



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

Tuesday, March 24, 2015, 9:00 AM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

By

Calvin Ching
Deputy Chief Court Administrator
First Circuit

Bill No. and Title: House Bill No. 792, House Draft 2 Relating to Evidence.

Purpose: Amends the Hawaii Rules of Evidence to authorize nonresident property crime victims to testify in misdemeanor or petty misdemeanor property criminal proceedings by a live two-way video connection. Effective July 1, 2030. (HB792 HD2)

Judiciary's Position:

The Judiciary's court operations staff takes no position of the merits of House Bill No. 792, House Draft 2 and respectfully offers the following comments regarding potential impact on court operations, notwithstanding testimony submitted by the Hawai‘i Supreme Court's Standing Committee on the Rules of Evidence that respectfully opposes House Bill No. 792, House Draft 2 on the substance of the bill.

If this measure is enacted, it would be prudent to set an effective date on or after January 1, 2017. This time frame will allow the Judiciary to submit a funding request for FY17 and, if funds are appropriated, to complete procurement, installation, testing and training for operation of new equipment in all District Court facilities statewide.

Thank you for the opportunity to testify on this measure.



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

Tuesday, March 24, 2015, 9:00 AM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

By

Judge Glenn J. Kim, Chair
Supreme Court Standing Committee on the Hawai‘i Rules of Evidence

Bill No. and Title: House Bill No. 792, House Draft 2 Relating to Evidence.

Purpose: Amends the Hawaii Rules of Evidence to authorize nonresident property crime victims to testify in misdemeanor or petty misdemeanor property criminal proceedings by a live two-way video connection. Effective July 1, 2030. (HB792 HD2)

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on Rules of Evidence respectfully opposes House Bill No. 792, House Draft 2, which would authorize video testimony of a nonresident in a prosecution for a misdemeanor or petty misdemeanor property offense. The measure would allow a Hawai‘i court to receive testimony by live, two-way closed circuit television from a property crime victim located outside Hawai‘i. The procedure contained in House Draft 2 is no less violative of the Confrontation Clauses of both the U.S. and Hawai‘i Constitutions than the procedure contained in the original bill and, given that, the Evidence Committee continues to oppose this proposed legislation.

The proponents of House Bill No. 792 apparently recognize the applicability of the rule of Maryland v. Craig, 497 U.S. 836, 860 (1990) (approving closed circuit broadcast of testimony given by a child sexual abuse victim at a remote location out of the accused’s presence), requiring a “case-specific finding of necessity” to satisfy the Sixth Amendment’s Confrontation



Clause. They claim, in the preamble to this measure, that the denial of face-to-face confrontation “is necessary to further an important public policy of ensuring public safety for visitors and residents.” But there are no case-specific findings of necessity contemplated, other than (1) “the crime is a misdemeanor or petty misdemeanor” and (2) the victim-witness is a nonresident of this state. These findings are not case-specific, and the link between this procedure and the stated goal of ensuring public safety is not stated, not apparent, and not inferable.

We invite the Committee’s attention to United States v. Yates, 438 F.3d 1307 (11th Cir. 2006)(en banc), where the testimony of two witnesses located in Australia was broadcast into an Alabama courtroom by means of a two-way, closed circuit television procedure. The witnesses were unwilling to travel to the United States, and they were beyond the federal district court’s subpoena power. Yates holds:

The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government’s case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference. . . . In this case, there simply is no necessity of the type Craig contemplates. When one considers that Rule 15 (which provides for depositions in criminal cases) supplied an alternative, this lack of necessity is strikingly apparent.

The Yates court added that Fed. R. Crim. P. 15 allows the Government to depose witnesses and guarantees “the defendant’s right to physical face-to-face confrontation by specifically providing for his presence at the deposition.” 438 F.3d at 1317. The court reasoned: “On this record, there is no evidentiary support for a case-specific finding that the witnesses and defendants could not be placed in the same room for the taking of pretrial deposition testimony pursuant to Rule 15.” Id.

