The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

Wednesday, February 8, 2017 at 9:10 a.m.
State Capitol, Conference Room 016

By

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

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 1282, Relating to the Offense of Abuse of Family or Household Members

Purpose: Establishes that the offense of abuse of family or household member is a petty misdemeanor with a jail sentence, etc.

Judiciary's Position:

The Judiciary understands the importance of this bill with its intent to provide a more timely route to disposition of these cases that will provide certainty to both complaining witnesses and defendants. While we take no position on this bill, we respectfully request an amendment to this bill to allow circuit family judges to have jurisdiction over all of the criminal offenses established by this bill, including petty misdemeanors.

The Judiciary respectfully proposes the following language (additional language underlined) to be inserted at page 15 (or wherever appropriate), line 3:

> SECTION 4. Section 603-21.5, Hawaii Revised Statutes, is amended to read as follows:

§603-21.5 General. (a) The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:

(1) Criminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;

(2) Actions for penalties and forfeitures incurred under the laws of the State;

(3) Civil actions and proceedings, in addition to those listed in sections 603-21.6, 603-21.7, and 603-21.8; and

(4) Actions for impeachment of county officers who are subject to impeachment.

(b) The several circuit courts shall have concurrent jurisdiction with the family court over:

(1) Any felony under section 571-14, violation of an order issued pursuant to chapter 586, or a violation of section 709-906 when multiple offenses are charged through complaint or indictment and at least one other offense is a criminal offense under subsection (a)(1);

(2) Any felony under section 571-14 when multiple offenses are charged through complaint or indictment and at least one other offense is a violation of an order issued pursuant to chapter 586, a violation of section 709-906, or a misdemeanor under the jurisdiction of section 604-8;

(3) Any offense under section 709-906;

(4) Any violation of section 711-1106.4; and

(5) Guardianships and related proceedings concerning incapacitated adults pursuant to article V of chapter 560.

Currently, the criminal division of the family court in the first circuit consists of two circuit family judges and one full-time equivalent of a district family judge. The cases heard by these three courtrooms are offenses and violations under sections 709-906 and 711-1106.4. The family court must continue to operate with these three courtrooms in order to effectively manage these cases. While the first offense under this bill is a petty misdemeanor (and, therefore, carries

no right to a jury), the second (full misdemeanor) and third offenses (felony) do carry the right to a jury trial. The family court can be most effective if we are able to administer these cases seamlessly regardless of the level of the charge under the same statute.

We note that this bill is effective upon signing. This is another compelling reason supporting our proffered amendment to section 603-21.5. Without the ability to administer a division of three judges, the family court will have to rearrange judicial resources, including moving resources away from the other cases under our jurisdiction (including, child abuse and neglect, delinquency, divorce, paternities, and domestic violence restraining and protective orders). This will lead to under-resourcing those important cases and may lead to requiring additional family district judges.

Lastly, we note that an important part of the criminal process is rehabilitation and prevention of further violence. For these cases, the probation process plays an integral role in these defendants' rehabilitation. The family court administers a probation department dedicated to working with these offenders. The probation staff and the three existing courtrooms now have a long history of effectively working together. Accepting our proffered amendment will allow that effectiveness to continue.

We also wish to inform this Committee that the Judiciary will have to make use of §706-623(1)(d) ([Terms of probation] "Six months upon conviction of a petty misdemeanor; provided that up to one year may be imposed upon a finding of good cause."). Currently, completion of a domestic violence intervention program generally takes more than 6 months. The court will therefore need to invoke §706-623(1)(d) and sentence petty misdemeanants to 1 year probation.

Thank you for the opportunity to provide testimony on this measure.

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION OF SENATE BILL 1282

A BILL FOR AN ACT RELATING TO THE OFFENSE OF
ABUSE OF FAMILY OR HOUSEHOLD MEMBERS

COMMITTEE ON JUDICIARY AND LABOR
Sen. Gilbert S.C. Keith-Agaran, Chair
Sen. Karl Rhoads, Vice Chair

Wednesday, February 8, 2017, 9:10 A.M.
State Capitol, Conference Room 016

Honorable Chair Keith-Agaran, Vice-Chair Rhoada, and Members of the Committee on Judiciary and Labor, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in opposition of Senate Bill No. 1282.

