



## *The Judiciary, State of Hawai‘i*

### **Testimony to the Senate Committee on Judiciary and Labor**

Senator Gilbert Keith-Agaran, Chair  
Senator Maile Shimabukuro, Vice Chair

Wednesday, February 18, 2015 9:00 AM  
State Capitol, Conference Room 016

### **WRITTEN TESTIMONY ONLY**

by

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

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**Bill No. and Title:** Senate Bill No. 764, Relating to the Hawai‘i Rules of Evidence.

**Purpose:** Allows the court to instruct the jury that the jury shall consider the prosecution's failure to disclose information or materials as required by the Hawaii rules of penal procedure as relevant in its deliberations to determine whether or not there is reasonable doubt.

### **Judiciary's Position:**

The Hawai‘i Supreme Court’s Committee on Rules of Evidence (hereinafter “Committee”) respectfully opposes Senate Bill No. 764 that would authorize a court to sanction the prosecution for an intentional or knowing failure to fulfill its obligations set forth in the Hawai‘i Rules of Penal Procedure (hereinafter “HRPP”). The sanction authorizes the court to inform the jury of the foregoing failure and that the jury “shall” consider the failure as “relevant” in its deliberations to determine whether reasonable doubt has been proven. As discussed hereinafter, the jury could interpret such an instruction as the type of comment by the court upon the evidence that Rule 1102 of the Hawai‘i Rules of Evidence (hereinafter “HRE”) (2014), prohibits.

Generally, in criminal trials the court instructs the jury that it “must consider only the evidence that has been presented to [it] in [the] case and inferences drawn from the evidence which are justified by reason and common sense.” *See* Rule 3.03, Hawai‘i Pattern Jury Instructions-Criminal (2014). The justification for the instruction the bills propose would result



from a hearing conducted outside of the presence of the jury during which a court found that there was an intentional or knowing failure to disclose information or materials. Such a finding would turn on the court’s assessment of the evidence and credibility of the witnesses, including counsel. As such, it is reasonable to expect the jury to interpret the instruction the bills propose as a comment by the court upon the evidence. Such a comment would violate the prohibition set forth in HRE Rule 1102 that provides: “The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence.” The instruction also would conflict with the following instruction that conveys the prohibition of Rule 1102 that is generally included in the instructions the court provides to the jury:

If I have said or done anything that has suggested to you that I favor either side, or if any of my statements or facial expressions has seemed to indicate an opinion as to which witnesses are, or are not, worthy of belief or what facts are or are not proved, or what inferences should be drawn from the evidence, I instruct you to disregard it. [See Rule 3.03, Hawai‘i Pattern Jury Instructions-Criminal (2014)]

Mandating that the jurors “shall consider the . . . failure to disclose as *relevant* in its deliberations to determine whether or not there is reasonable doubt” also usurps their role as the “exclusive judges of all questions of fact and the credibility of witnesses” and would conflict with the instruction a court provides them regarding that role. See Rule 3.01, Hawai‘i Pattern Jury Instructions-Criminal (2014) (“You are the judges of the facts of this case. You will decide what facts are proved by the evidence.”). Moreover, the instruction the bill proposes fails to provide the jury with any guidance as to the relevance the failure has to the determination of reasonable doubt. Accordingly, the instruction would be confusing and would not further the goal of promoting the “development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” HRE Rule 102 (2014).

Furthermore, a court is presently vested with the authority to impose sanctions that would not result in the court commenting upon the evidence. HRPP Rule 16 (2014), includes comprehensive and specific procedures regarding the parties’ duties to disclose information and materials, as well as the following section dealing with the consequences of noncompliance:

(e) **Regulation of Discovery.** . . .

(9) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may order such party to permit the discovery,



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grant a continuance, or it may enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

HRPP Rule 16 affords a court the necessary flexibility and discretion to ensure compliance with the disclosure requirements of the rules without exposing the jurors to collateral matters that do not bear upon the determination of reasonable doubt and does not authorize a court to comment upon the evidence. Such discretion furthers the intended goal of the Rules of Penal Procedure “to provide for the just determination of every penal proceeding” by “secur[ing] simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” HRPP Rule 2 (2014).

Thank you for the opportunity to testify on Senate Bill 764.

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

February 18, 2015

S.B. No. 764:           RELATING TO HAWAII RULES OF EVIDENCE

Chair Keith-Agaran and Members of the Committee:

We support the passage of S.B. No. 764 which, in a criminal case, allows the trial court to inform the jury through a jury instruction about the failure of the prosecution to disclose information or materials to the defense as required by the Hawaii Rules of Penal Procedure. The measure allows for the jury instruction when the court finds that the prosecution intentionally or knowingly failed to disclose the information or materials.