We have presented Yates in some detail for several reasons. To begin with, it is a proper application of Maryland v. Craig. Secondly, it closely parallels any record that would be developed in a court adopting the House Bill 792 procedure. And it shows that necessity is absent whenever a deposition procedure like that furnished by Fed. R. Crim. P. is available to the



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prosecutor. We note that the deposition procedure of HRPP (Hawai'i Rule of Penal Procedure) 15, our state counterpart of the federal deposition rule, permits depositions under the same conditions as does the federal rule, and both rules are far superior to a two-way closed circuit telecast because the defendant is entitled to be present at the deposition.

Why is the accused's presence with the witness when testimony is taken so critical? Isn't two way TV, where the witness can see the defendant, and vice versa, just as good as physical presence? For the answer we go back to Coy v. Iowa, 487 U.S. 1012 (1988), which posited physical, face-to-face confrontation as the "core" value of the Confrontation Clause. The Yates court also addressed this question: "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent. . . . The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." Id.

House Bill 792, House Draft 2 should be disapproved because it is unnecessary and violative of the Constitution.

Thank you for the opportunity to testify on this measure.

**Testimony of the Office of the Public Defender
State of Hawaii
to the Senate Committee on Judiciary and Labor**

March 24, 2015

H.B. No. 792 HD2: RELATING TO EVIDENCE

Chair Keith-Agaran and Members of the Committee:

We oppose passage of H.B. No. 792 HD2 because we believe that the measure would be unconstitutional as a violation of an accused's right to confrontation of witnesses against him or her under the Sixth Amendment of the U.S. Constitution and Article I, Section 14 of the Hawaii Constitution. Those constitutional provisions assure a criminal defendant of the right to confront every witness against him or her in a trial. The Hawaii Supreme Court, in State v. Faafiti, 54 Haw. 637 (1973) elaborated upon the importance of this fundamental right:

[T]he confrontation clause was incorporated into the United States Constitution as the Sixth Amendment to prevent the despised practice of having an accused tried primarily on "evidence" consisting solely of ex parte affidavits, and depositions, and to give the accused the right to demand that his accusers, *i.e.*, witnesses against him, be brought to face him.

54 Haw. at 640

H.B. No. 792 HD2 would allow a non-resident to present court testimony via video connection. We believe that this measure would directly violate the aforementioned constitutional provisions. A defendant in a criminal proceeding has a due process right to have the fact-finder directly observe the witness while he/she testifies. The fact-finder in a criminal proceeding is the exclusive judge of the credibility of the witnesses. To accomplish this, juries are routinely instructed that they must observe the witness's manner of testifying, the witness's intelligence, the witness's candor or frankness, or lack thereof, and the witness's temper, feeling, or bias. This duty would be severely impeded by testimony been delivered outside the presence of the fact-finder.

The bill does not impose any requirements pertaining to the visual or audio clarity of video connection. This is critical to the ability of the fact-finder to judge the credibility of the witness. Moreover, assuming a video connection would only show the face of the witness (as is the norm in "Skype" transmissions), the jury would be impeded in viewing the witness' body movements as he or she testifies. Oftentimes non-verbal communication is as important as what a witness says in judging credibility.

Even though H.B. No. 792 HD2 provides for the right of the defendant to have his attorney present with the witness delivering the video testimony, this is not sufficient to protect the right to confrontation. The defendant has the right to physically confront a witness against him/her, not simply to have his/her attorney confront the witness.

Moreover, most defendants would not have the financial means to pay for the attorney to travel to the location of the witness to conduct the examination. It is questionable whether any trial court in the state would approve alternative testimony under this measure even if it is enacted into law because any conviction where such a procedure is employed will immediately come under constitutional attack.

