TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
S.B. NO. 2964, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, February 23, 2016 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, 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") opposes certain parts of the bill, specifically relating to the threshold dollar amounts for theft offenses and to sentencing for methamphetamine trafficking offenses.

The purpose of this bill is to enact the recommendations of the 2015 Penal Code Review Committee.

The Department has concerns about the amendments proposed in part V of the bill by sections 37 to 39 (pages 72-74), which increase the threshold dollar amounts for the offenses of Theft in the Second Degree, Theft in the Third Degree, and Theft in the Fourth Degree. And the Department has concerns about the amendments proposed in part VIII of the bill by sections 52 to 56 (pages 93-100), which eliminate mandatory sentencing provisions for the methamphetamine trafficking offenses.

In part V, the bill increases the threshold value of property and services from $300 to $750 for the offense of Theft in the Second Degree, and from $100 to $250 for the offense of Theft in the Third Degree. The bill also increases the maximum value of property and services for Theft in the Fourth Degree from $100 to $250. The Department has concerns about these amendments.

The Department recommends that the threshold values for these theft offenses not be increased. The current values of $300 and $100 are appropriate amounts. To put it in perspective, the state minimum wage was $6.25 per hour in 2003. The current minimum wage is $8.50 per hour. Currently, a minimum wage worker would have to work at least forty hours,

over a full week, to replace property worth $300. The $300 felony theft amount remains a significant amount. To make $750 (pretax), a minimum wage worker would have to work eighty-nine hours, or over two weeks. That would be half of the worker's monthly salary before taxes and other deductions.

Increasing the theft threshold value from $300 to $750 would diminish the seriousness of many theft crimes and reduce the deterrent impact of the theft offenses. Under this bill, theft of property or services valued between $250 and $750 would only be a misdemeanor. As such, the many convicted misdemeanor offenders, who are felony offenders under the current law, would not receive the level of appropriate treatment, counseling, and supervision that they would otherwise receive from felony probation services. This bill would reduce the deterrent effect against crime, while at the same time reducing the level of services to offenders, which itself may increase the rate of recidivism and the number of victims. Thieves know the difference between misdemeanor and felony offenses. With the proposed amendments, thieves will know they can steal up to $750 in property without triggering felony prosecution. Property owners, particularly small business owners, may suffer greater losses, and are unlikely to pass all of those losses to their customers.

In part VIII, the bill eliminates mandatory sentencing provisions for the methamphetamine trafficking offenses. The Department has concerns about these amendments, which will significantly reduce the consequences of trafficking methamphetamine. Methamphetamine, often called “ice”, is one of the most commonly abused drugs in Hawaii, and by far the most dangerous. Ice destroys families and lives and is frequently a factor in violent and property crimes.

Section 52, on pages 93-96, amends the offense of Methamphetamine Trafficking in the First Degree by removing from its definition: (1) the possession of one ounce or more of methamphetamine; and (2) the distribution of one-eighth of an ounce or more of methamphetamine. Those prohibitions are then added, in section 54 of the bill, at pages 97-98, to the offense of Promoting a Dangerous Drug in the First Degree. These amendments would allow someone who committed these methamphetamine trafficking offenses to get probation. Under current law, these trafficking offenders would be sentenced to indeterminate terms of imprisonment.

In section 56, at pages 99-100, the bill repeals the offense of Methamphetamine Trafficking in the Second Degree. That offense prohibits the distribution of methamphetamine in any amount; and someone convicted of that offense must be sentenced to an indeterminate term of imprisonment, with a mandatory minimum term of imprisonment ordered by the court. By repealing this offense, a person who distributes any amount of methamphetamine will be eligible for probation.

The current methamphetamine trafficking offenses were adopted in 2006 to address the serious problem of methamphetamine abuse in our community. Methamphetamine has ruined many lives. The trafficking offenses were intended to target the distributers and sellers who were providing the drug to vulnerable individuals, getting them addicted to the substance, and making profits from their addiction. This bill will allow these traffickers to get probation.

Aside from the points of opposition related to the threshold amount for theft offenses and sentencing for methamphetamine trafficking offenses described above, the Department supports the rest of the bill.

DAVID Y. IGE
GOVERNOR OF HAWAII

VIRGINIA PRESSLER, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

Testimony SUPPORTING SB2964
Relating to the Administration of Justice

SENATOR GILBERT S. C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Hearing Date: February 23, 2016, 9:00 a.m. Room Number: 016

Fiscal Implications: Although positive fiscal impacts are not the primary focus of this bill, a continuation in the increased rate of admissions to the Hawaii State Hospital (HSH) is possible if this measure is not adopted, and concomitant increased expenditures and pressure on the HSH budget.

