The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor
Senator Gilbert Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Monday, February 1, 2016, 9:30 a.m.
State Capitol, Conference Room 016

by
R. Mark Browning
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 2314, Relating to the Offense of Abuse of Family or Household Members.

Purpose: Makes a person ineligible for a deferred acceptance of a guilty plea or nolo contendere plea in cases where the person was originally charged with the offense of abuse of family or household member and the charge is subsequently reduced to a lesser included offense.

Judiciary's Position:

The Judiciary takes no position on this bill but we wish to raise a consequence for the Legislature to consider. If defendants who are "originally charged with the offense of abuse of a family or household member and the charge is subsequently reduced to a lesser included offense" are "ineligible for a deferred acceptance of guilty plea or nolo contendere plea," intransigent and intractable delays will result nearly instantaneously. The resulting backlog will create more dangerous situations for victims, procedural due process issues for defendants, and the risk of case dismissals due to the denigration of the right to speedy trial.

Thank you for the opportunity to submit testimony on this bill.

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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 1, 2016

RE: S.B. 2314; RELATING TO THE ABUSE OF FAMILY OR HOUSEHOLD MEMBERS.

Chair Keith-Agaran, Vice-Chair Shimabukuro, members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to S.B. 2314.

The intent of S.B. 2314 is to ensure defendants who have been charged with the offense of abuse of family or household member (hereinafter referred to as AFHM) are ineligible for a deferred acceptance of guilty plea or nolo contendere plea regardless on whether the defendant pleads to a lesser-included offense. Although the intent of this bill is well founded, the practical application has far-reaching negative effects that would drastically affect not only the prosecution of such cases, but also the Judiciary in their ability to manage and control the extensive caseload that would be created. Presently, the Judiciary employs two (2) courtrooms at District Court located at 1111 Alakea Street, Honolulu, HI 96813, which among other things handles AFHM cases. Each courtroom has the ability to handle a maximum of two (2) jury trials per given week, for a total of four (4) trials per week between them, depending on the number of witnesses testifying and the complexity of the case. In the past month of January alone there have been 204 cases that were set on the trial calendar.

The Department fully supports protecting victims of domestic violence, but the methods proposed in S.B. 2314 would eliminate much of the discretion and flexibility that our deputies need to be able to handle the current caseload, given the existing circumstances. Every AFHM case is unique, whether it be the parties involved, injuries sustained or surrounding facts and circumstances leading up to the offense. In most cases, ensuring that a defendant is held accountable for the original charge of AFHM is the ideal outcome, however, this is often

impracticable when victims of domestic violence decline to follow through with and assist in the prosecution of these charges. In a fair number of AFHM cases, not only do victims and defendants continue to live with each other during the pendency of their case, but quite often, the couple also shares common children with one another. It is also very common that defendants and victims reconcile between the time of arrest and the case being set for trial, subsequently victims do not wish to follow through with prosecution. In situations where there is a difficulty in locating a victim or the victim is reluctant to cooperate, having the flexibility to amend the charge sometimes with the option for deferral, at least ensures that the defendant's activity is monitored by the courts for at least one (1) year and the defendant can be required to attend domestic violence intervention treatment, both of which are critical to the rehabilitation process.

Section 1 of S.B. 2314 attempts to illustrate the idea that "defendants originally charged with this offense (AFHM) have the option of pleading to a lesser included offense". To clarify, neither the defendant nor the court has the initial choice of pleading to a lesser offense. An amendment is only offered at the discretion of the prosecutor after careful and close review of the circumstances and evidence of the case. Further, in situations where an amendment is proposed, and a defendant in fact moves for a deferral, the court always has the discretion and final decision to grant or deny the motion for deferral.

Additionally, our department has concerns about the far-reaching effect and potential unintended consequences of S.B. 2314, which none of us may yet have considered or imagined. One example would be a situation where a defendant was charged with AFHM but then, through our further investigation, our department determines that there is a lack of Family Court jurisdiction, based on the insufficient relationship between the victim and defendant. In such a case we would be required to amend the offense purely for a jurisdictional issue. S.B. 2314 would effectively preclude that defendant the opportunity of a deferral, where he or she would otherwise be eligible for a deferral as the AFHM charge was not applicable to begin with.

For all of the reasons stated above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 2314. Thank you for the opportunity to testify on this matter.

ALAN M. ARAKAWA
Mayor

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Acting Prosecuting Attorney

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TESTIMONY
ON
SB 2314 - RELATING TO THE OFFENSE OF
ABUSE OF FAMILY OR HOUSEHOLD MEMBER

February 1, 2016

The Honorable Gilbert S. C. Keith-Agaran
Chair
The Honorable Maile S. L. Shimabukuro
Vice Chair
and Members
Senate Committee on Judiciary and Labor

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

The Department of the Prosecuting Attorney, County of Maui, SUPPORTS SB 2314 - Relating to the Offense of Abuse of Family or Household Member. The bill will make a person ineligible for a deferred acceptance of guilty or no contest plea in cases where the person was originally charged with the offense of abuse of a family or household member and the charge is reduced to a lesser included offense.

This bill will toughen laws against domestic violence by ensuring that a defendant pleading guilty or no contest to a lesser included charge of Abuse of a Family or Household Member will not get his or her record cleared with a deferred acceptance. While there are concerns about this bill hampering the ability to reach a plea bargain in cases were the victim subsequently recants the victim's abuse allegations, we believe that the use of a Victim's Voluntary Statement will be able to counter the recanting victim at trial.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, SUPPORTS the passage of this bill. We ask that the committee PASS SB 2314.

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

Office of the Public Defender
State of Hawaii
Timothy Ho, Chief Deputy Public Defender

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

February 1, 2016, 9:30 a.m.

S.B. No. 2314: RELATING TO THE OFFENSE OF ABUSE OF FAMILY OR HOUSEHOLD MEMBERS

Chair Keith-Agaran and Members of the Committee:

This measure would prohibit defendants originally charged with the offense of abuse of family or household member from receiving a deferred acceptance of guilty or no contest plea after pleading guilty or no contest to a lesser-included offense. We believe, among other things, that this measure is grossly unfair, severely limits prosecutorial discretion and will add to the current level of court congestion. **The Office of the Public Defender strongly opposes S.B. 2314.**

We believe that there are two primary issues at play here. The first issue deals with the ability of first-time offenders to take advantage of Chapter 853, Hawaii Revised Statutes, to defer the acceptance of their no contest or guilty pleas. The second issue deals with the impact of this measure on the plea bargaining process, and the ability of the prosecutor and court to manage their caseloads.

Chapter 853-1 (a), HRS, states in pertinent part as follows:

(1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;
(2) It appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and
(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law,

the Court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and **after considering the recommendations, if any, of the prosecutor, may defer further proceedings**.

If this measure passes, defendants, originally charged with abuse of a household member under §709-906, HRS, would be prohibited from requesting a deferral of their amended charges. As stated in Chapter 853, HRS, the court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant's motion to defer the proceedings. In order for the Court to defer the proceedings, it must find that the defendant is not likely to engage in a (further) course of criminal conduct, **and** that the ends of justice and welfare of society do not require the defendant receive a criminal conviction. Not all requests by defendants to defer their criminal proceedings are granted

by the Court. A criminal history, seriousness of the offense, history of substance abuse, lack of employment and previous criminal behavior, even if uncharged, are common reasons cited to by prosecutors and judges for a denial of a defendant's motion to defer the acceptance of his or her guilty or no contest plea.

A defendant charged with abuse of household or family member is statutorily prohibited from receiving a deferral of his charges. A defendant in this situation cannot even ask for a deferral unless the prosecutor agrees to amend the charge to an offense which is deferral eligible. This measure removes the discretion to charge an offense from the prosecuting attorney's hands. If a prosecutor decides to amend a charge to a lesser offense, we must assume that he or she took into account the seriousness of the offense and the impact on all parties.

Why is it important that some defendants receive deferrals of their criminal proceedings? A criminal conviction follows an individual for the rest of their lives, and impacts their ability to seek and maintain employment, and to receive government benefits. A defendant that is young, or who committed offense under provocation, or has mitigating circumstances, should be allowed, in limited circumstances, to be given a second chance, a chance to avoid a criminal conviction. Police officers, soldiers, government and private sector employees may lose their jobs if they receive a criminal conviction. A Pearl Harbor Naval Shipyard employee, for example may lose their security clearance and be denied entry into the shipyard, which would cause them to be terminated from their employment.

The unfairness lies in the fact that the original charge is decided upon by the State, and a charge can only be amended upon their request, and with approval by the court. When a prosecutor decides to amend an original charge to an offense which carries a lesser penalty and/or degree, they do so for many reasons. The strength of their case, or lack thereof, the history and background of the defendant and complaining witness, the actual harm caused by the defendant's actions, and the relative seriousness of the case as compared to the rest of the prosecutor's caseload all come into play. We are seeing increasing numbers of women being charged with abuse of a family or household member. On many occasions, they have been victims of abuse themselves, by their parents, and most likely, by their current spouses or partners. Under S.B. 2314, they would be prohibited from requesting a deferral of their proceedings. A defendant who receives a deferral from the court is placed under court supervision. A defendant originally charged with abuse who is granted a deferral to an amended charge would be required to attend domestic violence intervention (DVI) classes, and would not be granted a dismissal of their charge at the conclusion of the deferral period if they did not successfully complete the DVI program, reoffended or failed to comply with any other order of the court.

Plea bargaining is the life blood of the criminal justice system. A very small percentage of charged cases end up going to trial. A vast majority of the cases end up with a guilty or no contest plea, either as originally charged or to an amended charge. There are not enough judges, prosecutors and defense attorneys to accommodate any more trials than that are currently being held. Prosecutors have to prioritize their cases and decide which defendants should or should not receive a plea offer. A plea offer could be to reduce a

charge in exchange for a guilty or no contest plea, or to agree to a reduced sentence and/or fine. The possibility of asking for a deferral, a chance to avoid a criminal conviction, is a particularly enticing reason for a defendant to waive his right to a trial and enter a plea. Without the possibility of a deferral, a defendant is more likely to elect a trial. Defense attorneys weigh the strength of their case versus the strength of the State's case in determining whether or not to recommend trial. The likelihood of getting an acquittal, favorable verdict, or an improved position for sentencing are factors that defense attorneys consider in deciding to recommend a trial or plea. Our adversarial system of criminal of justice, over the long run, works fairly well. On Oahu, there are two family court judges who preside over abuse of household member jury trials. Each judge can one trial a week. Combined, they are able to hear approximately one hundred (100) jury trials a year. The Office of the Public Defender handles the bulk of the jury trials held every year. Our anecdotal statistics show that ninety percent of our trials result in not guilty verdicts. Nine out of every ten cases we take to trial result in acquittals. One of our deputies had fourteen jury trials during her four month rotation in the abuse of family or householder rotation. All fourteen of her trials resulted in not guilty verdicts. If our clients are prohibited from requesting deferrals, and we win ninety percent of our trials, what incentive is there for our attorneys to recommend a guilty or no contest plea to our clients? We will take our chances at trial.

When a court has more trials than it can handle, cases get backed up, and the result of court congestion is that cases get dismissed for speedy trial violations. Over the past three years, our office has handled an average of a thousand cases each year. Even with the ability to seek plea bargains and deferrals to amended offenses the courts are congested to the point where cases are being dismissed for speedy trial violations. If we are to add a few hundred more trials to the court's calendar, the congestion would result even more dismissals. The problem with cases being dismissed as a result of court congestion is that the more serious cases which demand the court's attention and all of the prosecutor's resources, will be dismissed, and victim's would not get the justice they deserve, and defendants the counselling and punishment that they require.

This measure has huge negative implications of the administration of the family court adult criminal calendar, and unfairly impacts defendants charged with abuse of a family or household member. We strongly oppose this measure, and thank you for the opportunity to present testimony to this committee.

hscadv

HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

January 28, 2016

To: Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

From: Michelle Rocca, Training and Technical Assistance Director
Hawaii State Coalition Against Domestic Violence

Re: **Testimony in Support of SB 2314**

Good afternoon Chair Keith- Agaran, Vice Chair Shimabukuro, and members of the committee. On behalf of the Hawaii State Coalition Against Domestic Violence we thank you for the opportunity to share our testimony in **support of SB 2314** relating to the offense of abuse of a family or household members.

Currently, if charged with the misdemeanor crime of Abuse of a Family Household Member (709-906), one is not eligible to enter a plea of differed acceptance of guilt (DAG) or differed acceptance of nolo contendere (DANC). The disqualification for a differed sentence is appropriate and is due to the nature of the offense being specific to family violence. It sends an accurate message to offenders, victims, and the community at large that offenders who engage in violence against family members will not be offered the opportunity to compromise and that abuse is an offense that one must take full responsibility for.

Unfortunately, a number of abusers are afforded the opportunity to plead to a lesser offense such as assault, harassment, etc., which then allows for the differed sentence to become available to the offender. This action dilutes the intention of the Abuse of a Family and Household Member statute to hold offenders accountable, keep record of the person's use of violence, and communicate a message of no tolerance to our community.

We support and encourage the prohibition of DAG and DANC pleas as a viable option for offenders of family violence as this process undermines the strong, and necessary message of AFHM statute 709-906 deterring citizens from committing the crime of family violence, and by holding offenders who do so accountable for their actions.

Thank you for your consideration and for the opportunity to provide testimony on this matter.

TO: Chair Keith-Agaran
Vice Chair Shimabukuro
Members of the Committee on Judiciary and Labor
FR: Nanci Kreidman, MA
Chief Executive Officer

RE: SB 2314

Aloha. Thank you for the opportunity to provide our perspective on this important Bill. The criminal justice system, designed to hold perpetrators accountable for the crimes they have committed, and impose conditions or sanctions appropriate to deter further commission of crime can be challenging for survivors. The crime of domestic violence is a complex and potentially lethal act, most often taking place behind closed doors. Seeking help of any kind, or reporting this kind of crime is very difficult for survivors; it requires the survivor to detail the private, and embarrassing events that are perpetrated against her by her abuser.

Abuse of Family and Household Member (709-906) is intentionally crafted to prohibit abusers from eligibility for deferred acceptance of guilty pleas or nolo contendere pleas. It appears that the number of abusers permitted to plead to a lesser offense (assault, for example), which avoids the mandatory jail sentence and the mandatory participation in Domestic Violence Intervention, is enormous. The Abuse of Family and Household Member statute was written to honor the need for the imposition of mandatory conditions; it was also amended to prohibit abusers from receiving a DAG or DANC plea. It is important to have a record, to convey a no tolerance message and to maintain accountability; any other approach is detrimental to the public safety and compromises an abuser's need to take responsibility for harming his partner or family member.

Since there are so many abusers who accept the plea deals, to avoid sanctions and accountability, while blurring the record of abuse committed against an intimate partner, we support the prohibition of a DAG or a DANC plea for defendants who have committed a crime of abuse.

We look forward to the Committee's favorable action on S.B. 2314. Thank you for the opportunity to provide testimony today.

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Senate Committee on Judiciary and Labor
Monday, February 01, 2016!
SB 2314

TESTIMONY
Joy A Marshall, RN (RET) League of Women Voters of Hawaii

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

The League of Women Voters of Hawaii supports SB 2314 which makes a person ineligible for a deferred acceptance of a guilty plea or nolo contendere plea in cases where the person was originally charged with the offense of abuse of a family or household member and the charge is subsequently reduced to a lesser included offense.

Our position is clear that in in the process of charges that abuse of a family member be treated no differently that abuse of any person in the populace. That abuse like all crimes is a crime of consequences no different than in any other case.

We urge you to pass this bill. Thank you for the opportunity to submit testimony.