Rule 16 of the Hawaii Rules of Penal Procedure requires disclosure by the prosecution to the defense of certain specified information and materials in a criminal prosecution. Compliance with this rule is critical to the right to a fair trial in every criminal case. Violations of this rule are a common occurrence in the state trial courts. Oftentimes the violations are the result of unintentional oversight by prosecutors. However, occasionally, the non-disclosure by a prosecutor is suspect. When the rules of discovery are violated, there is a serious risk of a defendant being convicted without the necessary means to fully prepare for his/her trial.

Although Rule 16 provides for the availability of sanctions against counsel for violations of the rule, too often the court's remedy is to grant a continuance of the trial at the expense of the defendant who is often in custody. S.B. No. 764 would allow for a remedy to the defendant which would directly affect the trial. S.B. No. 764 is modeled after a bill which passed the California Legislature in 2014. That bill received widespread support from a variety of civil liberty interest groups who saw the need for this legislation to cover a loophole in the current criminal justice system which potentially leads to excessive pretrial incarceration and improper convictions.

Therefore, we support passage of S.B. No. 764. Thank you for the opportunity to testify in this matter.

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SUBMITTED BY E-MAIL TO: JDLtestimony@capitol.hawaii.gov

February 16, 2015

Senator Gilbert S.C. Keith-Agaran  
Chairman, Committee on Judiciary & Labor  
Hawaii Senate  
State Capitol, Room 221  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: Senate Bill No. 764, "Hawaii Rules  
of Evidence; Instructions to Jury"

Dear Chairman Keith-Agaran and Committee Members:

I am a private practice attorney based in Honolulu and concentrating in criminal defense law. I have been a member of the Hawaii bar since 1968. Additionally, I have served as a Lecturer in Law at the William S. Richardson School of Law since 2005, co-teaching (as a founding member) the Hawaii Innocence Project courses, along with William Harrison, Esq., Susan Arnett, Esq., and Professor Virginia Hench.

This letter constitutes my written testimony (also submitted on behalf of the Hawaii Innocence Project) strongly in favor of Senate Bill No. 764. That bill was introduced by Senators Maile Shimabukuro (Vice Chair of the Senate Judiciary Committee), Will Espero (Chair of the Senate Public Safety Committee and Senate Majority Floor Leader), Rosalyn Baker (Vice Chair of the Senate Public Safety Committee), and Les Ihara, Jr. (Senate Majority Policy Leader). The bill is scheduled to receive a hearing by the Senate Judiciary Committee in conference room 016 at 9:00 a.m. on Wednesday, February 18, 2015.

Senate Bill No. 764 would appropriately amend Rule 1102 of our Hawaii Rules of Evidence. Rule 1102 currently states: "The [trial] court shall instruct the jury regarding the law

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applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses." As the legislative description of Senate Bill No. 764 explains, the bill "[a]llows the [trial] court to instruct the jury that the jury shall consider the prosecution's failure to disclose information or materials as required by the Hawaii rules of penal procedure as relevant in its deliberations to determine whether or not there is reasonable doubt." Specifically, Senate Bill No. 764 adds the following language to Rule 1102:

If the court rules that the prosecution intentionally or knowingly failed to disclose information or materials as required by the Hawaii rules of penal procedure, as amended, the court may inform the jury that the failure to disclose the information occurred and that the jury shall consider the prosecution's failure to disclose as relevant in its deliberations to determine whether or not there is reasonable doubt.

This subsection shall not be construed to limit any other remedy available under law.

[Underlining added.]

In my professional opinion, the current draft language of the bill should be improved and strengthened in two respects. First, after "as required by the Hawaii rules of penal procedure, as amended," the words "or the United States Constitution or Hawaii Constitution," should be added. That is because some prosecutorial disclosures of information or materials to the defense are constitutionally required. See, e.g., State v. Estrada, 69 Haw. 204, 215, 738 P.2d 812, 821 (1987) ("Prosecutorial suppression of favorable material evidence violates due process, regardless of any good faith or bad faith by State"). Second, after "to determine whether or not there is reasonable doubt," the words "of the defendant's guilt" should be added in order to explicitly clarify to what the critically important concept of "reasonable doubt" applies.

Senate Bill No. 764 is derived from California Assembly Bill No. 885 of the 2013-2014 California legislative session, which was passed on August 28, 2014, by the California Senate, and on August 29, 2014, by the California Assembly. The final version of that bill stated in pertinent part:

Section 1127j is added to the Penal Code, to read:

1127j. (a) In any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose specified materials and information required under current law, ... and *Brady v. Maryland* (1963) 373 U.S. 83, the court may instruct the jury that the intentional or knowing failure to disclose the materials and information occurred and that the jury shall consider the intentional or knowing failure to disclose in determining whether reasonable doubt of the defendant's guilt exists.