Department Testimony: The Department of Health (DOH) supports this measure.

The purpose of this bill is to enact recommendations of the penal code review committee convened pursuant to HCR155, SD1 (2015) including changes to HRS §704-404, HRS §704-411, HRS §704-712, HRS §704-713, and HRS §704-415.

Generally, the DOH supports the enactment of the recommendations made by the penal review committee with regards to the statutes and will comply with these provisions should the measure be enacted. We note several instances where the phrase "from within the department of health" in reference to an examiner designated by the director of health in felony cases is deleted.

We understand that this provision to repeal the requirement that one member of the panels be appointed from with the department is temporary and that mandatory participation in

forensic examinations by a state designated examiner from within the department will be restored in two years. We understand that the intent of this provision is to provide flexibility in assigning court ordered evaluations received by the department during a limited period of time while addressing personnel shortages.

If this provision is enacted, the director will utilize the provided discretion in assigning cases, if indicated, during this period and will remain committed to build the workforce of employed examiners within the department who provide services pursuant to HRS §704.

Thank you for the opportunity to testify.

Offered Amendments: None.

Christopher T. Van Marter
Senior Deputy Prosecuting Attorney
Chief – White Collar Crime Unit
Department of the Prosecuting Attorney
1060 Richards Street
Honolulu, Hawaii 96813
(808) 768-7436
cvanmarter@honolulu.gov

Chair Keith-Agaran, Vice-Chair Shimabukuro, and fellow members of the Senate Committee on Judiciary & Labor, the White Collar Crime Unit of the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in **strong opposition to Part V, Section 42** of S.B. 2964. That specific proposal was submitted by the penal code review committee.

Part V, Section 42 attempts to repeal subsection (a) of Section 708-893 of the Hawaii Revised Statutes (HRS), which reads: "A person commits the offense of Use of a Computer in the Commission of a Separate Crime if the person: (a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree".

HRS Section 708-893 was originally enacted in 2001. Subsection (a) was added to HRS Section 708-893 in 2006. Subsection (a) was introduced during the 2006 legislative session as H.B. 2535 and S.B. 2434, and it was subsequently enacted into law on May 25, 2006, as Act 141. Significantly, no member of the 2006 legislature voted against the bills that ultimately became subsection (a) to HRS Section 708-893. No member of the 2006 House of Representatives and no member of the 2006 Senate voted against what became subsection (a) to HRS Section 708-893. Subsection (a) received unanimous support from every member of the 2006 legislature that was present to vote. It's unclear whether the penal code review committee was aware that the 2006 legislature unanimously approved the addition of subsection (a) to HRS Section 708-893.

In any event, since 2006, the legislature has taken a number of steps to strengthen Hawaii's computer crime laws. Indeed, since 2006, the legislature has updated every Hawaii computer crime law and strengthened the penalties for those crimes. Hawaii's updated computer crime laws now reflect the current view of the legislature and the general public about the seriousness of the problem of cybercrime.

That's why it was so troubling to see this proposal emerge from the penal code review committee. Simply put, the proposal to repeal subsection (a) to HRS Section 708-893 is a step backward. It will weaken Hawaii's computer crime laws – indeed, it will completely repeal one of the most important statutes that Hawaii has to address the problem of computer crime.

The rational for the repeal of subsection (a) is found on page 70 of S.B. 2964. The rational states, "[r]epealing a provision that subjects a person to a separate charge and enhanced penalty for using a computer to commit an underlying theft crime because it seems unduly harsh,

given the prevalence of 'smart phones' and other computer devices". That is the sole justification for the repeal of a law that passed with unanimous support from the 2006 legislature!

The rational for the repeal of subsection (a) is illogical and makes no sense. What does the prevalence of electronic devices have to do with how society views the seriousness of computer-facilitated crime? And, what does the prevalence of electronic devices have to do with how the legislature classifies criminal conduct that is facilitated by electronic devices? It doesn't matter whether there are one million, one billion, or even one trillion electronic devices on Earth. There is simply no logical connection between how many devices there are on Earth and how society views the seriousness of those who use electronic devices to facilitate fraud, and how the legislature classifies criminal conduct that is facilitated by those electronic devices. Simply put, the prevalence of devices and how the legislature views the criminal use of those devices are two are entirely separate issues. In short, S.B. 2964's stated rational for repealing subsection (a) to HRS Section 708-893 is unpersuasive and tenuous, at best.

