

QUESTION #
SB2851 SD1

**PROPOSES TO AMEND ARTICLE I, SECTION 10 OF THE HAWAII CONSTITUTION
TO ALLOW A FELONY PROSECUTION TO BE INITIATED BY A LEGAL
PROSECUTING OFFICER THROUGH THE FILING OF A SIGNED, WRITTEN
INFORMATION SETTING FORTH THE CHARGE**

Constitutional Question

"Shall Hawaii's constitutional provision regarding the initiation of criminal charges be amended to permit criminal charges for felonies to be initiated by a legal prosecuting officer through the filing of a signed, written information setting forth the charge in accordance with procedures and conditions to be provided by the state legislature?"

Description of Proposed Amendment

The proposed constitutional amendment would permit felony criminal charges to be initiated by filing of a written information signed by a legal prosecuting officer under procedures and conditions established by the Legislature. Article I, section 10, of the State Constitution currently permits felony prosecutions to be initiated in only two ways: (1) upon filing of an indictment following a grand jury proceeding; or (2) upon filing of a complaint following a preliminary hearing conducted by a judge. Both methods require presentation of sworn testimony to establish probable cause to believe that an offense has been committed and that the accused committed it. This amendment would allow felony charges to be initiated by a third method that does not require presentation of sworn testimony.

Under companion legislation adopted during the 2004 legislative session (Senate Bill No. 2861, enacted as Act 62, Session Laws of Hawaii 2004, which will take effect only if the voters approve the proposed constitutional amendment), charges for certain class B and C felonies may be initiated by presentation to a judge of only written information. The written information would have to set forth the charge against the accused, be signed by a prosecutor, and have attached to it an exhibit establishing probable cause. The exhibit would have to include an affidavit or declaration made under penalty of law and could include additional documents, photographs, and other materials. If a judge finds probable cause based upon the written information, the judge would then issue a warrant for arrest of the accused.

Felony offenses are those punishable by more than one year in prison. There are three classes of felonies, A, B, and C, with A felonies being the most serious of these. Murder, an unclassified felony, is the most serious of all felonies. While the companion legislation enacted in 2004 to implement the proposed constitutional amendment would limit the use of information charging to certain class B and C felonies, the proposed constitutional amendment itself makes it possible for the Legislature in the future to allow the use of information charging for all felonies, including class A felonies and murder.

Meaning of a "Yes" Vote

A "yes" vote means that felony prosecutions may be initiated by use of a written information, in addition to the current methods of grand jury proceedings and preliminary hearings.

Meaning of a "No" Vote

A "no" vote means that felony prosecutions may be initiated only through grand jury proceedings and preliminary hearings and not by use of a written information.

Meaning of a "Blank" Vote

A "blank" vote has essentially the same meaning as a "no" vote because the number of "yes" votes must exceed the sum of the "no" and "blank" votes in order for the amendment to be approved.

Pros

Currently, all felony prosecutions must be initiated either by grand jury indictment or a preliminary hearing held in court. These procedures are cumbersome and expensive to the State and counties. They are also burdensome to victims and other witnesses who must often appear at these preliminary proceedings as well as a later trial. Often, police officers must sit at court waiting to testify instead of being on patrol or otherwise on duty.

Initiating felony prosecution by written information will help victims and other witnesses, including police officers, avoid multiple court appearances and will result in cost savings to the State and counties. Also, because prosecutions can be initiated more quickly by use of written information, cases may proceed more quickly to trial.

Appropriate legal safeguards will still be in place. Judges, not prosecutors, will make initial determinations of probable cause, and defendants will have the right to challenge those determinations at a hearing before a judge. This constitutional amendment and the 2004 legislation that will implement it (Senate Bill No. 2861, enacted as Act 62, Session Laws of Hawaii 2004, which will become effective only if the voters approve the amendment) strike a very fair balance between protecting the rights of defendants, promoting efficiency in the criminal justice system, and providing fair treatment for victims and other witnesses.

Cons

This proposed constitutional change would allow felony criminal charges to be instituted by filing a written document called an "information." Felony offenses are those crimes punishable by more than one year in jail. This proposed change would mean that it would no longer be necessary for a witness to testify under oath before a grand jury or a judge at a preliminary hearing in order to charge a person with a felony offense. Information charging is also referred to as "direct file."

A major justification for this proposed change is that it will benefit witnesses by saving them from court appearances. However, there has been no demonstration that this will result from a "direct file" system. In most cases at present, complaining witnesses and investigating police officers come to court once, if at all, to testify at grand jury or preliminary hearing. If the witness is unavailable, hearsay testimony is permitted. In other words, someone else is permitted to testify to what a person would say.

The "direct file" system that would result from this constitutional change would not have any effect on witnesses coming to court for any other reason than grand jury or preliminary hearing. In other words, persons would still have to come for all other court appearances unrelated to grand jury or preliminary hearing. Indeed, persons excused from testifying as a result of the "direct file" system may be called as witnesses by defendants challenging probable cause after they have been charged by information.

Currently, most felony cases are resolved without a trial through pleas or other resolution of the case. One of the important tools used in resolving cases this way is the opportunity for defendants to see and hear witnesses on the stand at preliminary hearing testify about the charge against them. If the case came from the grand jury, a defendant can view a videotape of the grand jury proceeding and/or read a transcript of the sworn testimony. If a defendant does not have such opportunity, there will be less incentive for the defendant to enter a plea. Instead, there likely will be more demands for pre-trial motions and for trial, which will put an additional burden on our court system, as well as on members of the public who will have to come to court as witnesses and jurors.

Only eleven other states use "direct file" and some in very different forms than is being proposed for Hawaii. Some states require court permission for "direct file" charging; other states have built in balancing protections, such as allowing depositions. None of these provisions have been proposed for Hawaii and have largely been determined to be too expensive for our current court budgets. Additionally, because "direct file" makes it easier to bring criminal charges, some states have reported an increase in the number of charges brought, with additional burdens on the various parts of the criminal justice system. If additional resources are needed as a result of this constitutional change, taxpayers will have to pay for them. It is important to note that large states with the highest number of cases have not chosen to use "direct file" because they determined that it would not save money or time and would not benefit their justice systems.

A major reason for opposition to this proposed change is due to the seriousness of bringing felony charges. A person charged with a felony offense has to post bail, which is often

set in the range of \$5,000 and higher. Persons can request release from custody if they cannot afford to post bail but may have to wait in jail for a few weeks until the court can schedule a hearing on the request. That delay often results in the loss of jobs and housing. It has long been a basic principle of our Constitution that putting someone in that kind of jeopardy should require sworn testimony of a witness before a grand jury or a judge. Information charging would eliminate this important safeguard.

Another important protection would be lost with information charging. Our criminal justice system has functioned as a series of checks and balances. The prosecuting attorney brings a charge to the grand jury or to a judge at preliminary hearing and presents evidence to establish probable cause. The grand jurors are allowed to question witnesses. The grand jurors may also seek advice of independent counsel before deciding if probable cause has been established. At preliminary hearing, the defendant's lawyer may question witnesses. After the witnesses testify, the judge decides whether probable cause has been established.

With information charging, no live witnesses are required to testify, and thus there is no opportunity to question the witness or seek clarification before the probable cause determination is made. If the written document establishes probable cause, a felony charge will be brought against a member of our community. Opponents of this proposed change do not believe such serious criminal charges should be so easily brought. The requirement to establish probable cause before a grand jury or a judge where there can be questions and clarifications should remain. The process of adversarial scrutiny adds to the credibility of our criminal justice system.