

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

March 29, 2018

S.B. No. 2172 SD2: RELATING TO EXPERT WITNESS FEES

Chair Nishimoto and Members of the Committee:

This measure would clarify that expert witness fees for witnesses in criminal cases are paid out of a fund established under the State of Hawaii Department of Budget and Finance. S.B. No. 2172 SD2 mandates that expert witnesses subpoenaed on behalf of either the state or defendant at the expense of the state in criminal cases are entitled to applicable fees associated with their testimony, consultation, and preparation associated with the expert's testimony. The bill also entitles out-of-state expert witnesses to round-trip airfare as well as \$200 per day per diem.

This statutory section, H.R.S. § 621-7, which relates to witness fees is currently tied into a fund for such fees established under and administered by the Department of Budget and Finance. S.B. No. 2172 SD2 clarifies that fees for expert witnesses who are subpoenaed to testify in criminal cases fall are eligible for payment under this statute. We support this clarification.

Thank you for the opportunity to provide testimony in this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE SCOTT Y. NISHIMOTO, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Ninth State Legislature
Regular Session of 2018
State of Hawai`i

March 29, 2018

RE: S.B. 2172, S.D. 2; RELATING TO EXPERT WITNESS FEES

Chair Nishimoto, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of S.B. 2172, S.D. 2. This bill is part of the Department's 2018 legislative package.

The purpose of S.B. 2172, S.D. 2 is to clarify the applicable reimbursements allowable for expert witnesses, as outlined in §621.7, §621.9, and §836-3 of the Hawaii Revised Statutes. This is in direct response to a March 2, 2017 policy change within the Department of Budget and Finance ("B & F"), in which B & F discontinued reimbursement of certain expert witness fees.

Generally, when a party subpoenas an expert witness for the purposes of trial, grand jury or any other criminal proceeding, the subpoenaing party incurs a number of costs associated with that particular expert. These costs may include but are not limited to: expert testimony, review of documents, consultation and preparation, travel, and time in attendance at court. As each county prosecuting attorney's office handles cases on behalf of the State, it was well established, up until March 2, 2017, that the State—specifically B & F—reimbursed these associated costs, whether it be for the prosecution, an indigent defendant represented by the public defender's office, or private conflict counsel. Although the current statutes associated with reimbursements for witnesses remain silent in regards to expert witnesses, the legislature made it quite clear in the 1976 House Journal Conference Committee Report that expert witness fees was not only contemplated, but anticipated to be included in any reimbursements:

“At present, the courts have an account titled “Legal Expenses” which is looked to by both the prosecutor and indigent defendants to pay for witness

expenses, transcript costs in the case of indigent defendants and investigatory, expert and other services.”

After discussions with the Office of the Attorney General, the Governor signed and issued Governor’s Administrative Directive No. 18-01, on January 2, 2018 (See Attachment 1). The directive essentially re-established the guidelines and procedures regarding expert witness reimbursements, to what they were prior to March 2, 2017. In addition, the directive proposes that legislative action be taken, to expressly clarify allowable expenses, to ensure efficient administration of criminal cases.

Using the right expert witness in any particular case can make or break a case, thus it was always the Legislature’s intent to ensure that the quality of a case presented by the prosecution or defense not be dictated by truncated trial expenses. Considering the importance of ensuring the participation of qualified expert witnesses, to successfully convict defendants who have caused harm to people and property here in Hawai’i, or to properly defend against various criminal allegations, the Department strongly believes that this is a very logical fiscal responsibility, which has been and would continue to be manageable for the State.

For these reasons, the Department of the Prosecuting Attorney strongly supports the passage of S.B. 2172, S.D. 2. Thank you for this opportunity to testify.