Domestic violence (DV) cases are some of the most difficult cases to prosecute and some victims are uncooperative due to the perpetrator employing a strategy of abuse in which power and control is exerted on a victim over a period of time. The criminal justice system only sees these cases when it manifests in a physical way.

Legislation has already determined that physical assault is wrong no matter who perpetrates it. It has also recognizes that in DV cases, there is an additional component - the application of power and manipulation, which needs to be addressed when considering an appropriate punishment when a conviction is obtained. Domestic violence intervention (DVI) classes are now mandatory as part of a sentence.

Through the passage of this Bill, the message sent to victims of DV would be that they are not as important. A person could assault their neighbor or a stranger and be sentenced to up to one year in jail. If that same person were to assault their wife or husband, the most they would be sentenced to is 30 days. This is not the right message to send and goes against all of the positive impacts DV advocates have been working towards all these years.

There are other issues to consider. First, the statute of limitations (SOL) on a petty misdemeanor is 1 year. Many times, cases that come to our office in screening come more than 6 months after the incident, some over a year, all the while the SOL is running. Prosecutors may receive these cases with such short lead time, that they will be unable to even charge the case, which in turn does not better the conviction rate. The SOL issue has not been appropriately addressed in this legislation.

Secondly, the DVI class is 26 weeks long. The probationary period of two-years gives defendants enough time to complete this program. The waiting time for these programs can be long, and most don't go on a weekly basis, hence the longer probationary period insures ample time to complete the program. Will the probationary period be shortened to six months? If the defendant is given the full thirty days of jail, does means no probation - hence no DVI? This issue is not appropriately addressed in this legislation.

What could end up happening is that programs will be forced to shorten the length for their DVI programs in order to address the shortened probationary period. While there are numerous studies on the effectiveness of these programs, what most agree on is that changing a pattern of behavior is difficult and takes time. Shorter programs simply aren't as effective. Accountability is a key concern, and there is concern that this bill doesn't adequately insure that there would be enough time to allow the defendant to be held accountable.

If over-crowded circuit court dockets are the motivating factor behind this bill, perhaps it is because of the belief that a petty misdemeanor would deny the right of a defendant to demand jury trial. The United States and Hawai'i Constitution guarantee the right to a jury trial for "serious" offense. Defense counsels could argue that this is in fact a serious offense, as nothing has change except the "name" of the offense. In accordance with State v. Basabe, 105 Haw. 342, 347, 97 P.3d 418, 423 (Ct. App. 2004), courts would look at three factors in making this determination:

(1) Treatment of the offense at common law;
(2) The gravity of the offense; and
(3) Authorized penalty.

If the courts agree, and the defendant could be granted the right to a jury trial, this would defeat the intention of this bill.

Domestic violence is a serious societal problem that requires stiff consequences to break the cycle of abuse. We are making strides to actively pursue and prosecute these cases and hold defendants accountable. As written, this bill does not adequately support this process, and in fact could decrease the likelihood of greater conviction rates and accountability.

For the foregoing reasons, the Office of the Prosecuting Attorney, County of Hawai'i opposes the passage of Senate Bill No. 1282. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy

Rebecca Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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TESTIMONY IN SUPPORT OF SENATE BILL 1282

A BILL FOR AN ACT RELATING TO THE OFFENSE OF ABUSE OF FAMILY OR HOUSEOLD MEMBERS

COMMITTEE ON JUDICIARY & LABOR
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

Wednesday, February 8, 2017, 9:10 a.m.
State Capitol, Conference Room 016

Honorable Chair Keith-Agaran, Vice-Chair Rhoads, and Members of the Committee on Judiciary & Labor, the Office of the Prosecuting Attorney, County of Kauaʻi submits the following testimony in support, with comments of concern, regarding Senate Bill No. 1282.

This measure establishes that certain offenses relating to Abuse of a Family or Household Member (AFHM) would be considered petty misdemeanors and make adjustments to the repeat offender provisions of the statute.