The "Report of the Committee to Review and Recommend Revisions to the Hawaii Penal Code" dated December 30, 2015 (hereinafter "Report"), offered the same rational, i.e., citing the "prevalence of electronic devices" argument. See *infra*. But, the Report added another rational. On page 51, the Comment states, "The removed offenses, first and second degree theft, are already subject to prosecution as a class B and C felony, respectively". However, that's another non sequitur. It simply doesn't follow that, since first and second degree theft are already subject to prosecution as a class B and C felony, subsection (a) to HRS Section 708-893 should therefore be repealed. Indeed, if the Comment's rational was valid, it would be a justification to repeal the entire statute, not just subsection (a). Why? Because, every "separate crime" that is set forth in HRS Section 708-893 is "already subject to prosecution" as a stand-alone crime – not just first and second degree theft, but all nine of the crimes that are set forth in subsection (b) are "already subject to prosecution" as stand-alone crimes. Thus, it's not surprising that the statute is called "Use of a Computer in the Commission of a Separate Crime". By definition, every "separate crime" is a crime that is "already subject to prosecution" as a stand-alone crime. But, that's not a logical or coherent rational for repealing only a selective portion of the statute.

Respectfully, the Comment seems to miss the point of HRS Section 708-893. HRS Section 708-893 was enacted because society, through their elected representatives, views the use of a computer in the commission of certain crimes as an aggravating circumstance that warrants an increased penalty. That's why the legislature chose to classify the crime as "one class or grade, as the case may be, greater than the offense facilitated". See HRS Section 708-893(2). In short, the whole point of HRS Section 708-893 is to treat the use of a computer as an aggravating circumstance, just like the legislature treated the misuse of "personal information" as aggravating circumstance when it adopted Hawaii's identity theft laws. When the legislature enacted Hawaii's identity theft laws, it chose to subject the offender to increased penalties for committing first and second degree theft. Why? Because, the legislature deemed the use of "personal information" to facilitate theft an aggravated form of theft. Similarly, when the legislature adopted subsection (a) to HRS Section 708-893, it deemed the use of a computer to facilitate theft an aggravated form of theft, and accordingly, like the identity theft statutes, provided for increased penalties. To reiterate, every member of the 2006 legislature who was

present to vote, in fact voted to support the bills that added first and second degree theft to HRS Section 708-893.

The Comment also points out that, by adding first degree theft to HRS Section 708-893, the legislature increased the penalty for first degree theft from a class B felony to a class A felony when a computer is used to facilitate the theft. However, that fact was well known to the 2006 legislature. Indeed, it was brought to the attention of the legislature by the written testimony submitted by the Office of the Public Defender. Their written opposition, notwithstanding, the 2006 legislature voted to add first and second degree theft to HRS Section 708-893. In short, the Comment to the 2015 Penal Code Review Committee Report regarding the increased penalties for first degree theft constitutes old information that was considered and rejected – unanimously!

The Comment also indicates that, "due to time constraints", the committee did not review statistics about the prosecution of subsection (a) to HRS Section 708-893. Had the committee requested, the Department of the Prosecuting Attorney for the City and County of Honolulu would have provided the following statistics for the period from 2006, when subsection (a) was enacted, through February 2016:.

51 – Total cases referred for prosecution

11 – Total cases where prosecution was declined

40 – Total cases charged (40 defendants)

15 – Total defendants who received either a DAG (5) or DANC (10) plea

10 – Total defendants who were sentenced to probation

5 – Total cases that were dismissed as part of a plea agreement

9 – Total defendants sentenced to prison (5: 20 years, 3: 10 years, 1: 8 years youthful)

Note: Of the 9 sentenced to prison, 3 had a prior felony record and were therefore not eligible for probation

1 – Total cases pending prosecution.

As these statistics demonstrate, of the 40 defendants charged with committing the offense of Use of a Computer in the Commission of a Separate Crime, 30 received either a deferral of their plea, probation, or had their computer charged dismissed altogether as part of a plea agreement. In other words, 75% of all defendants charged with Use of a Computer did <u>not</u> receive a prison term. Put differently, only about 25% received a prison term, and of the 9 who did receive a prison term, 3 of them were ineligible for probation based on their prior felony record. And, 3 of the 9 had their sentenced reduced to 10 years as part of a plea agreement. In short, a total of 9 defendants have been sentenced to prison since 2006. That equates to an average of 1 defendant per year since subsection (a) was added to HRS Section 708-893 in 2006.

Clearly, subsection (a) is not contributing in any meaningful way to Hawaii's prison over-population problem. 1 person per year! As the statistics clearly show, 3 out of 4 defendants are being sentenced to court-supervision, as opposed to prison. And, regarding the 9 defendants who received a prison term, the facts in those cases showed that the defendants' criminal conduct was especially egregious and involved repetitive conduct, multiple victims, high-dollar losses, additional charges, and/or a complete unwillingness to take responsibility or make restitution.

