony case, after one failed attempt to establish probable cause to support the charges. A defendant may never even be charged with a crime, after the prosecution just once unsuccessfully attempts to obtain a probable cause finding. From the perspective of crime victims, this is a regressive bill.

For the above reasons, the Office of the Prosecuting Attorney for the County of Kaua'i respectfully submits the above testimony in overall support of the passage of S.B. 36. Thank you for the opportunity to testify on this matter.

RICHARD T. BISSEN, JR.
Mayor

ANDREW H. MARTIN
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TESTIMONY
ON
S.B. 36 RELATING TO
THE INITIATION OF FELONY PROSECUTIONS

February 28, 2023

The Honorable David A. Tarnas
Chair
The Honorable Gregg Takayama
Vice Chair
and Members of the Committee on Judiciary and Hawaiian Affairs

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

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments **in support of** S.B. 36, Relating to the Initiation of Felony Prosecutions. This measure would: 1) conform the Hawai`i Revised Statutes to article I, Section 10 of the Hawai`i State Constitution, 2) clarify the three methods for initiating felony prosecutions, and 3) clarify the requirements for multiple attempts to initiate prosecution of the same felony offense.

On September 8, 2022, the Hawaii Supreme Court issued the State v. Obrero decision, which interpreted Hawai`i Revised Statutes § 801-1 to require that felony prosecutions be initiated only by indictment or information, as opposed to the additional method of a preliminary hearing authorized by the 1982 amendment to article I, Section 10 of the Hawai`i State Constitution. Although we relied upon the 1982 Constitutional amendment for 40 years to initiate prosecution of serious felony offenses via preliminary hearing, the Obrero decision required us to obtain a Grand Jury indictment within a relatively short time frame in order to properly charge certain serious offenses. This created additional demands upon not only our resources, but also the Judiciary and the citizens serving on the grand jury itself.

To adapt to the Obrero decision, the four County Prosecutors worked with the Judiciary to request additional Grand Jury sessions and jointly requested a special legislative session to either repeal or amend Hawaii Revised Statutes § 801-1. We were fortunate that we were able to accommodate all our serious cases using this expanded Grand Jury calendar. However, having

the option to initiate serious felony prosecutions via preliminary hearing will reduce the number of Grand Jury sessions necessary to keep up with the number of incoming felony matters.

S.B. 36 also addresses the concerns articulated by the Hawai`i Supreme Court in the Obrero decision regarding multiple attempts at charging the same felony case using different methods. While the need to re-charge a felony case does occur on occasion, S.B. 36 sets forth specific pre-requisites that need to be met before doing so. This language is the result of months of collaboration between multiple stakeholders, including the Legislature and the county Prosecuting Attorneys, and represents a balance between preserving defendants' constitutional rights and recognizing that real-world circumstances (such as sudden witness unavailability or newly-discovered evidence) may require more than one attempt at initiating a felony prosecution.

For these reasons, the Department of the Prosecuting Attorney, County of Maui **supports the passage of S.B. 36**. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

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

Senate Bill 1418

This bill will be considered at the February 14th meeting of the Waikiki Neighborhood Board and has a great amount of support. As this must be filed before the board meets to become part of the record I will submit it as Individual Testimony in favor.

Amplified music and other sound has been a major area of complaint in Waikiki for several years with residents and visitor industry constantly having their evenings disturbed by the loud reproduced sounds in general from street performers on Kalakaua Avenue.

We feel a resident should be able to return home after a long work day and be able to open a lanai door for fresh Tradewinds without having amplified sound so loud that normal conversations and even television or home music are made impossible.

Several of our neighbors have gone to the extreme of replacing windows and installing air conditioning. This adds a unreasonable cost of living to our neighbors and denies them the use of natural Tradewinds to them.

Our local businesses along Kalakaua and the related side streets are often so overwhelmed with amplified sound that they cannot even speak to prospective customers and hotels in the area have reported the number one customer complaint is the amplified sounds that interrupt sleep. This has forced Hotels that house airline crews to move them to the most distant location in the hotel to ensure they have adequate “Crew Rest” before going to work.

This Board is not opposed to “Street Performers” but is strongly opposed to electronic amplification that disturbs our residents and visitors’ ability to rest and enjoy Waikiki nights.

Mahalo,

Robert Finley

SB-36
Submitted on: 2/24/2023 4:38:07 PM
Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Victor K. Ramos	Individual	Support	Written Testimony Only

Comments:

SUPPORT: Much needed "house keeping" bill to update the law to comport with 40 plus years of successfully processing felony criminal cases.

SB-36
Submitted on: 2/28/2023 8:17:59 PM
Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Oppose	Written Testimony Only

Comments:

oppose

SB-36
Submitted on: 2/28/2023 10:41:17 PM
Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Zach Won	Individual	Support	Written Testimony Only

Comments:

I support the idea of intiation of felony prosecutions. I believe if done right it can open up many different ways to come to a conclusion and find justice