The motivating factor behind the reclassification of certain incidences of this offense appears to be to remove the right to jury trial currently attaching to misdemeanor AFHM offenses, reduce the high incidence of court congestion in the First Circuit, reduce plea bargaining, and result in increased conviction rates for the AFHM offense. Our Office supports this approach in principle, but has concerns regarding the repeat offender provisions allowing the introduction of prior convictions, as this may run counter to recent decisions of the Hawaiʻi Supreme Court pertaining to repeat offender sentencing. We also have generalized concerns associated with the perceived reduction in the consequences for first offense AFHM charges. We believe these concerns may

be able to be addressed through further discussion on this Bill as it progresses through the legislative process.

The Office of the Prosecuting Attorney, County of Kaua`i supports the passage of Senate Bill No. 1282 at this point in order to further the conversation on this important issue. Thank you for the opportunity to testify on this matter.

ALAN M. ARAKAWA
Mayor

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Deputy Prosecuting Attorney
Supervisor - Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY
ON
SB 1282 - RELATING TO THE OFFENSE OF
ABUSE OF FAMILY OR HOUSEHOLD MEMBERS

February 7, 2017

The Honorable Gilbert S.C. Keith-Agaran
Chair
The Honorable Karl Rhoads
Vice Chair
and Members
Senate Committee on Judiciary and Labor

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

The Department of the Prosecuting Attorney, County of Maui strongly opposes SB 1282. This measure reduces the penalty for a first conviction of the offense of Abuse of a Family or Household Member (AFHM) from a misdemeanor to a petty misdemeanor.

First, we disagree with the statement that "defendants are not being convicted for and sentenced in accordance with the original charge . . . and not ordered by the court to participate in a domestic violence intervention program." In our experience, judges within the Second Circuit Court have imposed specific conditions relating to domestic violence rehabilitation regardless of the original charge. Indeed, this is permitted by Hawai'i case precedent where the probationary condition had a rational basis in the facts in the record, and is reasonably related to the sentencing factors within HRS §706-606. See State v. Kahawai, 103 Hawaii 462, 467 (2004). Thus, the sentencing court currently has the proper authority to impose probationary conditions related to domestic violence even where the original AFHM charge is amended to a harassment or assault charge.

Second, reducing the penalty for a first time conviction for AHFM will severely restrict the sentencing court's discretion to impose an appropriate jail sentence. Under the current law, a sentencing court can sentence a first time AFHM offender to up to a year in jail. While it is true that some offenders may not deserve more than thirty (30) days in jail, other first time offenders may undoubtedly deserve more. Thus, reducing the penalty for a first time offender will inhibit the sentencing judge's ability to fashion an appropriate sentence.

Third, reducing the penalty for a first time conviction for AHFM sends the wrong message to potential offenders. There is no doubt that the Hawai'i legislature has taken domestic violence very seriously. For example in recent history, laws have been enacted where a misdemeanor abuse may become a felony due to aggravated circumstances (choking). See HRS §709-906(8). Likewise, committing murder (second degree) against a person under certain circumstances involving domestic violence, increases the crime to Murder in the First Degree. See HRS §707-701(f),(g)(h). Hence, domestic violence is a serious matter and should be treated accordingly; thus, lowering the penalty for AHFM sends the wrong message to potential offenders and the community.

Finally, as mentioned in other testimony submitted on this measure, part of the motivation for this bill is apparently to reduce court congestion in the First Circuit. We strongly object to utilizing this method as a possible solution to that situation. We all recognize that domestic violence is a very serious matter, which sometimes results in the abuser murdering the victim. If court congestion is the problem, other solutions to that problem should be considered.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, requests that this measure be HELD.

Thank you very much for the opportunity to testify.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

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OUR REFERENCE WO-NTK

February 8, 2017

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

Dear Chair Keith-Agaran and Members:

SUBJECT: Senate Bill No. 1282, Relating to the Offense of Abuse of Family or Household Members

I am Walter Ozeki, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 1282, Relating to the Offense of Abuse of Family or Household Members.