Thank you for the opportunity to testify in this matter.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: Submitted testimony for HB792 on Mar 24, 2015 09:00AM
Date: Monday, March 23, 2015 10:24:59 AM

HB792

Submitted on: 3/23/2015

Testimony for JDL on Mar 24, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Richard K. Minatoya	Maui Department of the Prosecuting Attorney	Support	No

Comments: Hawaii's economy relies heavily on the tourism industry. Oftentimes, property crimes committed against our visitors are difficult, if not impossible, to prosecute because of the high cost of travel as well as the great inconvenience in bringing a non-resident tourist back to testify in court. This bill will greatly assist law enforcement officials in prosecuting those individuals who commit property crimes against non-residents. The bill brings the Hawaii Rules of Evidence in conformance with Hawaii Revised Statutes § 802ID-7. It also is aligned with Hawaii Rules of Evidence, Rule 616, which already provides for televised testimony of a child under certain circumstances. We ask that the committee pass this bill. Thank you.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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PROSECUTING ATTORNEY

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FIRST DEPUTY
PROSECUTING ATTORNEY



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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF HOUSE BILL 792, HD 2

A BILL FOR AN ACT RELATING TO EVIDENCE

COMMITTEE ON JUDICIARY AND LABOR

Sen. Gilbert S.C. Keith-Agaran, Chair
Sen. Maile S.L. Shimabukuro, Vice Chair

Tuesday, March 24, 2015, 9:00 a.m.
State Capitol, Conference Room 016

Honorable Chair Keith-Agaran, Vice-Chair Shimabukuro, and Members of the Committee on Judiciary and Labor, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in support of House Bill No. 792, HD 2.

This measure amends the Hawai'i Rules of Evidence to authorize nonresident property crime victims to testify in misdemeanor or petty misdemeanor property criminal proceedings by a live two-way video connection.

Hawai'i's economy relies heavily on the tourism industry. Often times, property crimes committed against our visitors are difficult to prosecute because the visitors may lack the financial or time resources to return to Hawai'i to testify at trials or other evidentiary hearings. Due to recent technological improvements, any accused would be afforded full and fair rights to confrontation and cross-examination, where demeanor, reactions, affect and countenance of the witness testifying can all be easily observed via high-definition video and audio connections.

The Office of the Prosecuting Attorney, County of Hawai'i supports the passage of House Bill No. 792, HD 2. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY IN SUPPORT OF
HB792 HD1 – RELATING TO EVIDENCE**

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Judiciary and Labor
March 24, 2015, 9:00 a.m., Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

The Office of the Prosecuting Attorney, County of Kaua'i submits the following testimony in **STRONG SUPPORT** of HB792 HD1, Relating to Evidence.

The proposed bill recognizes that in a substantial portion of the property crimes committed in the State of Hawaii, the victims are visitors from outside the state who may lack the financial or time resources to return to Hawaii to testify at trials or other evidentiary hearings, and that alternative measures are necessary to ensure that justice is done in these cases. Many thieves target obvious tourist vehicles or lodging specifically due to this logistical impediment to prosecution.

Although Hawaii Revised Statutes Section 801D-7 already gives victims and witnesses the right to testify at trial by video, that right has never been implemented by the necessary amendment to the Hawaii Rules of Evidence. This bill would address that, and provide a reasonable and efficient framework for allowing the testimony of victims and witnesses to crimes which may otherwise never reach a just resolution.

Although concerns have been raised that the proposed Bill could potentially conflict with the rights of an accused to confrontation under the Constitution of the United States, it should be noted that there are **MANY** situations in which a declarant is not physically present within the courtroom. For example, there are more than twenty exceptions to the hearsay rule. These

exceptions are founded in the idea that there are certain categories of testimony that are inherently reliable. Our Office submits that the testimony of a property crime victim, carefully limited to subject-matter areas of ownership and value of the property in question, lack of consent to the taking thereof, are inherently reliable. Simply put, these are not the kinds of things that witnesses are likely to lie about. Moreover, our Office notes that there are already provisions in the Hawai'i Rules of Evidence that permit for victims of certain offenses (child sex abuse victims) to testify from outside the courtroom. We also note that in certain matters (grand jury proceedings), the State of Alaska offers witnesses the opportunity to testify, in limited circumstances, remotely. This is due to the difficulty and demonstrable inconvenience of requiring certain limited categories of witnesses to travel vast distances at great expense to testify on routine matters. In this respect, Alaska is very similar to Hawai'i.

