

TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 3042, A BILL FOR AN ACT PROPOSING AN AMENDMENT TO ARTICLE XVI OF THE CONSTITUTION OF THE STATE OF HAWAII.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 1, 2008 **TIME:** 4:00 PM

LOCATION: State Capitol Room
Deliver to: Committee Clerk, Room 302, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lance M. Goto, Deputy Attorney General

Chair Waters and Members of the Committee:

The Attorney General strongly supports this bill.

This measure seeks to limit the immunity granted to any witness in a criminal proceeding from "transactional immunity," as defined by section 621C-4 of the Hawaii Revised Statutes (HRS), to "use immunity."

The issue of offering immunity in a criminal investigation arises when the investigation may be stalled and there are no other viable investigative avenues that can be pursued. Immunity is offered to an individual chosen by the investigators by obtaining a court order compelling the person to whom it is given to provide information to the investigators. In exchange for that information, the court order prevents the person providing the information from being prosecuted for the information the person provides. The people for whom immunity is considered are ideally individuals who are involved enough in the crime being investigated to have valuable inside information, but who have a lesser role in the crime than the prime suspects. Once a person is immunized, that person can be prosecuted only if the person commits perjury, gives a false statement, or refuses to provide testimony under the order of immunity.

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However, the ideal and the reality of deciding who get immunity may be quite far apart. Hard decisions often must be made about how much must be given up to the immunized witness to facilitate prosecuting the more culpable people further up the criminal food chain. In the more difficult scenarios, the person being considered for immunity is sometimes only slightly less blameless than the ultimate targets of the investigation. The question then becomes how much of a shield should the law provide to the witness immunized in order to further the investigation. That dilemma highlights what is sought to be achieved through this bill.

In 1972, the United States Supreme Court issued two opinions, Kastigar v. United States and Zicarelli v. New Jersey State Commission of Investigation that found that "use immunity" is a constitutionally acceptable means of obtaining a witness's testimony. That was followed by the Legislature enacting chapter 621C of the Hawaii Revised Statutes in 1978 establishing the authority for "use immunity" in this State. However, that law was overturned when the Hawaii Supreme Court determined in an opinion in 1980, State v. Miyasaki, that the only kind of immunity that was constitutionally permissible under the Hawaii State Constitution was "transactional immunity." In making its ruling, the Hawaii Supreme Court acknowledged that its opinion was contrary to the two decisions that were previously issued by the United States Supreme Court. Moreover, subsequent developments in the law have made Miyasaki not only contrary to federal law, but contrary to the majority of the different versions of immunity laws across the country.

What this bill seeks to do is to have Hawaii's immunity laws return to the kind of "use immunity" recognized under federal law, and what was intended to be followed under section 621C-3, HRS, as enacted in 1978. What "use immunity" will do, if approved as a constitutional amendment, is to prevent the prosecution from using any testimony or other evidence produced by a witness under

compulsion of a court-ordered grant of immunity, along with any other information or evidence derived from that produced by the witness, in a prosecution against that witness. It does not prevent the prosecution from prosecuting the witness for any crimes that law enforcement develops independently from the information given by the witness.

"Transactional immunity," on the other hand, is a much broader concept than "use immunity." "Transactional immunity" immunizes any act or matter that can be said to be related to the information provided by the immunized witness. Said in another way, transactional immunity covers not only what the witness does say, but anything that is later found to be "related" to what the witness said. The danger presented by "transactional immunity" is that it immunizes not only what the witness actually divulges to law enforcement, but also, should there be any dispute over what the transactional immunity covers, anything that is determined in subsequent litigation to be related to what the witness said. In other words, transactional immunity may be deemed to be granted to something the witness never said and law enforcement never knew about.