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

January 2, 2018

ADMINISTRATIVE DIRECTIVE NO. 18-01

TO: Department of Budget and Finance, Department of Accounting and General Services and Department of Attorney General

FROM: David Y. Ige
Governor

SUBJECT: Reimbursement of Expert Witness Fees and Other Expenses to Counties

Discussion

Hawaii Revised Statutes sections 621-7, 621-8, 621-9, 836-2 and 836-3 provide budgetary procedures for the covering of expenses when subpoenaing witnesses to testify for the State in criminal cases. The statutes do not clearly delineate what constitutes allowable expenses and should be clarified by appropriate legislative action. Pending such clarification and in order to promote the efficient administration of criminal prosecutions by the State, I direct appropriate executive branch agencies as follows:

Policy

This Administrative Directive shall be effective for an interim period from the date of this directive and shall expire on June 30, 2018.

1. County Prosecutors may submit to the Department of Budget and Finance the following:

Allowable Expenses:

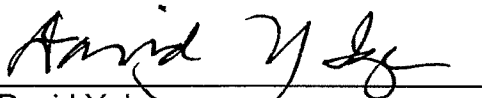
Costs for law enforcement officers, including overtime, to transport a defendant.

Expert witness fees, including preparation, travel, waiting, and testimony.

Per diem at a rate comparable to that of permanent employees of the State.

Expenses Specifically Excluded:

Costs in excess of the per diem, except as approved by the Department of Budget and Finance. Approval must be obtained prior to the excess expense being incurred.



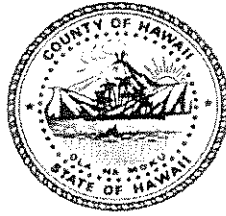
David Y. Ige
Governor, State of Hawai'i

JAN - 2 2018

Date

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 2172, SD 2

A BILL FOR AN ACT RELATING TO
EXPERT WITNESS FEES

COMMITTEE ON JUDICIARY
Rep. Scott Y. Nishimoto, Chair
Rep. Joy A. San Buenaventura, Vice Chair

Thursday, March 29, 2018, 2:00 p.m.
State Capitol, Conference Room 325

Honorable Chair Nishimoto, Vice-Chair San Buenaventura, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in **STRONG SUPPORT** of Senate Bill 2172, SD2.

This measure clarifies the legislative intent of HRS 621-7 and continues the long standing practice of reimbursements going to Prosecutor Offices, Public Defenders and court appointed attorneys for expert witnesses in criminal cases.

Clarification is needed because the Dept. of Budget and Finance recently decided to interpret the HRS Sections 621-7, 621-9 and 836-3 differently from the way they had been interpreted for over 30 years, and decided to discontinue reimbursements of certain expert witness fees and created new rules about when witnesses would be reimbursed. This new interpretation clearly seems to go against the legislative purpose as set out in the 1976 House Journal Conference Committee Report which not only contemplated, but also anticipated expert witness fees to be included and any reimbursements.

On January 2, 2018, the Governor signed and issued Administrative Directive No. 18-01, which re-established the procedures regarding expert witness reimbursements prior to the new interpretation by the Dept. of Budget and Finance made on March 2, 2017. However, the Governor's Administrative Directive No. 18-01 proposes that legislative action be taken to clarify allowable expenses.

In certain cases, such as Sexual Assaults, often times cases cannot be made without the assistance of an expert witness. Last year, our State made the decision that having sex assault kits tested was a top priority. One of the reasons was to determine if there was DNA on rape kits so these cases can be brought to trial. A change in the interpretation of the HRS 621-7 would

negatively impact these cases and send a message that the State does not care about victims of Sexual Assault.

County Prosecutors prosecute cases in the name of the State. Unfortunately, at least for the County of Hawaii, the Office of the Prosecuting Attorney, like other County of Hawaii agencies has been asked to submit a status quo budget, together with a budget with a possible cut for the last 5 years. We have cut our budget to the bone, and do not have funds set aside for expert witnesses.

For the above stated reasons, the Office of the Prosecuting Attorney, County of Hawaii, Strongly Supports the passage of Senate Bill No. 2172, SD 2. Thank you for the opportunity to testify on this matter.