Finally, our Office notes that technological improvements already have created a situation where any accused would be afforded full and fair rights to confrontation and cross-examination; the demeanor, reactions, affect and countenance of the witness testifying can all be easily observed via high-definition video and audio connection.

For these reasons, we are in **STRONG SUPPORT** of HB792 HD1. We ask the Committee to **PASS** this Bill. Thank you for the opportunity to testify on this matter.

DENNIS "FRESH" ONISHI
Council Member
District 3



PHONE: (808) 961-8396
FAX: (808) 961-8912
EMAIL: donishi@co.hawaii.hi.us

HAWAI'I COUNTY COUNCIL
25 Aupuni Street, Hilo, Hawai'i 96720

March 22, 2015

The Honorable Gilbert Keith-Agaran, Chair
and Members of the Senate Committee on Judiciary and Labor

Dear Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee,

Thank you for the opportunity to provide testimony in support of House Bill No. 792 HD2. This measure is very similar to an original proposal submitted via the Hawai'i State Association of Counties, 2015 Legislative Package.

The proposed measure will ensure that visitors from out of state who have been victims of property crimes in Hawai'i, will have a fair opportunity to see justice through by testifying at trials or other evidentiary hearings via a live two-way video stream.

Countless criminals target rental cars or lodgings, particularly due to this logistical impediment to prosecution.

Although Hawai'i Revised Statutes Section 801D-7 already gives victims and witnesses the right to testify at trial by video, that right has never been implemented by the necessary amendment to the Hawaii Rules of Evidence. This bill would address that, and provide a reasonable and efficient framework for allowing the testimony of victims and witnesses to crimes which may otherwise never reach a just resolution.

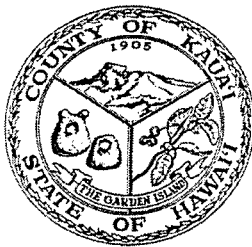
Thank you for your consideration and for the opportunity to submit testimony in support of this measure.

Sincerely,

Dennis "Fresh" Onishi
Hawai'i County Council Member

COUNTY COUNCIL

Mel Rapozo, Chair
Ross Kagawa, Vice Chair
Mason K. Chock
Gary L. Hooser
Arryl Kaneshiro
KipuKai Kualii
JoAnn A. Yukimura



OFFICE OF THE COUNTY CLERK

Ricky Watanabe, County Clerk
Jade K. Fountain-Tanigawa, Deputy County Clerk

Telephone (808) 241-4188
Fax (808) 241-6349
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Council Services Division
4396 Rice Street, Suite 209
Lihue, Kauai, Hawaii 96766

March 23, 2015

**TESTIMONY OF KIPUKAI KUALII
COUNCILMEMBER, KAUAI COUNTY COUNCIL
ON
HB 792, HD 2, RELATING TO EVIDENCE
Senate Committee on Judiciary and Labor
Tuesday, March 24, 2015
9:00 a.m.
Conference Room 016**

Dear Chair Keith-Agaran and Members of the Committee:

Thank you for this opportunity to submit testimony in support of HB 792, HD 2, Relating to Evidence. My testimony is submitted in my capacity as an individual member of the Kauai County Council and as Chair of the Economic Development / Intergovernmental Relations Committee.