But, how did the Hawaii Paroling Authority (HPA) treat those 9 defendants who were sentenced to prison for committing the offense of Use of a Computer in the Commission of a Separate Crime? According to HPA's Annual Reports for the years 2007 through 2014, the HPA set the following minimum prison terms for inmates convicted of the offense of Use of a Computer in the Commission of a Separate Crime:

2007 – No parole action taken. 0 inmates were covered by HRS Section 708-893

2008 – 1 person. Minimum: 10 years

2009 – No parole action taken. 0 inmates were covered by HRS Section 708-893

2010 – No parole action taken. 0 inmates were covered by HRS Section 708-893

2011 – 1 person. Minimum: 1.5 years

2012 – 1 person. Minimum: 8 years

2013 – 7 people. Average minimum: 3.5 years

2014 – 2 people. Average minimum: 5.75 years

2015 – HPA's Annual Report not yet available.

As HPA's statistics reflect, with the exception of the 2008 inmate, the remaining inmates have been ordered to serve an average prison term that is less than one-third of their maximum sentence. To put these statistics in perspective, therefore, during the period from 2007 to 2014, only 12 people statewide were sentenced to prison for committing the offense of Use of a Computer in the Commission of a Separate Crime, and all but one of those will be eligible for parole after serving only about one-third or less of their sentence! Clearly, HPA's statistics refute any suggestion that subsection (a) to HRS Section 708-893 is "unduly harsh". It fact, the statute is fair and just, and defendants are being treated equitable, notwithstanding their serious criminal conduct.

HPA's statistics, combined with the statistics from the Honolulu Prosecutor's Office, demonstrate that, since subsection (a) was added to HRS Section 708-893 in 2006:

(1) 75% of the defendants who were charged with committing the offense of Use of a Computer in the Commission of a Separate Crime were sentenced to court supervision or had

their charge dismissed entirely as part of a plea agreement;

(2) Only about 25% of those who were charged with committing the offense of Use of a Computer in the Commission of a Separate Crime were sentenced to prison;

(3) Of the 25% who were sentenced to prison, about half had their charges reduced as part of a plea agreement or were ineligible to receive a sentence of probation; and

(4) Of the 12 inmates statewide who were sentenced to prison, almost all of them were ordered to serve only about one-third of their sentence before becoming eligible for parole.

Had the Penal Code Review Committee had access to these statistics, it's inconceivable that they would have deemed the statute "unduly harsh". On the contrary, these statistics demonstrate that the statute is both fair and just, and that it is being applied in a fair and equitable manner by the courts, the paroling authority, and law enforcement.

Lastly, it's worth pointing out that the Comment emphasized that a "significant minority" of the committee was opposed to repealing subsection (a) to HRS Section 708-893. The law enforcement stakeholders in particular opposed the repeal of subsection (a) to HRS Section 708-893.

In conclusion, Part V, Section 42 is a controversial measure, and is strongly opposed by law enforcement. It attempts to undo the unanimous vote of the 2006 legislature, based on a razor thin, entirely unpersuasive rational. Therefore, that specific measure should be rejected.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of Part V, Section 42 of S.B. 2964. **The Department of the Prosecuting Attorney respectfully requests that you strike and remove Part V, Section 42 from S.B. 2964**, and that you reject the recommendation to repeal subsection (a) to HRS Section 708-893. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulupd.org

KIRK CALDWELL
MAYOR

LOUIS M. KEALOHA
CHIEF

MARIE A. McCAULEY
CARY OKIMOTO
DEPUTY CHIEFS

OUR REFERENCE JM-NTK

February 23, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members
Committee on Judiciary and Labor
State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

SUBJECT: Senate Bill No. 2964, Relating to the Administration of Justice

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

The Honolulu Police Department opposes Senate Bill No. 2964, Part V, Section 42, which relates to the Use of a Computer in the Commission of a Separate Crime. This proposal was submitted by the penal code review committee.

Under this bill, Part V, Section 42, subsection (a) of Section 708-893 of the Hawaii Revised Statutes, would be repealed. More specifically, it would remove the enumerated offenses of Theft in the First and Second Degree from this section of the law.

This subsection received unanimous support when it was passed by the 2006 Legislature. The Legislature has consistently and progressively taken steps since then to strengthen and keep pace with technology as it pertains to its use in criminal activities. These laws recognized the severity and aggravating circumstances when computers are used to commit crime.