How we deal with the problem of domestic violence is continually evolving and is an area where we must continue to strive to improve on. As with all problems of such magnitude, the first step in order to properly address and direct the necessary resource toward the problem is to identify the scope of the problem and the areas in which progress can be readily made. Since the HPD already maintains and tracks statistics related to the occurrence of domestic violence offenses, it would be a logical progression and would benefit all agencies and organizations involved in the fight against domestic violence if these statistics were made available to lawmakers. This would aid in the formulation of a more comprehensive, multidisciplinary strategy to address this problem.

The HPD urges you to support Senate Bill No. 1282, Relating to the Offense of Abuse of Family or Household Members.

Thank you for the opportunity to testify.

APPROVED:

Cary Okimoto
Acting Chief of Police

Sincerely,

Walter Ozeki, Captain
Criminal Investigation Division

Serving and Protecting With Aloha

TO: Chair Keith-Agaran
Vice Chair Rhoads
Members of the Committee on Judiciary and Labor

FR: Nanci Kreidman, M.A.
Chief Executive Officer

RE: SB 1282

Aloha! Thank you for the opportunity to provide our testimony in support of SB 1282.

The system as we have devised it has some glaring weaknesses. In spite of our spirited efforts to revise, strengthen and alter what is in place very few notable improvements have resulted in a more responsive system of justice for those suffering the harm of abuse. A more "radical" adjustment seems necessary. We have almost nothing to lose. My gratitude goes to this Committee and Senate Women Leaders who have worked diligently with the parties to deliberate this set of improvements.

Without consequences, change is hard to come by. Accountability is a key ingredient in facilitating behavioral change and remedy for those suffering. We must get ahead of this problem, as we are investing millions of dollars annually, while scrambling to meet an unceasing demand for help, and perpetuating a burden on an array of community resources. The criminal justice system is not magic, and cannot alone, address this complex gender based crime. While we are working with employers, health care practitioners and faith based leaders, changes to the criminal justice system are necessary.

Eliminating the need for a jury trial will be good for courts, survivors and others involved in the criminal proceedings. Multiple continuances and multiple appearances, plea deals that don't convey the community's intolerance for crimes against family members, and often, not guilty verdicts are devastating. Juries are simply not well informed about the complexity and nuances of the crimes of intimate partner violence; personal bias inevitably, and unfortunately impact these outcomes, as well.

Most abuse of family and household member offenses charged do not represent the singular act of abuse that has been perpetrated. When a perpetrator is not held accountable, the behavior continues. This makes them a repeat offender. The system should charge them and treat them as such.

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Past history is the best predictor of future behavior. Understanding this can improve the understanding and the effectiveness of sanctions to curtail the behavior. Allowing for prior convictions to be used as evidence in the instant offense committed by a repeat offender is an idea worth employing at this point.

Please pass SB 1282 and allow us to advance our collective efforts to improve this active partnership in our community's system to address domestic violence.

Thank you.

are not in favor of the Court issuing an automatic restraining order in any divorce, annulment or separation. It would seem to us that judges should have the discretion to determine, after hearing evidence, on a case by case basis whether an order should be issued pertaining to sale or transfer of any property or assets.

Sometimes a victim may not anticipate the harm that can befall her (him) if a partner decides to hide assets or claim marital assets. It would seem that a better way could be devised to put protections into place to guard against such exploitation. On the other hand, incurring debt may be an inevitable outcome for victims, as they are more often without resources, and too often, return to their abusers because they do not have sufficient resources to sustain independence or support for the children.

It is a concern for us that personal service is not required, but could the order could be made effective by publication. Given the seriousness of The restrictions imposed by the orders are serious and we believe that the notice should be by personal service which is the standard for existing statute.

We are also opposed to the prohibition of parties to remove the children from the island or from the school they are attending. There are safety considerations that must be taken into consideration and assessed appropriately. There may be real needs to escape that should not result in punishment of a victim acting in the best interests of herself (himself) and her (his) children.

We rely on our Courts to have judges well trained and equipped to address property and safety issues.

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Thank you for holding this Bill.