What this bill seeks to do is to place Hawaii on an equal footing with the majority of the jurisdictions in this country. But for the reading to the Hawaii Constitution given by the Hawaii Supreme Court in 1980, "transactional immunity" is not constitutionally required. "Use immunity" is the law of the land in the federal courts and the majority of other states in the Union. "Use immunity" shields a witness only for information the witness provides to law enforcement or which leads law enforcement to other evidence, and which law enforcement could otherwise use against the witness. "Use immunity" does not require having to go through an abstract analysis about whether a witness is immunized from prosecution for things law enforcement may not even know about because the criminal acts committed by the witness are somehow

"related" to something the witness may have told law enforcement. Finally, the witness under "use immunity" can be prosecuted for any crimes that are developed independently from the information provided to the prosecution. The witness is not completely absolved from being accountable for his or her acts. It is for these reasons that we ask for passage of this bill.

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Testimony of the State Office of the Public Defender
To the House Committee on Judiciary

February 1, 2008

RE: HB No. 3042: Proposing An Amendment to Article XV! of the Constitution of the State of Hawai'i

Chair Waters and Members of the Committee:

HB No. 3042 proposes an amendment to our State Constitution that would allow a witness to be compelled to offer evidence against himself or herself as long as the evidence was not used in the prosecution of that witness. In other words, if the government claimed to have separately developed evidence against the witness and asserted that any evidence the witness had given was not the basis of the prosecution, the witness could still be prosecuted.

We oppose this bill. Our current caselaw and statutory provisions already make reasonable provision for compelling testimony.

This bill would make serious inroads on the exercise of the right to remain silent, otherwise known as the right against self-incrimination. As Justice Nakamura stated in State v. Miyasaki, 62 Haw. 269 (1980),

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony, which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

The change anticipated by this bill would create a practice where co-defendants could be compelled to testify against one another and still prosecuted for their role, while trying to prove that the government's case was not based on separately developed evidence. Such a situation flies in the face of the constitutional protections against self-incrimination. We believe current law is appropriate and no additional change is required.

Thank you for the opportunity to comment on this matter.

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DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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PROSECUTING ATTORNEY



DOUGLAS S. CHIN
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE TOMMY WATERS, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-fourth State Legislature
Regular Session of 2008
State of Hawaii

February 1, 2008

**RE: H.B. 3042; PROPOSING AN AMENDMENT TO ARTICLE XVI OF THE
CONSTITUTION OF THE STATE OF HAWAII.**

Chair Waters and members of the House Judiciary Committee, the Department of the Prosecuting Attorney submits the following testimony in strong support of House Bill 3042.

The purpose of this bill is to propose amendments to Article XVI of the State Constitution which would add a section which would authorize the granting of use immunity to witnesses who refuse to testify and have asserted their privilege against self-incrimination.

Currently Hawaii's immunity statutes, Hawaii Revised Statutes (HRS) sections 621C-3 and 621C-4 provide for both use and transactional immunity. However, in 1980, the Hawaii Supreme Court issued an opinion in State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980) that the use immunity provided for in HRS section 621C-3 was unconstitutional under the state constitution because it was not equivalent to the protection against self-incrimination provided under Article I, Section 10 of the state constitution; the result of the holding is that currently only transactional immunity may be granted. The constitutional amendment proposed by this bill would reinstate the granting of use immunity under HRS 621C-3.

Use immunity is grant of immunity from prosecution such that the use of any compelled testimony or any information directly or indirectly derived from the testimony cannot be used against the testifier. Thus, if a person is granted use immunity and the state has independent evidence of the crime for which the person has testified on, the state may still prosecute the person. In contrast, transactional testimony is a grant of immunity from prosecution which protects the testifier from prosecutions for the offense which the compelled testimony relates. Under a grant of transactional immunity, the same testifier could not be

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prosecuted for the offense he or she testified about, even if the state has independent evidence of the crime.