On page 70, lines 6 and 7 of Senate Bill No. 2964, the penal code review committee cites its rationale for repealing this subsection as "unduly harsh, given the prevalence of 'smart phones' and other computer devices." The prevalence of any item should not be the deciding fact of whether or not a law should be repealed. We would argue that the exact opposite is true. Because of the prevalence of such devices, we have seen an increase in its use to commit fraud, terroristic threatening, harassment, and sex crimes. These crimes would have not otherwise been committed without the use of such devices.

We are in agreement with the Department of the Prosecuting Attorney that these are aggravating circumstances that warrant an increased penalty and should be prosecuted as separate crimes. A comparison can be drawn to the time when the Legislature treated personal information as an aggravating circumstance when the identity theft laws were passed. The Legislature took this aggravating circumstance one step further when it passed legislation making the unauthorized possession of personal confidential information a class c felony.

The use of devices will continue to increase making it easier for persons to commit theft. It is not the proliferation of these devices that will make it easier and more frequent but the individual's choice to use these devices to hide behind the anonymity it creates along with the ease of access. In other words, these devices are a tool to commit more and more frequent the offense of theft and make it more difficult to identify and apprehend those offenders.

The Honolulu Police Department urges you to reject the recommendation and strike Part V, Section 42 of Senate Bill No. 2964, as stated on page 77 in lines 3 through 20 and on page 78 in lines1 through 11.

Thank you for the opportunity to testify.

Sincerely,

John D. McCarthy, Captain
Criminal Investigation Division

APPROVED:

Louis M. Kealoha
Chief of Police

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulupd.org

KIRK CALDWELL
MAYOR

LOUIS M. KEALOHA
CHIEF

MARIE A. McCAULEY
CARY OKIMOTO
DEPUTY CHIEFS

OUR REFERENCE CK-SK

February 23, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members
Committee on Judiciary and Labor
State Senate
Hawaii State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

SUBJECT: Senate Bill No. 2964, Relating to the Administration of Justice

I am Captain Carl Kalani of District 2 of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Part VII, Section 47, specifically §710-, Resisting an order to stop a motor vehicle in the first degree, and §710-1027, Resisting an order to stop a motor vehicle in the second degree.

With the inherent dangers to police officers as suspects in motor vehicles flee from them, establishing the felony offense will make the working environment safer for the officers, parties in violation of this section, and communities as a whole.

Thank you for the opportunity to testify.

Sincerely,

for Carl Kalani, Captain
District 2

APPROVED:

Louis M. Kealoha
Chief of Police

Serving and Protecting With Aloha

DAVID Y. IGE
GOVERNOR

MARI McCAIG
Chair

MARTHA ROSS
Commissioner

ABELINA M. SHAW
Commissioner

PAMELA FERGUSON-BREY
Executive Director

STATE OF HAWAI`I
CRIME VICTIM COMPENSATION COMMISSION
1136 Union Mall, Suite 600
Honolulu, Hawai`i 96813
Telephone: 808 587-1143
FAX 808 587-1146

TESTIMONY ON SB 2964
RELATING TO THE ADMINISTRATION OF JUSTICE
by
Pamela Ferguson-Brey, Executive Director
Crime Victim Compensation Commission

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

Tuesday, February 23, 2016; 9:00 AM
State Capitol, Conference Room 016

Good morning Chair Keith-Agaran, Vice Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor. Thank you for providing the Crime Victim Compensation Commission (the "Commission") with the opportunity to testify in strong support, with exception to sections 52-56 relating to methamphetamine, of Senate Bill 2964 relating to the Administration of Justice.

The Commission was established in 1967 to mitigate the suffering and financial impact experienced by victims of violent crime by providing compensation to pay un-reimbursed crime-related expenses. Many victims of violent crime could not afford to pay their medical bills, receive needed mental health or rehabilitative services, or bury a loved one if compensation were not available from the Commission. In 2003, the Commission undertook the Restitution Recovery Project to disburse restitution payments collected from inmates and parolees to their crime victims or to the Commission in cases where the Commission has previously paid a compensation award to the crime victim.

In 2015, the Commission was selected to serve as a member of the Committee to Review and Recommend Revisions to the Hawai`i Penal Code (Penal Code Committee). The Commission's role as a member of the Penal Code Committee was to represent the crime victim service community. As part of that role, the Commission solicited input from victim service providers and advocates to identify key issues and concerns specific to the penal code. The Penal Code Committee's recommendations became the basis for this bill.

The Commission strongly supports the recommendations of the Penal Code Committee except for the provisions relating to methamphetamine and would like to provide comments on five provisions of the bill that have significant importance to crime victims.