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HAWAII
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COMMISSION
ON THE
STATUS
OF
WOMEN

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February 8, 2017

To: Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair
Members of the Senate Committee on Judiciary and Labor

From: Cathy Betts
Executive Director, Hawaii State Commission on the Status of Women

Re: Testimony in Support, SB 1282, Relating to the Offense of Abuse of Family or Household Members

Thank you for this opportunity to testify in support of SB 1282, which would revise Hawaii Revised Statutes 706-906. The Commission supports the underlying intent of this measure, which would increase domestic violence intervention for incidents and require statistical data reports from the Hawaii State Judiciary on crimes involving domestic violence.

As stated in the purpose section of this bill, defendants involved in incidents categorized as Abuse of a Family or Household Member commonly plead down to misdemeanor assault, harassment, etc. As a result, most of these defendants are never required to undergo domestic violence intervention, batterer intervention, or any type of court intervention to address the seriousness of domestic violence. A lack of accountability seriously undercuts any goal of eliminating domestic violence and making our communities safer. This bill remedies that by requiring immediate domestic violence intervention. It further remedies our constant dilemma of having very little data about domestic violence crimes by requiring the Judiciary to collect and report data.

Some of the language regarding "repeat offenders" and the evidentiary inclusion of prior convictions may be problematic. As such, the Commission is available to provide input on potential bill revision with any other interested stakeholders. Thank you for this opportunity to provide input on this measure.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB1282 on Feb 8, 2017 09:10AM
Date: Wednesday, February 1, 2017 10:04:03 PM

SB1282
Submitted on: 2/1/2017
Testimony for JDL on Feb 8, 2017 09:10AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Karin Nomura	Individual	Support	No

Comments: Just want to add that in many domestic abuse situations, by the time the abused stops making excuses for the bruises, cuts or incidents to the point that the police can/will make an arrest, it's usually been years of abuse...

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

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TESTIMONY OF THOMAS D. FARRELL
Regarding Senate Bill 1282
Relating to the Offense of Abuse of Family or Household Members

Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair

Wednesday, February 8, 2017, 9:10 a.m.
Conference Room 016, State Capitol

Good morning Senator Keith-Agaran and members of the Committee:

Since I have testified in opposition to several measures on your agenda this morning, I thought I might balance it out by testifying in support of SB 1282.

I am not sure that tinkering with the mandatory minimums in the Abuse statute will make much difference, but I think the statistical study which the bill requires is an outstanding idea, and will prove very interesting to policy makers.

Now, if I were to punch the chair of this committee in the nose (something assure you that I have no intention of doing), I could get a DAG plea because he is not my family or household member. If I were to punch my wife in the nose (something I have even less intention of doing), that is Abuse of a Family or Household Member and, if convicted, I would not be eligible for a DAG plea. That is current law.

What happens every day is that defendants are arrested and charged with Abuse of a Family or Household Member, but before some cases come to court, the Prosecuting Attorney realizes that the evidence is weak, and a jury is unlikely to convict. So the Prosecutor recharges the defendant with Harassment, which is a petty misdemeanor in which the defendant is not entitled to a jury. Harassment is much easier to prove, but a defendant charged with Harassment is eligible for a DAG plea. So many defendants take the DAG. Would they plead guilty to Harassment with no chance of a DAG? Perhaps some would, but not many. If there's no incentive to plead, why not go to trial and see what happens?

I think you will find when you get your statistical study that there are quite a few arrests for abuse, and many of these cases get dumbed down to harassment.

I'm all in favor of tough penalties for domestic abusers. They deserve it and, frankly, it's good for business. However, I am not in favor of overcharging and I am not in favor of using the

threat of a severe penalty to get someone to plead guilty to a lesser offense, when the person has committed no offense at all.

So, if you really want to get tough on domestic violence, here's my suggestion: "A defendant arrested for Abuse of a Family or Household Member shall either plead guilty or be tried on that charge, and no lesser offense." You may see more trials---there's nothing wrong with that, our Constitution guarantees it. And you may see lots of acquittals, which should be acceptable to all of us because no reasonable person is in favor of convicting the innocent. And what you will also see, are that abusers actually get convicted of and suffer the penalties that you intended, and are not allowed to cop out to a petty misdemeanor and get a DAG.

A provocative idea? Perhaps so, but it is one that you should seriously consider.