The need for immunity statutes stems from the necessity of testimony in our judicial system which grants a defendant the right of confrontation and from the fact that sometimes the only persons capable of giving useful testimony are those who have participated or are implicated in the crime. However, unlike most state and all federal jurisdictions, Hawaii permits granting of only transactional immunity in which the prosecution faces a dilemma of whether to completely absolve a defendant who could be prosecuted based on independent evidence, in order to obtain testimony against someone else.

We believe that permitting use immunity does not conflict with the privilege against self-incrimination since the privilege against self-incrimination never protected the person asserting it, from prosecution based upon independent evidence.

For these reasons, we strongly support the passage of H.B. 3042 and respectfully request your favorable consideration of this bill.

Thank you for this opportunity to testify.

For these reasons, we strongly support the passage of this bill and thank you for this opportunity to testify.

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Harry Kim
Mayor



Lawrence K. Mahuna
Police Chief

Harry S. Kubojiri
Deputy Police Chief

County of Hawaii

POLICE DEPARTMENT

349 Kapiolani Street • Hilo, Hawaii 96720-3998
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January 31, 2008

Representative Tommy Waters
Chairperson and Members
Committee on Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

**Re: HOUSE Bill 3042, PROPOSING AN AMENDMENT TO ARTICLE XVI OF THE
CONSTITUTION OF THE STATE OF HAWAII**

Dear Representative Waters and Members:

The Hawai'i Police Department supports the passage of House Bill 3042, Proposing An Amendment to Article XVI of the Constitution of the State of Hawaii Relating to Testimony of Defendants in Criminal Cases, to allow prosecutors to compel the testimony of a witness claiming Fifth Amendment privilege, but prohibits use of that testimony in any criminal proceeding against a witness, except prosecution for perjury or false statement.

As cited by the Office of the Attorney General, it is critically important to the successful prosecution of criminal cases in Hawai'i that the State has the means to compel the testimony of witnesses in possession of vital information. Currently, if a witness asserts a privilege to refuse to testify or provide evidence on the grounds of self-incrimination, the State can compel the witness's testimony only by providing the witness complete and permanent *transactional immunity* as defined in §621C-4, of the Hawai'i Revised Statutes.

This measure seeks to allow *use immunity* that has been upheld as complying with the Constitution of the United States by the United States Supreme Court. *Use immunity* allows that a witness's testimony can be compelled, so long as the testimony, and any evidence and information derived from that testimony, cannot be used against that witness in any criminal case, except one for perjury, false statement, failing to comply with the order to testify, or similar offenses. *Use Immunity* appropriately balances society's need to prosecute serious criminal cases with the rights of individuals.

For these reasons, we urge this committee to support this legislation. Thank you for allowing the Hawai'i Police Department to testify on H.B. No. 3042.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence K. Mahuna", written over a circular stamp.

LAWRENCE K. MAHUNA
POLICE CHIEF

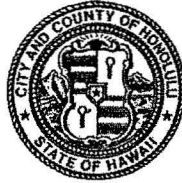
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POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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MUFI HANNEMANN
MAYOR



BOISSE P. CORREA
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MICHAEL D. TUCKER
DEPUTY CHIEFS

OUR REFERENCE JC-NTK

February 1, 2008

The Honorable Tommy Waters, Chair
and Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members:

Subject: House Bill No. 3042, Proposing an Amendment to Article XVI of the
Constitution of the State of Hawaii

I am Janet Crotteau, Captain of the Criminal Investigation Division of the
Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports House Bill No. 3042, which proposes
an amendment to the Constitution of the State of Hawaii by establishing "use immunity"
as a means to compel witness testimony on vital information which cannot be obtained
elsewhere.

Currently a witness in a criminal proceeding who asserts a self-incrimination
privilege may be compelled to testify or provide evidence when "transactional immunity"
is granted. Transactional immunity places a person beyond the law and makes the
person free from the possibility of prosecution for a crime that the person may confess
to while testifying. Basically, immunity is offered to someone who may also be deeply
involved in the crime, but the person's knowledge about the crime makes the person
indispensable to successfully prosecute the defendant.