PRIORITY OF PAYMENT OF COURT-ORDERED FEES AND FINES

As a housekeeping matter, sections 14, 25, 26, 27, and 28 places the priority of payment of fees and fines in a new section of chapter 706 and deletes the priority of payments in individual sections of chapter 706. Currently, the priority of payment of court-ordered fees and fines are set forth in multiple sections of the penal code with inconsistent wording. This bill places the priority of payment in a single statute and deletes payment priorities in the various statutes. This will prevent confusion and the need to restate payment priorities when statutes for fees or fines are amended or added.

PARENTS OF MINOR VICTIMS WILL BE ALLOWED ALLOCUTION

Section 17 of this bill amends HRS § 706-604 to ensure that victims will be given the opportunity to speak to the court prior to the defendant being sentenced. The proposed amendment also permits a minor victim's family to speak at sentencing. Minors, as a result of their age, are often unable to fully describe to the court how the crime affected them and to express what sentence they wish for the defendant to receive. Allowing the victim's family to speak in addition to the minor, ensures that the court fully understands the impact of the crime on the minor, the minor's feelings on punishment, and the full extent of restitution.

RESTITUTION WILL BE COLLECTED FROM INMATES IN ACCORDANCE WITH HRS § 353-33.6

Section 61 and section 24 of this bill amends HRS § 353-22.6 and HRS § 706-646, respectively, to clarify that that restitution will be collected from the defendant in accordance with Hawaii Revised Statutes (HRS) § 353-22.6 and any court-ordered restitution payment schedule is suspended while a defendant is in the custody of the Department of Public Safety (PSD). As part of the Justice Reinvestment Act that went into effect on July 1, 2012, HRS § 353-22.6 was amended to increase the collection by PSD of restitution from inmates from 10% of earnings to 25% of an inmate's wages, deposits and credits to satisfy any outstanding restitution order. The amendment went into effective on July 1, 2012, however, the court restitution orders after July 1, 2012, did not always conform to the new law.

As the clearinghouse for restitution payments collected from inmates and parolees, the Commission receives court judgments containing restitution orders that are inconsistent with HRS § 353-22.6. In a 2013 study of restitution orders for Halawa inmates, the Commission found that 28.9% of the orders were not in compliance with HRS § 353-22.6. The Office of the Attorney General advised PSD that PSD must comply with the court orders instead of complying with the provisions of HRS § 353-22.6. This resulted in significant financial losses to the victims.

The following chart illustrates the real losses to crime victims when courts order restitution to be paid at a rate less than 25% of all earnings, deposits and credits. The chart presents the data for ten restitution orders imposed after July 1, 2012, that have restitution payment orders that are less than the 25% required by HRS § 353-22.6. In approximately two and a half years, the victims of these cases should have received a total of $5,518.40 instead of the $172.97 ordered by the courts.

CIRCUIT	SENTENCE DATE	RESTITUTION ORDERED	TOTAL INMATE EARNINGS	TOTAL INMATE CASH DEPOSITS	AMOUNT DEDUCTIBLE FROM INMATE	POTENTIAL DEDUCTIONS AUTHORIZED BY STATUTE	TOTAL LOSS TO CRIME VICTIMS AS OF 1/30/15
1st	4/23/2013	$ 6,660.00	$ 579.00	$ 3,411.00	$ 57.90	$ 997.50	**$ 939.60**
1st	10/30/2012	$ 3,925.43	$ 667.50	$ 2,950.00	$ 66.75	$ 904.38	**$ 837.63**
1st	3/12/2013	$ 309.19	$ 143.00	$ 3,250.00	$ 14.30	$ 309.19	**$ 294.89**
1st	1/28/2013	$ 1,845.00	$ 9.00	$ 1,975.00	$ 0.90	$ 496.00	**$ 495.10**
1st	7/17/2012	$ 150,542.45	$ 80.32	$ 939.87	$ 8.03	$ 255.05	**$ 247.02**
1st	8/6/2013	$ 36,450.25	$ 0.00	$ 925.00	$ 0.00	$ 231.25	**$ 231.25**
2nd	**8/2/2013	$ 2,925.22	$ 30.10	$ 1,660.00	$ 9.03	$ 422.53	**$ 413.50**
3rd	**11/2/2012	$ 1,084.00	$ 0.00	$ 1,850.00	$ 0.00	$ 462.50	**$ 462.50**
3rd	11/29/2012	$ 440.00	$ 160.56	$ 2,915.00	$ 16.06	$ 440.00	**$ 423.94**
5th	7/31/2013	$ 14,874.28	$ 0.00	$ 4,000.00	$ 0.00	$ 1,000.00	**$ 1,000.00**
Totals:		$ 219,055.82	$ 1,669.48	$ 23,875.87	$ 172.97	$ 5,518.39	
Total Loss to Crime Victims as of January 30, 2015:							**$ 5,345.42**

In the two cases indicated with ** next to the sentencing date, the restitution orders were corrected nunc pro tunc to the sentencing date. In theory, the loss to the crime victims should have been zero, however, PSD was unable to retroactively collect the restitution. Therefore, the losses reflected on the chart for those two cases are from the date of sentencing to the date the court filed the corrected restitution order. These two cases further illustrate the need for PSD to be able to follow HRS § 353.22.6 without regard to inconsistent court orders or having to wait for court orders to be corrected.