(b) Nothing in this section shall be construed to limit any other remedy available under law.

Assembly Bill No. 885 was supported by a wide array of organizations interested in criminal justice issues, including the California Attorneys for Criminal Justice, the American Civil Liberties Union, California CURE (Citizens United for Rehabilitation of Errants), the California Public Defenders Association, Californians United for a Responsible Budget, the Fair Chance Project, Friends Committee on Legislation of California, Legal Services for Prisoners with Children, the San Francisco Public Defender, and Taxpayers for Improving Public Safety. Assembly Bill No. 885 was based on a similar proposal in one of the nation's most prestigious law reviews, the *Yale Law Journal*: Note, A Fair Trial Remedy for Brady Violations, 115 *Yale L.J.* 1450 (2006). Significantly, the author of that proposal, Yale Law School graduate Elizabeth Napier Dewar, is currently employed by the Office of the State Solicitor in Massachusetts (part of the Massachusetts Attorney General's Office), which represents the State of Massachusetts in appellate courts.

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On September 28, 2014, in the face of opposition from California prosecutors, Assembly Bill No. 885 was vetoed by Governor Jerry Brown. In his veto message, he claimed that the bill "would be a sharp departure from current practice that looks to the judiciary to decide how juries should be instructed. Under current law, judges have an array of remedies at their disposal if a discovery violation comes to light during trial." Yet in fact, the California bill (like Hawaii Senate Bill No. 764): (a) did not intrude in any manner whatsoever on judicial authority "to decide how juries are instructed," because it permissively stated that trial courts "may" give the instruction, and (b) did not interfere in any way with other "remedies," because it stated "[n]othing in this section shall be construed to limit any other remedy available under law." Governor Brown's veto was justifiably criticized.<sup>1</sup>

One or more prosecutors in Hawaii may contend that Senate Bill No. 764 should be amended to include an unusual provision currently in House Bill No. 309, a bill that has not been scheduled for a hearing by the House of Representatives. That peculiar provision states: "If the court finds that the defense intentionally or knowingly committed misconduct during the trial that has the effect of misleading the jury, the court may inform the jury of the misconduct for purposes of the jury's deliberation on the evidence in determining whether or not there is reasonable doubt." That language definitely should not be added to Senate Bill No. 764.

First, it is the prosecution's constitutional and statutory burden to prove the defendant's guilt of every

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<sup>1</sup> See "Bill to help keep the innocent out of prison vetoed" (<http://www.sfexaminer.com/sanfrancisco/bill-to-help-keep-the-innocent-out-of-prison-vetoed/Content?oid=2907698>); "Ammiano 'angry' as Brown vetoes prosecutor misconduct bill" (<http://www.sfbg.com/politics/2014/09/29/ammiano-angry-brown-vetoes-prosecutor-misconduct-bill>); "Maintaining the Status Quo on Brady Violations is not a Sufficient Deterrent to Prevent a Growing National 'Epidemic' of Prosecutorial Misconduct" (<http://www.cacj.org/Legislation/Press-Releases.aspx>).



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element of the charged offense beyond a reasonable doubt. State v. Murray, 116 Hawaii 3, 10, 169 P.3d 955, 962 (2007) ("the prosecution [is] required to prove every element of the charged crime beyond a reasonable doubt" and that "is a constitutionally and statutorily protected right" of all defendants). A defendant has no obligation to prove anything. Second, unwisely adding that provision to Senate Bill No. 764 would open a Pandora's box of problems in criminal cases. Pursuant to the Sixth Amendment to the United States Constitution and even more so under Article I, Section 14 of the Hawaii Constitution, all defendants have the constitutional right to the "effective assistance of counsel." State v. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992). If a defendant were to be punished for his or her defense counsel's intentional or knowing "misconduct during the trial that has the effect of misleading the jury" by having the jury consider defense counsel's misconduct during the vitally important process of "determining whether or not there is reasonable doubt" of the defendant's guilt, such a procedure would almost certainly result in appellate reversal of any conviction obtained because of the denial of the defendant's constitutional right to the effective assistance of counsel. Indeed, many forms of misconduct by defense counsel would have no relevance to determining whether reasonable doubt of the defendant's guilt exists.

In light of all of the foregoing, I and the Hawaii Innocence Project urge the Hawaii Senate's Judiciary Committee to approve Senate Bill No. 764, with only the two appropriate revisions that I have recommended on page 2 of this written testimony.

Very truly yours,

LAW OFFICES OF BROOK HART  
A Law Corporation



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Hawaii Innocence Project,  
William S. Richardson School of Law