We believe this immunity is too broad and far-reaching and so is rarely used and
that it is therefore ineffectual. In contrast, "use immunity" only protects the witness from
prosecution using the witness' own testimony. If evidence is acquired through

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The Honorable Tommy Waters, Chair
and Members

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other methods substantiating the supposed crime, such as an independent witness' testimony, then the person can be prosecuted for that crime. In this way, the witness does not receive absolution for all of the witness' crimes because of the witness' testimony against a more serious defendant. We believe the limits of protection under "use immunity" will encourage its use in criminal proceedings while ensuring that criminals will face consequences for their crimes.

In addition, the establishment of "use immunity" would align the state with the federal system and a majority of other states where it is considered the norm.

Thank you for the opportunity to testify.

Sincerely,



JANET CROTTEAU, Captain
Criminal Investigation Division

APPROVED:

for: 
BOISSE P. CORREAU
Chief of Police

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CHARMAINE TAVARES
MAYOR

OUR REFERENCE

YOUR REFERENCE

POLICE DEPARTMENT COUNTY OF MAUI

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January 31, 2008



THOMAS M. PHILLIPS
CHIEF OF POLICE

GARY A. YABUTA
DEPUTY CHIEF OF POLICE

The Honorable Tommy Waters, Chair
And Members of the
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members of the Committee:

**SUBJECT: House Bill No. 3042, Proposing an Amendment to Article XVI
of the Constitution of the State of Hawaii.**

I am Thomas M. Phillips, Chief of Police of the Maui County Police Department. We are supporting House Bill No. 3042, relating to the proposed amendment to Article XVI of the Constitution of the State of Hawaii.

The purpose of this bill is to amend the State Constitution to allow prosecutors to compel the testimony of a witness claiming Fifth Amendment privilege, but prohibits the use of that testimony in any criminal proceeding against a witness, except prosecution for perjury or false statements.

Currently, if a witness asserts a privilege to refuse to testify or provide evidence on the grounds of self-incrimination, the State can compel that witness's testimony, but only by providing that witness complete and permanent "transactional immunity" from any criminal prosecution ever for or on account of any act, transaction, or matter concerning which the witness is required to testify. This severely burdens Hawaii's prosecutors.

In prosecutions by the United States and most other states, a witness's testimony can be compelled, so long as the testimony, and any evidence and information derived from that testimony, cannot be used against that witness in any criminal case, except for perjury, false statements, failing to comply with the order to testify, or similar offenses.

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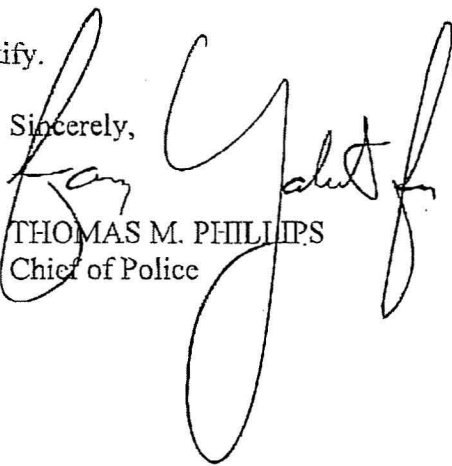
The Honorable Tommy Waters, Chair
And Members of the
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"Use Immunity" appropriately balances society's need to prosecute serious criminal cases with the rights of individuals. The current system, which conditions compelling testimony on a grant of "transactional immunity," makes society pay too high a price for such testimony and severely impedes the ability of prosecutors in Hawaii to obtain convictions in appropriate cases.

The Maui County Police Department urges you to support House Bill No. 3042, proposing an Amendment to Article XVI of the Constitution of the State of Hawaii related to "Use Immunity".

Thank you for the opportunity to testify.

Sincerely,



THOMAS M. PHILLIPS
Chief of Police

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