Through the collaborative efforts of the Judiciary, PSD, and the Commission, the number of restitution orders that are inconsistent with HRS § 353-22.6 have significantly decreased. However, the loss to crime victims if restitution is not collected at the statutory rate is significant and cannot wait for a court to correct the order. This bill will eliminate the need to correct restitution orders through the courts and the resulting delay in deducting the appropriate restitution payment from inmate accounts.

MARITAL STATUS OF VICTIMS OF SEXUAL ASSAULT IN THE THIRD DEGREE ELIMINATED AS AN ELEMENT THAT THE STATE MUST PROVE

Currently, to secure a conviction for Sexual Assault in the Third Degree involving sexual contact, the prosecutor must prove that the victim and the offender were not married. In many cases, this requirement requires a prosecutor to ask a minor child who may be as young as five whether he or she was married to the perpetrator. In addition, the requirement that the victim and perpetrator not be married fails to provide a spouse with the same protections that exist for an unmarried person. A person would be the victim of a Sexual Assault in the Third Degree if that person is forced to have sexual contact with the person's fiancé or fiancée an hour prior to their wedding. However, if the same act occurred immediately after the wedding, no crime would have occurred. Marriage should not create a license for a spouse to engage in unwanted sexual contact.

The proposed amendment in section 32 eliminates the unwarranted requirement of the parties being unmarried from the definition of Sexual Contact which would eliminate it as an element that must be proven for a conviction of Sexual Assault in the Third Degree.

METHAMPHETAMINE TRAFFICKING PROVISIONS SHOULD NOT BE CHANGED

The Commission opposes the modifications of the laws relating to methamphetamine set forth in sections 52 through 56. The use of methamphetamine results in high costs to the community both financially and in increased crime. Empirically, the Commission has found that methamphetamine use is often involved in assaults and domestic violence cases. In assault cases, where a motive for the violence is not apparent, methamphetamine usually appears to be the cause of the violence. Many domestic violence police reports start with the offender being high on methamphetamine. The use of methamphetamine results in high medical costs to the victims of the violence caused by methamphetamine use and to the user who suffers irreversible damage to the user's body and mind. In most cases, the medical costs for the user is passed on to the community.

Given the higher cost to the community, there is no justification to lower the sentencing penalties for methamphetamine dealers – those caught distributing methamphetamine or in possession of more than one ounce (considered to be an amount that a dealer would possess) of methamphetamine.

Thank you for providing the Commission with the opportunity to testify in strong support of Senate Bill 2964 except for the provisions relating to methamphetamine.

THE SEX ABUSE TREATMENT CENTER

A Program of Kapi'olani Medical Center for Women & Children

DATE: February 23, 2015

TO: The Honorable Gilbert Keith-Agaran, Chair
The Honorable Maile Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FROM: The Sex Abuse Treatment Center
A Program of Kapi'olani Medical Center for Women and Children

RE: Testimony in Support of S.B. 2964
Relating to the Administration of Justice

Good morning Chair Keith-Agaran, Vice Chair Shimabukuro, and members of the Senate Committee on Judiciary and Labor.

The Sex Abuse Treatment Center (SATC) supports S.B. 2964, which enacts recommendations of the penal code review committee convened pursuant to H.C.R. 155, S.D. 1 (2015).

Please note that the SATC's following comments are limited to Part IV of S.B. 2964. This Part amends the definition of "sexual contact" in the context of Chapter 707 of the Hawai'i Revised Statutes (HRS) to eliminate a blanket exemption from the offenses of sexual assault for married people who subject their spouses to unconsented-to touching of intimate body parts. The amendments in Part IV would, however, maintain the exemption for married persons with respect to the crime of Sexual Assault in the 4th Degree.

The current law specifies that to be "sexual contact", the actor – the person initiating the touching of sexual or other intimate body parts – cannot be married to the other person who the actor is touching or is causing to touch the actor. This means that touching of intimate body parts between married spouses is not considered "sexual contact" for the purpose of defining crimes.

This has the perverse result of excusing married spouses from being accountable for various behaviors that would constitute sexual assault, and fails to protect victims of intimate partner sexual violence in the context of a marriage to their attacker in a manner that is grossly disproportionate to the protections afforded to their unmarried peers.