HB 792, HD 2 amends the Hawaii Rules of Evidence to authorize non-resident property crime victims to testify in misdemeanor or petty misdemeanor property criminal proceedings by a live two-way video connection. This Bill will serve to ensure that visitors who may have to return to their residences or who may be unable to return to Hawaii to testify, the opportunity to testify against those who have committed crimes against them. During testimony to the Kauai County Council, our local law enforcement personnel stated that property crimes committed against our visitors are very difficult to prosecute because of the high cost of travel and the inconvenience of bringing visitors back to the islands to testify. HB 792, HD 2 will allow our visitors to seek justice for crimes committed against them and provide testimony which may not otherwise be heard.

For the reasons stated above, I respectfully ask the Senate Committee on Judiciary and Labor to approve this measure. Again, thank you for this opportunity to submit my testimony. If you have any questions, please feel free to contact the Office of the County Clerk, Council Services Division, at (808) 241-4188.

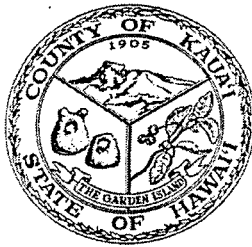
Sincerely,

KIPUKAI KUALII
Councilmember, Kauai County Council

AB:aa

COUNTY COUNCIL

Mel Rapozo, Chair
Ross Kagawa, Vice Chair
Mason K. Chock
Gary L. Hooser
Arryl Kaneshiro
KipuKai Kualii
JoAnn A. Yukimura



OFFICE OF THE COUNTY CLERK

Ricky Watanabe, County Clerk
Jade K. Fountain-Tanigawa, Deputy County Clerk

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Council Services Division
4396 Rice Street, Suite 209
Lihu'e, Kauai, Hawaii 96766

March 23, 2015

**TESTIMONY OF MEL RAPOZO
COUNCIL CHAIR, KAUAI COUNTY COUNCIL
ON
HB 792, HD 2, RELATING TO EVIDENCE
Senate Committee on Judiciary and Labor
Tuesday, March 24, 2015
9:00 a.m.
Conference Room 016**

Dear Chair Keith-Agaran and Members of the Committee:

Thank you for this opportunity to submit testimony in support of HB 792, HD 2, Relating to Evidence. My testimony is submitted in my individual capacity as Chair of the Kauai County Council.

Last year, the Kauai County Council received testimony for a similar measure from our local law enforcement personnel. They stated that property crimes committed against our visitors are very difficult to prosecute because of the high cost of travel and the inconvenience of bringing visitors back to the islands to testify. Being able to prosecute these criminals will bring justice for the victims and their families, and may also reduce the crime in our communities. To ensure our visitors will be given a fair opportunity to testify and seek justice for crimes committed against them, HB 792, HD 2 amends the Hawaii Rules of Evidence to authorize non-resident property crime victims to testify in misdemeanor or petty misdemeanor property criminal proceedings by a live two-way video connection.

For the reasons stated above, I respectfully ask the Senate Committee on Judiciary and Labor to approve this measure. Again, thank you for this opportunity to submit my testimony. Should you have any questions, please feel free to contact the Office of the County Clerk, Council Services Division, at (808) 241-4188.

Sincerely,

MEL RAPOZO
Council Chair, Kauai County Council

AB:aa

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Subject: *Submitted testimony for HB792 on Mar 24, 2015 09:00AM*
Date: Monday, March 23, 2015 12:43:26 PM

HB792

Submitted on: 3/23/2015

Testimony for JDL on Mar 24, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Chief of Police Darryl Perry	Kauai Police Department	Support	No

Comments:

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HB792

Submitted on: 3/23/2015

Testimony for JDL on Mar 24, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kaeo Bradford	Individual	Support	No

Comments:

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Subject: Submitted testimony for HB792 on Mar 24, 2015 09:00AM
Date: Monday, March 23, 2015 10:15:35 AM

HB792

Submitted on: 3/23/2015

Testimony for JDL on Mar 24, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Lisa Murphy Allison	Individual	Support	No

Comments: I support the bill...

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