



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:
H.B. NO. 2235, H.D. 1, RELATING TO PROSTITUTION.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

LATE TESTIMONY

DATE: Thursday, February 9, 2012 **TIME:** 2:00 p.m.
LOCATION: State Capitol, Room 325
TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General (the "Department") appreciates the intent of this bill in trying to protect people forced into prostitution, but must oppose it because, as drafted, the bill is vague, overbroad, and could be misused.

The purpose of this bill is to authorize a person convicted of a prostitution-related offense to file a motion to vacate the judgment of conviction under certain circumstances. It also establishes procedures for the motion to vacate judgment.

The Department has numerous legal concerns about this bill.

This bill attempts to create a special post-conviction relief process for a defendant convicted of a prostitution offense, to vacate the judgment of conviction when: (1) the judgment of conviction was not obtained in violation of the constitution of the United States or of the State of Hawaii; (2) there are no other legal grounds to challenge and overturn the judgment; (3) the investigation and prosecution of the crime, and the court actions and decisions all complied with the law; and (4) the defendant was treated fairly and justly throughout the criminal justice process and all of defendant's rights and privileges were protected. The criminal justice system already has in place processes that allow convicted defendants to appropriately challenge judgments of conviction. A convicted defendant has a right to appeal the conviction to an appellate court and challenge the lower court proceedings. After that, a convicted defendant also has the ability to challenge a conviction in a post-conviction relief proceeding, such as the one set up by Rule 40, of the Hawaii Rules of Penal Procedure. These processes have been developed and established to ensure fairness and justice for all in the criminal justice system. The

process in this bill, however, to vacate prostitution convictions, is completely inconsistent with our criminal justice system.

Although the criminal investigation, prosecution, and court proceedings may have all been conducted appropriately and in compliance with the law, and the defendant treated fairly, this bill proposes that, some time after all of that takes place, when the defendant has no basis to challenge the conviction under existing law, the defendant should still be allowed to come back to court to vacate the judgment of conviction for the petty misdemeanor prostitution offense. The proposed justification is that "the defendant's participation in the offense was the result of the person having been a victim" of promoting prostitution or a trafficking offense. The implication is that the defendant committed the offense under duress and, therefore, should not be held responsible for the crime. There are many problems with this proposal.

This is a scenario that could result from this bill. A defendant is arrested for the crime of prostitution and taken into police custody. During the course of the criminal investigation, the defendant has an opportunity to tell the police investigator that the defendant was being forced to engage in prostitution by another person. If the defendant discloses this information during the investigation and the investigator is able to confirm the information, the defendant would likely be treated as a victim and witness in a case against the one promoting the prostitution activity. The defendant would not be prosecuted for prostitution. Under section 702-231, Hawaii Revised Statutes (HRS), duress is a defense to a penal charge. If the defendant does not disclose the information, then the investigator would have no reason to treat the defendant as a victim or witness, and would not be able to investigate the promoting prostitution offense. Defendant would be investigated and prosecuted for the prostitution activity, and ultimately convicted based on evidence that proves the commission of the offense beyond a reasonable doubt. Possibly a year or more later, defendant files a motion to vacate the conviction alleging that defendant participated in the prostitution conduct because defendant was forced to do so by somebody. Defendant does not even name the person involved but alleges. Defendant might also attach to the motion to vacate judgment sworn statements from a staff member of a victim services organization and defendant's own attorney, which state that defendant informed them that defendant was a victim of trafficking. The sworn statements may also include statements given to the declarants by defendant about the alleged trafficking conduct. As provided by this bill,

these sworn statements create a presumption that the defendant's participation in the prostitution offense was a result of being a victim of trafficking. The prosecutor and investigator, having had no opportunity to investigate and corroborate defendant's allegations of forced prostitution or trafficking at the time of defendant's arrest and prosecution because of defendant's failure to disclose any of these allegations at that time, have no evidence to rebut defendant's allegations or the legal presumption created by the bill. That being the case, the court must grant the motion to vacate the judgment and dismiss the matter.

The prosecution, despite following all the laws and procedure, and proving defendant's guilt beyond a reasonable doubt, is left with no ability to challenge defendant's late allegations and defend the judgment of conviction. The process is unfair and unjust.

The bill provides that a defendant's judgment of conviction for a prostitution offense may be vacated if:

[T]he person's participation in the offense was the result of the person having been a victim of:

- (a) Promoting prostitution in the first degree under section 712-1202 or promoting prostitution in the second degree under section 712-1203;
- (b) A severe form of trafficking in persons as defined in title 22 United States Code section 7102 (13); or
- (c) A crime as set forth in title 18 United States Code section 2422, section 2423(a), or section 2425.

The bill is not clear about what would be required to prove that the defendant was a victim of one of these specified crimes. It is not clear that a prosecution of one of these specified crimes need have taken place, that someone was convicted of one of these crimes, and that the person's victimization, at the time of the conduct that resulted in the prostitution conviction, was brought out and proven in the prosecution of a specified crime. It is not even clear that the identity of the alleged perpetrator of the promoting prostitution or trafficking offense needs to be disclosed or established. If the bill simply requires the defendant, a year or more after conviction, to allege that the defendant was forced to engage in prostitution by another person, then the prosecution would be in no position to contest those allegations.

The Department is concerned about the specified crimes. Promoting prostitution in the second degree, under section 712-1203, HRS, unlike promoting prostitution in the first degree, does not require any force, threat, or intimidation to compel or induce a person to engage in

prostitution. It simply requires that the person knowingly advance or profit from prostitution. The offense does not establish the prostitute as a victim.

Another specified crime provision reads:

A crime as set forth in title 18 United States Code section 2422, section 2423(a), or section 2425.

Section 2422 prohibits a person from knowingly persuading, inducing, enticing, or coercing anyone to travel in interstate or foreign commerce to engage in prostitution. The acts of persuading, inducing, or enticing another to engage in certain conduct are not indicative of any coerced or forced prostitution. An offense under this section may also not have a victim.

Sections 2423(a) and section 2425 both appear to prohibit conduct involving promoting prostitution or sexual activity of a minor. Because the potential victims for these offenses appear to be minors, these offenses do not appear relevant to the provisions of this bill, because under existing law, minors in these cases are never prosecuted. Defendants convicted of prostitution offenses who are seeking to get their judgments of conviction vacated could not have been minors at the time of the commission of their offenses. If they were minors, they would have been petitioned into Family Court and would have been adjudicated as juveniles, not convicted of any crimes.

On page 2, at lines 10-17, the bill requires that the motion to vacate judgment of conviction:

Be made within a reasonable period of time after the person ceases to be a victim as described in subsection (1), subject to reasonable concerns for the safety of the person, family members of the person, or other victims of the trafficking that may be jeopardized by the bringing of a motion, or for other reasons consistent with the purpose of this section[.]

This provision contains a significant amount of vague and ambiguous wording. A “reasonable period” subject to “reasonable concerns” or “other reasons consistent with the purpose of this section,” is unclear. A “reasonable period of time after the person ceases to be a victim” is also vague and ambiguous. It is unclear when a person ceases to be a victim of prostitution or trafficking. It is unclear, if the person leaves the alleged trafficker, but continues to engage in prostitution on their own or while working for someone else, whether the person ceased to be a victim. It is unclear, if the person who engaged in the promoting prostitution activity stopped

using any force or coercion on the person, and the person continued to engage in prostitution activity, whether the person ceased to be a victim.

On page 3, at lines 18-21, the bill provides:

If the court grants a motion filed under this section, the court shall vacate the conviction and dismiss the accusatory pleading, and may take additional action as is appropriate in the circumstances or as justice requires.

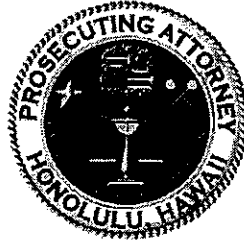
The phrase, “may take additional action as is appropriate in the circumstances or as justice requires,” is also of concern. The intended purpose of this provision is unclear. If the court has granted defendant’s motion, and vacated the conviction and dismissed the case, it is unclear what other action would be needed.

For the foregoing reasons, the Department respectfully requests that this bill be held.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

IN RE TESTIMONY

**THE HONORABLE GILBER S.C KEITH-AGARAN, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawai`i**

Thursday, February 9, 2012

RE: H.B. 2235, H.D. 1; RELATING TO PROSTITUTION.

Chair Keith-Agaran, Vice Chair Rhoads, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony expressing strong concerns regarding H.B. 2235, H.D. 1 that authorizes a person convicted of committing the offense of prostitution to file a motion to vacate the judgment. Rule 40 of the Hawaii Rules of Penal Procedure currently would be the better way to achieve the policy goal of H.B. 2355, H.D. 1. Moreover, there are a number of problems in H.B. 2355, H.D. 1, which we will point out as well.

Under Rule 40(a)(1) of the Hawaii Rules of Penal Procedure, a person may seek relief on the following grounds:

- (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai`i;
- (ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;
- (iii) that the sentence is illegal;
- (iv) that there is newly discovered evidence; or
- (v) any ground which is a basis for collateral attack on the judgment.

The department is aware that newly discovered evidence may come up in prostitution cases, and even if it was known to the petitioner and it was not raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding, the petitioner can prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue.

Moreover, a petitioner who was under "duress" to perform prostitution--where such duress continued throughout the court proceedings--has a strong basis for a collateral attack on

the judgment. In the interest of justice, the Department of the Prosecuting Attorney of the City and County of Honolulu is open to hearing such issues in a Rule 40 hearing.

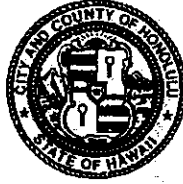
To date, our department has not heard of any situation where a victim of trafficking or other forms of forced prostitution have been precluded from using Rule 40 of the Hawaii Rules of Penal Procedure. We have made previous requests for advocates to send us case examples, but have not received any yet.

In particular, our Department has the following concerns with H.B. 2355, H.D. 1: Official documentation of the person's status as a victim of trafficking can be done by an extremely broad number of persons or organizations, such as a trained professional staff member of a victim services organization, an attorney, a member of the clergy, or a medical or other health professional from whom the person has sought services; each of these sources presents considerable potential for abuse. Further, it appears that even one such document would automatically create a presumption that the person's participation in prostitution was a result of having been a victim of trafficking. We also note that the official documentation is not required for the granting of a petition under this bill. Lastly, under this bill the court may take additional action as is appropriate in the circumstances or as justice requires. This language is too broad. Rather, the court should enter an appropriate order with respect to the judgment or sentence in the former proceeding.

For these reasons, we recommend H.B. 2355, H.D. 1 be deferred by the committee because of the problems we mentioned in the bill and Rule 40 of the Hawaii Rules of Penal Procedure is currently available for persons who seek relief such as discharging a case. We have expressed our willingness to work with advocates on this important issue. And will continue to do so. Thank you for the opportunity to testify.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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PETER B. CARLISLE
MAYOR

LATE TESTIMONY

LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE JM-TA

February 9, 2012

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

Subject: House Bill No. 2235, H.D. 1, Relating to Prostitution

I am John McEntire, Major of the Narcotics/Vice Division of the Honolulu Police Department.

The Honolulu Police Department opposes House Bill No. 2235, H.D. 1, Relating to Prostitution, as written.

The bill allows anyone convicted of prostitution and other related offenses to file a motion to vacate the conviction based on participation which was the result of the person having been a "victim" of section 712-1202, Promoting Prostitution in the First Degree, Hawaii Revised Statutes, or section 712-1203, Promoting Prostitution in the Second Degree.

Because section 712-1203 does not include the elements of force, threat, fraud, or intimidation, the inclusion of this section would allow anyone convicted of prostitution who had a "pimp" or was otherwise assisted by someone who advances or profits from prostitution, to file the motion.

We are not opposed to this bill as it applies to those whose participation in the offense is the result of victimization by section 712-1202 or by any other form of force, threat, fraud, or intimidation.

The Honolulu Police Department urges you to oppose House Bill No. 2235, H.D. 1, Relating to Prostitution.

Serving and Protecting With Aloha

The Honorable Gilbert S. C. Keith-Aragan, Chair
and Members

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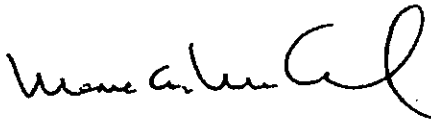
Thank you for the opportunity to testify.

Sincerely,



JOHN MCENTIRE, Major
Narcotics/Vice Division

APPROVED:



for

LOUIS M. KEALOHA
Chief of Police

Testimony for JUD 2/9/2012 2:00:00 PM HB2235

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: Fawn Jade Koopman
Organization: Individual
E-mail: fawnjk@hawaii.edu
Submitted on: 2/9/2012

LATE TESTIMONY

Comments:
I stand in strong support of HB2235,
thank you.