For example, a married person who knowingly subjects their spouse who is mentally defective, mentally incapacitated, or physically helpless to acts that would otherwise be considered sexual contact, would be excused from having committed Sexual Assault in the 3rd Degree (HRS Sec. 707-732(d)). Likewise, a married person who knowingly and by strong compulsion, such as the use of physical battery, a dangerous

instrument, or threat of bodily injury, forces their spouse to be subject to acts that would otherwise be considered sexual contact, would be excused from having committed Sexual Assault in the 3rd Degree (HRS Sec. 707-732(f)).

Exceptions to criminal statutes that allow married persons to force their spouses to have unwanted sexual contact without reprisal are based on the false and outdated legal notion that a marriage contract represents unconditional sexual consent by, and submission of, one spouse (historically, the wife) to the other. However, all fifty states have recognized, in banning penetrative rape in the context of marriage since the 1970s, that unwanted sexual activity in marriage can be a form of spousal abuse and domestic violence, and it is not an obligatory feature of the marriage experience that people, by default, consent to when they get married. There are many times in the course of any marriage where sexual contact may be unwanted and a violent, traumatizing affront to a non-consenting spouse.

An unlimited exception for married persons to have access to non-penetrative sexual contact with their spouses deeply disadvantages would-be victims who are married to their attackers relative to their unmarried peers, a deeply concerning equal protection issue. Although married persons are not a class to which harmful differences in protections provided by the law are automatically considered suspect, there is no rational basis for this drastically disparate treatment.

If the State of Hawai‘i rejects a justification that marriage equals unconditional sexual access and consent, it makes no sense that a person on the day before their wedding may report their intimate partner to the police to seek protection against forcible sexual contact, but on the day after the wedding that same person would have no such recourse unless such sexual contact escalated to sexually penetrative rape.

The amendment to the Penal Code proposed in Part IV of S.B. 2964 would correct this imbalance in the current law with respect to the offense of Sexual Assault in the 3rd Degree by removing the language “not married to the actor” from the definition of “sexual contact,” when describing a would-be victim of unwanted, unconsented to, and compulsory sexual contact.

Therefore, we respectfully urge you to join SATC in supporting the passage of this portion of S.B. 2964.

To: **COMMITTEE ON JUDICIARY AND LABOR**
Senator Gilbert Keith-Agaran, Chair
Senator Maile Shimabukuro, Vice Chair

Re: **SB 2964** Tuesday, February 23, 2016 9:00 a.m. Room 16

SUPPORT

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro and members of your committee,

As a member of the 2015 Penal Code Review Committee, I was somewhat of a lone ranger — neither an attorney, judge, police officer, legislator, cabinet member nor someone linked to a special-interest group. I was just me, private citizen, honored to be selected for what I was told was my independence. As such, I witnessed the committee's hard work with fresh eyes, and what I saw in large part was a group of dedicated individuals eager to make Hawaii a better place via laws that make sense in the 21st century.

It saddens me that some committee members are now seeking to undo important changes that were supported by the committee as a whole. Raising the felony threshold level is one such issue. I ask that you apply common sense to this provision, honoring the intent of the 1986 Legislature. Here is a practical example, especially handy if you play golf:

Thirty years ago, the threshold was set at $300. Hence, the act of stealing a single golf club was deemed a misdemeanor. Today, with a 30-year-old law still in place, stealing that one club is a felony. The crime has not changed, but the times have. In 1986, nobody wanted to send anyone to prison for stealing a golf club — and I doubt that anyone wants to do so today.

What makes most sense, of course, is to tie this amount to our overall cost of living. If the median home price in Honolulu was $171,200 in 1986, and today it is $700,000, the felony threshold would rise 4.09x to $1227. However, following the strong recommendation of the Justice Reinvestment Initiative, the Penal Code Review Committee compromised, limiting the increase to $750. This sum passed muster with the committee as a whole, and I urge you to support it.

I respectfully request that you pass this bill. Thank you very much.

Aloha,

Peter Gellatly

Corrections Population Management Commission, 2004-11
Penal Code Review Committee, 2015

Better media

PO Box 88377 • Honolulu, HI 96830

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc: [redacted]
Subject: *Submitted testimony for SB2964 on Feb 23, 2016 09:00AM*
Date: Saturday, February 20, 2016 8:34:26 PM

SB2964
Submitted on: 2/20/2016
Testimony for JDL on Feb 23, 2016 09:00AM in Conference Room CR016

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Ho`omana Pono, LLC	Support	Yes

Comments:

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov