



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

Representative Karl Rhoads, Chair

Representative Joy San Buenaventura, Vice Chair

Tuesday, February 10, 2015, 2:00 p.m.

State Capitol, Conference Room 325

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, Relating to Evidence.

Purpose: Amends the Hawai‘i Rules of Evidence to authorize nonresident property crime victims to testify in criminal proceedings by a live two-way video connection.

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on Rules of Evidence respectfully opposes House Bill No. 792, which would authorize “video testimony of [a] nonresident in a [prosecution for a] felony 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 would violate the Confrontation Clauses of the U.S. and Hawai‘i Constitutions.

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 felony” and (2) the victim-witness is a nonresident of this state. These findings are not



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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 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.



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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 should be disapproved because it is unnecessary and violative of the Constitution.

Thank you for the opportunity to testify on House Bill 792.

**Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary**

February 6, 2015

H.B. No. 792: RELATING TO EVIDENCE

Chair Rhoads and Members of the Committee:

We oppose passage of H.B. No. 792 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 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 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.

TESTIMONY OF THE HAWAII POLICE DEPARTMENT

HOUSE BILL 792

RELATING TO EVIDENCE

BEFORE THE COMMITTEE ON JUDICIARY

DATE : Tuesday, February 10, 2015

TIME : 2:00 P.M.

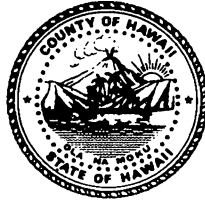
PLACE : Conference Room 325
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PERSON TESTIFYING:

Harry S. Kubojiri
Hawaii Police Department
County of Hawaii

(Written Testimony Only)

William P. Kenoi
Mayor



Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT

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February 6, 2015

Representative Karl Rhoads
Chairman and Committee Members
Committee on Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai'i 96813

Re: HOUSE BILL 792, RELATING TO EVIDENCE

Dear Representative Rhoads:

The Hawai'i Police Department supports House Bill 792, with its purpose being to authorize nonresident property crime victims to testify in criminal proceedings by a live two-way video connection.


We believe this legislation as written will serve to ensure that those individuals who criminally prey on visitors to our shores will no longer find themselves gaining a "free pass" when the visitors must return to their residences or are otherwise unable to return to Hawai'i in order to testify.

We further believe this legislation will to ensure that those visitors, who are victims of property crimes will have a sense of relief in knowing that distance will no longer equate to being re-victimized if they are unable to return to Hawai'i to testify.

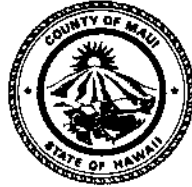
It is for these reasons, we urge this committee to approve this legislation.

Thank you for allowing the Hawai'i Police Department to provide comments relating to House Bill 792.

Sincerely,


HARRY S. KUBOJIRI
POLICE CHIEF

ALAN M. ARAKAWA
Mayor



JOHN D. KIM
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TESTIMONY
ON
HB 792 - RELATING TO EVIDENCE

February 9, 2015

The Honorable Karl Rhoads
Chair
The Honorable Joy A. San Buenaventura
Vice Chair
and Members
House Committee on Judiciary

Chair Rhoads, Vice Chair San Buenaventura and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, SUPPORTS HB 792 - Relating to Evidence. Hawaii's economy relies heavily on the tourism industry. Often times, 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.

Additionally, this bill conforms to a similar rule under the Hawaii Rules of Evidence, Rule 616, which provides for televised testimony of a child under certain circumstances.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, SUPPORTS the passage of this bill. We ask that the committee PASS HB 792.

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